Owuor v Republic (Criminal Appeal 120 of 2017)
[2023] KECA 364 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 364 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 120 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MARCH 31, 2023

BETWEEN

JACK OOKO OWUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisumu (Majanja, J.) dated 28th March, 2017 in HCCRC NO. 39 OF 2008)

JUDGMENT

1. The substantial argument raised in this appeal is that that the learned trial Judge erred in law and fact in convicting Jack Ooko Owuor, the appellant, on the basis of an inadmissible confession, inadmissible because it was made to a private citizen.

2. On the night of 13th /14th September, 2008, the body of Stephen Onyango Ogenga (the deceased) lay in a pool of blood at Ndeda Shopping Centre. Next to the body was a knife. Maurice Ogenga Odhiambo (PW1) and Silas Owiti Silwa (PW2) were amongst people who had gathered at the Centre and saw both the body and knife. A postmortem conducted by Dr. Tanui revealed that the deceased died as a result of a penetrating chest injury leading to a collapsed lung. The report prepared by the doctor was produced in Court by his colleague Belinder Akinyi (PW4). In an information dated 24th September, 2008 the appellant was charged with the murder of the deceased contrary to section 204 of the *Penal Code*.

3. George Abiero (PW3) is a fisherman at Ndeda Beach. He too went to the scene where the body of the deceased lay. While there, he heard the appellant state that he had killed the deceased and that the police should arrest him. On hearing this, PW3 went to PW2 and told him what the appellant had said.

4. In his defence, the appellant stated that he is a fisherman and was at work in the day of 13th September, 2008. At night he went to sleep and was arrested in the course of that night, awoken from his sleep. He said that he does not know why he was arrested.

5. The High Court (Majanja, J) convicted the appellant, reasoning:

> " The main issue for consideration is whether the accused stabbed the deceased. The only witness who puts him at the scene is PW 3 who told the court that the accused told him that he had killed the deceased and that the police should come and arrest him. As a matter of law, there is no impediment in the court convicting an accused on the basis of an admission made to a third party. Apart from being satisfied that what the accused stated is in fact a confession or admission of the offence, the court must also be satisfied beyond reasonable doubt that these statements were made voluntarily and that the admission has the ring of truth (see *Sango Mohamed Sango & Another vs. Republic* MLD CA Criminal Appeal No. 1 of 2013 (2015) eKLR."

6. In this first appeal, Mr. Odeny appearing for the appellant as he did at trial, submitted that none of the prosecution witnesses was an eye witnesses to the alleged murder and the learned trial Judge erred in law in convicting the appellant based on an alleged confession that was not admissible under the law. Learned counsel argued that effect of section 25A of *Evidence Act* is that a confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and proved against such a person unless it is made before a Judge, Magistrate or Police officer (other than the investigating officer) being an officer not below the rank of an Inspector of Police and in the presence of a third party of the person's choice. The trial court was criticized for acting on a supposed inadmissible confession made to a private citizen.

7. In addition, counsel cited the decision of this Court in *Kanini Muli –Vs- Republic* [2014] eKLR to prop up his proposition that a conviction cannot be based on a confession only and the court need look for other independent evidence before returning a conviction. There is, of course, doubt as to whether that is a correct reading of that decision .And if we should digress for a moment, the court there restated the law on retracted or repudiated confessions. The law being that as a rule of prudence a court should be slow to act on a retracted or repudiated confession unless it is corroborated in material particulars. Yet, and this is important, a court can still act on a retracted or repudiated confession, without corroboration, if it seems to the court that the confession could only be but true. However, as it is apparent the faulty argument that a confession invariably requires corroboration before it is acted upon is not even available to the appellant as the basis of his appeal is not that the impugned confession was retracted or repudiated but rather that a confession made to a private citizen is not admissible at all.

8. In response, and relying on the decision of this Court in *Sango Mohamed Sango & another V Republic* (*supra*), Mr. Okango appearing for the respondent submitted that the statement made by the appellant to PW3 was an admission made to a private citizen voluntarily and is admissible under section 63 (2) (b) of the *Evidence Act* as direct evidence. The learned State Counsel contends that the appellant did not object to the admission of this evidence at trial nor did he question PW3 on it. Counsel further asserts that the evidence of PW 3 was corroborated by the evidence of PW4 whose testimony is that when he arrived at the scene, he found the crowd standing and asking why the accused had killed the deceased.

9. This is a first appeal and our role is to re-evaluate the evidence afresh and to draw our own conclusions having regard to the fact that, unlike the trial court, we have not seen or heard the witnesses testify and due allowance must be given for that handicap. See *Okeno vs. Republic* [1972] EA 32.

10. The argument by counsel for the appellant that a confession made to a private citizen is invariably inadmissible has been made before but rejected. The statutory provisions regarding confessions has changed over time and it is important to locate the law as it stood at the time the appellant allegedly

made the confession to PW3 on the night of 13th /14th September, 2008. Then section 25A of the *Evidence Act* read as follows:

> " 25A. Confessions generally inadmissible.
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> 1. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party to the person's choice.
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> 2. The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court."

11. There is also section 26:

> " 26.Confessions and admissions caused by inducement, threat or promise.
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> A confession or any admission of a fact tending to the proof of guilt made by an accused person is not
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> admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

12. We think that this Court in Mohamed Sango (*supra*) exhaustively dealt with the implication of the provisions of section 25A and 26 in relation to a confession made to a private citizen and it serves us well to reproduce the rationale of the decision in extensor:

> " The appellants contend that confessions to private citizens are not admissible because under section 25 of the *Evidence Act* confessions as a general rule are not admissible. They contend further that section 26 of the *Evidence Act* must be read together with section 25. In our view, that contention is not correct, and subject to the normal safeguards, a confession to a private citizen is admissible and may be proved in evidence against an accused person. The same argument was presented and rejected by this Court in *Mary Wanjiku Gitonga V. Republic*, Cr. App. No. 83 OF 2007. The appellant in that appeal was charged with the murder of her husband. The High Court admitted in evidence a confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession was challenged. This Court held firstly that the statement was admissible under section 63 of the *Evidence Act* as direct evidence of what the witness had heard and secondly that to treat such statements as inadmissible
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> "would be enlarging the provisions of section 25A (of the *Evidence Act*) beyond reasonable limits." .....Earlier, in Parvin Singh Dhalay V. Republic, supra, the court accepted on principle that a confession can be made to a private citizen and noted that in that appeal the confession in question was made to persons who were not in authority. It concluded thus:

> "But a confession to criminality remains a confession whether it be made to a person in authority or to a private person and once the confession is repudiated or retracted or both repudiated and retracted, the confession requires corroboration unless the court is, for cogent and solid reasons, satisfied that the confession, though not corroborated, cannot be but true." (Emphasis added).
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> (See also *Lakhani V. Republic* [1962] EA 644, Deokinanan V. Reginam [1968] 2 All ER 346 and Festo Androa Asenua & Another V. Uganda, Sc Cr. App. No 1 OF 1998).
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> It is important to bear in mind that the amendments regarding confessions that were introduced to the *Evidence Act* by Act No 5 of 2003 and Act No 7 of 2007 were informed by the prevailing concern arising from consistent claims of use of torture by the police to extract confessions from suspects. The concern was never about confessions to private citizens.....We do not see anything in the *Evidence Act* as amended that prohibits an accused person voluntarily making a confession to a private citizen. Indeed, if the intention was to introduce a general prohibition of confessions even to private citizens as the appellant's claim, there would have been no need to retain the provision in section 26 of the *Evidence Act* which specifically prohibits confessions made to persons in authority."

We agree with the above reasoning and need not say more. We do not accept the submission by counsel for the appellant that the decision in Kanini Muli (supra) is a proposition that the only confessions admissible are those made to persons in authority named in section 25A.

13. We think, nevertheless, that the decision in Kanini Muli has this important holding that is germane to this matter;

> " ...In our view, irrespective of whether the confession under section 25A was made to the police or in court before a judge or magistrate, the overriding duty of the trial court to satisfy itself that the confession was voluntary and was not procured by inducement, thereat or promise still remains intact and as heavy as ever. The judge or magistrate before whom a confession is made under section 25A is not a conveyor belt for mechanically recording statements and disposing of the maker of the statement."

14. The requirement that for a confession to be admissible it has to be voluntary and not procured by inducement, threat or promise remains in regard to a confession made to a private citizen as it is to a person in authority. Yet because a confession made to a private person, unlike that made to a person in authority, need not be in the presence of a third party of the person's choice, there is another layer of safeguard in regard to a confession made to a private person for it to be admissible. The confession must have the ring of truth. The ring of truth is dependent on the overall evidence led by the prosecution.

15. Given the law on confession to private citizens as it stands, the true invitation by the appellant to us is to interrogate whether the supposed confession he made to PW3 met those legal requirements.

16. The testimony of PW3 regarding the confession was:

> " As I was going to sleep and found Mr. Ooko who said that he had killed Otete. I found many people on the way. People were moving towards the scene of crime. I went to the scene. Mr. Otete was lying on the ground. He was (Ooko) saying that the police should come and arrest him."

17. In the cross-examination, counsel representing the appellant at trial only makes a challenge as whether the confession was made at all. There was no suggestion that it was made under duress, threat, promise

or inducement. As to whether the confession was made, PW3's evidence was neither broken nor debunked. Another opportunity that presented itself for the appellant to confront the confession was during the defence case. In his testimony he comments on the evidence of PW1 and PW2 but says nothing at all about that of PW3 or the confession. The confession, in our view, easily passed the first prerequisite, it was voluntary and untainted with duress, threat, promise or inducement.

18. The trial court observed, and this is borne out of the evidence; that PW 3 was with the appellant who told him what he had done; PW 3's testimony was neither shaken on cross examination nor was there a suggestion that there was bad blood between the appellant and PW 3; the appellant and PW 3 were acquaintances; the appellant freely admitted to PW3 to killing the deceased; and that PW 3 was a truthful witness.

19. In addition, the presence of the appellant at or near the scene taken together with the evidence that people at the scene were asking why the appellant had killed the deceased made the confession by the appellant believable. The confession had a ring of truth.

20. In the end we are of the firm view that the conviction was safe and the trial court cannot be faulted.

21. We turn our attention to the death sentence imposed by the trial Court. In doing so the Court remarked;

> " The law prescribes a mandatory sentence and it is death."

22. The remarks were made pre the Supreme Court decision in *Francis Karroo Muruatetu & another vs Republic* (2017) eKLR which brought an end to the debate whether the death penalty was the only punishment for a person convicted of murder and there can be no begrudging the learned trial Judge. The law now is that the death sentence is not mandatory and sentence will be at the discretion of the sentencing court. The appellant ought to take his chance at this new jurisprudence and deserves a resentence. From the record, the appellant did not offer any mitigation, perhaps because it may have been futile given the law then. For that reason, there is a dearth of material upon which to review the sentence and the order that commends itself to us is to remit this matter back to the High Court for resentencing. We trust that, should the High Court reach a decision that a prison sentence is deserved then it will, in imposing the term, take into account the long period spent by the appellant in custody during trial (section 333(2) of the *Criminal Procedure Code*).

23. The upshot is that the appeal on conviction fails, the sentence is quashed and set aside. The appellant shall within 14 days hereof be produced before the High Court at Kisumu for directions on an early resentencing. The appellant shall in the meantime, and until resentence, remain in prison. Those are our orders.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR