



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KARANJA, GATEMBU & SICHALE, J.J.A)

CRIMINAL APPEAL NOS. 24 & 26 OF 2019

BETWEEN

MWANYIKA MBELE *alias* HAMISI....1ST APPELLANT

SADI MWAKE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Voi (Kamau, J.) dated 25th May 2018 in High Court Criminal Case No. 5 of 2015)

JUDGMENT OF THE COURT

1. Mwanyika Mbele alias Hamisi, the appellant in Civil Appeal No. 24 of 2019 and Sadi Mwake, the appellant in Appeal No. 26 of 2019 were charged, alongside two other persons, with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The Information before the High Court dated 5th May 2015 by the Director of Public Prosecution on behalf of the Republic stated that the appellants, Amina Ruwa and Stephen Mwanjala Mbele on 22nd April 2015 at Buguta village within Voi sub-county in Taita Taveta County jointly murdered Julius Mwalimu Mbele (the deceased).

However, the charge against Amina Ruwa and Stephen Mwanjala Mbele was subsequently withdrawn and the two were discharged by the trial court under Section 82(1) of the Criminal Procedure Code on 1st December 2015.

2. The appellants, Mwanyika Mbele alias Hamisi and Sadi Mwake were then tried before the High Court at Voi and convicted in a judgment dated 25th May 2018 delivered on 30th May 2018. They were sentenced to “*spend the remainder of their lives in custody*”. They are aggrieved and have in this appeal challenged both the conviction and sentence.

3. Mwanyika Mbele alias Hamisi (the 1st appellant) and the deceased are brothers. Sadi Mwake (the 2nd appellant) is their nephew as his late father was a brother to the 1st appellant and the deceased. Amina Ruwa and Stephen Mwanjala Mbele, the charges against whom were withdrawn are also sister and brother, respectively of the deceased. The prosecution case before the trial court was that there was a dispute between the siblings over inherited land on account of which the appellants conspired to eliminate the deceased.

4. The facts are that in the night of 21st/ 22nd April 2015, the deceased, and his wife Clemence Alamba Mwalimu (PW1) were at their home. They went to sleep between 10.00 p.m. and 11.00 p.m. Shortly after going to bed, PW1 heard a loud bang. Someone with a bright torch, clad in a coat and his face covered, stormed into the house, and attacked them with a weapon. PW1 asked the attacker who he was, but the attacker did not respond. PW1 found herself with an injury. The deceased was seriously injured in the attack. PW1 screamed attracting neighbours. The attacker escaped.

5. Among those who got to the scene shortly after the assailant escaped was the son of the deceased, Shadrack Mbele Mwalimu (PW3). He stated that on getting to the scene, he found PW1, among other relatives. His father (the deceased) had been slashed and had injuries on the head, neck, and stomach. He tried to speak to his father, but there was no response. He enquired from PW1 what had happened, and she informed him that a person wearing a mask broke the door and killed the deceased. He observed that the door lock was broken.

6. It was also PW3's testimony that historically there was a land dispute between the families of the 2nd appellant and PW3's father; that the relationship between the 2nd appellant and PW3's father, whose inherited parcels of land were adjoining, was strained and had continued to deteriorate and that the 2nd appellant claimed the deceased had bewitched his father.

7. Michael Mwanguo Mwalimu (PW4), another son of the deceased, also testified about the strained relationship between the deceased (his father) and the 2nd appellant. He stated that during the funeral of the 2nd appellant's late father, Mwake Mwaniki, the deceased was chased away although he did not know the cause of the strained relationship. He stated further that the relationship between the deceased and the 1st appellant (a brother to the deceased) was good until the death of the 2nd appellant's father, Mwake Mwaniki, and since that time the 1st appellant had stopped visiting the deceased.

8. Mungwana Mbeke Mwake (PW5), also a brother of the deceased, stated that the deceased was involved in a boundary land dispute with another brother, Stephen Mwanjala Mbele and the 2nd appellant's father Mwake Mwaniki; that after the death of Mwake Mwaniki, the land dispute escalated to the extent that *"there were threats"*; that the 2nd appellant used to threaten the deceased's life. PW5 stated that the dispute between the family of the deceased and the children of Mwake Mwaniki was the cause of the death of the deceased; that the 1st appellant who was staying in Malindi used to call him on the phone and refer to the deceased in derogatory manner, referring to him as *"dog, hyena"*; that their sister, Amina Ruwa, who was initially charged alongside the appellants, called him and informed him that, *"I will kill the deceased"*, while the 2nd respondent said to him that *"this land will cause someone's death"*; and that the dispute was referred to the chief.

9. Senior Sergeant Samuel Ngalla (PW2), an administration police officer, was at the AP Post Buguta on 21st April 2015 when he received a report that the deceased had been attacked and killed. He went to the house of the deceased and confirmed the death. He noted that the deceased had cuts on the head, stomach, fingers, and legs. He then contacted the Officer Commanding Station, Voi. Among the officers from Voi Police Station who went to the scene to investigate were Administration Police Constable Joseph Malasi (PW6) and the investigating officer, Police Constable Joan Wanjini Gachanja (PW11).

10. Police Constable Joseph Malasi (PW6) stated that he was working at Buguta AP Post between 2010 and 2012 before moving to Voi Police Station; that the 2nd appellant, who was a carpenter near his place of work was his friend as he used to *"sit with him just to talk"*; that before he was transferred from Buguta, the 2nd appellant had left the area for a job in Masai Mara after which they never met much. He stated that on 25th April 2015, accompanied by other police officers, they went to Buguta kwa Mwasi village *"for investigations following the death of Julius Mwalimu Mbele"*; that this was after they got a message from Amina's phone which had been sent by the 2nd appellant in Taita language, which he translated to mean, *"Nimeuliza Babangu huyo wa Malindi amekuja hapa nakuta amemaliza kazi na amepata unga wa kwenda kumaliza mamba na umwambie asiende kuongea na kumaliza kwa simu."*; that on enquiring from Amina what the message was about, she said that it related to the death of the deceased.

11. PW6 stated further that they then interviewed the 2nd appellant who told them his uncle, the 1st appellant, was the one involved in the death of the deceased; that the 1st appellant, who was holding a panga, had knocked on his door on 21st April 2015 at about 10.00 p.m. and informed him that he had come *"to finish the job"*; that the 1st appellant threatened to kill him should he disclose that information; that they escorted the 2nd appellant to the Traffic Base Chief Inspector Mureithi to write the confession; that Chief Inspector Mureithi told him (PW6) that the 2nd appellant had requested that he, PW6, should be his witness; that Chief Inspector Mureithi wrote the statement and the 2nd appellant signed it. He denied that the 2nd appellant was beaten to sign the statement. He stated that, *"apart from arresting Sadi, I was there when he was being interrogated. I also interrogated him."*

12. Chief Inspector Michael Mureithi (PW9) of the Traffic Department in Voi stated that he was in his office on 26th April 2015 when the 2nd appellant was ushered into his office for purpose of recording a statement under enquiry; that before doing so, he informed the 2nd appellant that he was entitled to have a witness or his advocate or friend present; that the 2nd respondent indicated that Police Constable Joseph Malasi (PW6) was his friend and requested that he be called; that after cautioning the 2nd appellant that he was not under obligation to say anything and that if he said anything it would be used in evidence, he proceeded to record his statement in which the 2nd appellant stated that the 1st appellant had knocked on his door on 21st April 2015 at about 10.00 p.m. and informed him that he had come *"to finish the job"*; that the 1st appellant threatened to kill him should he disclose that information; that the 1st appellant was holding a panga; that shortly thereafter, the 2nd appellant heard people shouting but feared going out as he had been warned by the 1st appellant. PW9 stated that PW6 was present throughout the period of recording the witness statement.

13. As already indicated, the investigating officer, Police Constable Joan Wanjini Gachanja (PW11) was one of the officers accompanying PW6 to the scene of crime on 22nd April 2015 where they found friends and relatives of the deceased consoling the deceased's family.

She stated that on entering the house, there was blood on the floor and on the beddings where the body of the deceased was; that they questioned and recorded statements from the wife of the deceased (PW1) and the son (PW3) who had arrived shortly after the attack; and that the body was then taken to Moi District Hospital Mortuary in Voi.

14. It was PW11's testimony that through an informer, she learnt that there was a questionable text message; that while recording a witness statement from PW1, the wife of the deceased, they established there were land wrangles between the deceased and the 2nd appellant and allegations that the deceased was a witch; that the genesis of the land wrangles was on account of the 2nd appellant's grandfather, who was the father of the deceased, having given the deceased a bigger piece of land than that given to the 2nd appellant's father, and that the 2nd appellant's father, Mwake Mwaniki, wanted to encroach on the deceased's parcel; that after the death of Mwake Mwaniki, the 2nd appellant carried on with the dispute and family members took sides; and that the matter was referred to the chief but it was not resolved.

15. PW11 testified further that based on the investigations Amina Ruwa, 2nd appellant and Stephen Mwanjala were taken into custody for

further interrogation on 25th April 2015 where their mobile phones were recovered, and the text message in Taita language, to which we have already referred, was found in Amina Ruwa's phone; that PW6, whose language is Taita, translated the message thus, "there was someone who was to come from Malindi and he was to use some traditional medicine to hide what would happen to the deceased."; that a statement under inquiry was then recorded from the 2nd appellant in the presence of PW6 in which the 2nd appellant allegedly confessed that:

"On 21st April 2015, Mwanyika Mbele [the 1st appellant] went to his home armed with a panga and he told him that he was going to kill the deceased. After a short while, he heard screams in the deceased's home but because they were not in good terms, he did not go out to check on them. More so, he knew what was happening."

16. PW11 went on to say that they established that the 1st appellant, Mwanyika Mbele, a brother to the deceased, resided in Malindi, and with the assistance of Amina Ruwa, the 1st appellant was arrested in Malindi on 27th April 2015 and his phone recovered; that the recovered phones and sim cards were then forwarded to Safaricom and Cyber Crime Unit of the Directorate of Criminal Investigations for data retrieval and analysis; that after concluding the investigations, perusal and analysis of the data and forensic report, it was established that the 2nd appellant was aware that the 1st appellant was armed with a panga but did nothing to stop him from killing the deceased; that although the 1st appellant resided in Malindi, he communicated frequently with Amina Ruwa about the land wrangles and witchcraft claims against the deceased; that they charged the appellants alongside Amina Ruwa and Stephen Mwanjala Mbele but the charge against Stephen Mwanjala Mbele was withdrawn after receiving the forensic report while the charge against Amina Ruwa was withdrawn "as she was to be treated as a witness."

17. Inspector John Mutinda Nyamai (PW12), based at DCI Headquarters Cyber Crime Unit in Nairobi who is trained in computer and mobile phone forensic investigation, received mobile phones from DCI Voi with a request to recover and download the text message communication for the period 1st April 2015 and 24th April 2015. From the messages he was able to retrieve he stated that he "could not tell if the same had discussed about murder because they were in Taita language".

18. Corporal Faisal Jama (PW10) based in Westlands, Nairobi stated that he trained at Safaricom and is authorised to extract data from their call and Mpesa systems; that on 27th April 2015 his office received a request from DCIO Taita Taveta requesting for call data in respect of three cell phone numbers that had been recovered from the 1st appellant, the 2nd appellant and Amina Ruwa for the period 15th April 2015 to 24th April 2015; that he was able to establish there was communication between the three of them; that there was communication on 21st April 2015 between the 1st appellant and the 2nd appellant between 1545 hours and 1550 and again at 1815 until 1817 hours on the same day; that on the same date at 1817 the 2nd appellant sent an SMS message to Amina Ruwa; that at 1832, she also received a message from the 2nd appellant. He stated that his role was restricted to confirming that there was communication between the three.

19. Dr. Peris Wairimu Ngugi (PW7), a medical doctor at Moi Hospital Voi produced a post-mortem report relating to the deceased on behalf of Dr. Lucas of the same hospital who had performed the post-mortem on 22nd April 2015. The report revealed that the deceased had a deep cut on the back of the neck cutting through the cervical spinal cord and blood vessel severing the cervical vertebrae; there were cuts on the temporal right region; cuts on the thorax and abdomen. In the opinion of Dr. Lucas, the deceased died because of cardiorespiratory arrest due to severe penetrating trauma.

20. After the close of the prosecution case and satisfied that the appellants had a case to answer, they were put on their defence. In his sworn statement, the 1st appellant stated that he resides in Malindi; that having been retrenched from tourism he resorted to farming in Malindi where he lived since 1999; that although he heard prosecution witnesses say that the deceased was killed because of family land disputes, he does not have any interest or claim to the land the subject of alleged dispute. He denied that he was involved in the death of the deceased or that he had gone to the house of the 2nd appellant the night in question; that the last time he had seen the 2nd appellant was in 1989 and had not communicated with him in connection with the death of the deceased; that police officers went to his place in Malindi and informed him that he was suspected of having killed the deceased but he could not understand how he was involved. He maintained that on 21st April 2015 he was at work in Malindi guarding his employer's farm; that the only reason he was suspected of having killed the deceased was because he had previously been charged with the murder of someone else.

21. The 2nd appellant also gave sworn testimony. He stated that since the 1st appellant left for Malindi over 10 years ago he had never visited him; he denied any involvement in the death of the deceased stating that on 21st April 2015 at about 6.00 p.m. onwards he was at home and that on 22nd April 2015 he was at work in his home.

He denied that the 1st appellant visited him on that date or that the 1st appellant informed him that he was planning to kill someone. As regards the statement under inquiry, the 2nd appellant stated that he was coerced into signing it and did so under duress by the police officers; that the police officers who arrested him from his house beat him up and compelled him to sign the statement.

22. In her judgment, the learned trial Judge, J. Kamau, J, concluded that the 1st appellant was not truthful; that although he claimed that he had never gone back to Bogota since 1989, PW1 testified that he was indeed present at the chief's office when attempts were made to reconcile the parties. The Judge also found that both appellants were not truthful when they said they had no contact with each other since 1989 because the text messages showed otherwise. The Judge also rejected the claim by the 2nd appellant that he was coerced into signing the statement under inquiry; and that the evidence in the form of call data analysis establishing communication between the 2nd and 1st appellant on 21st April 2015 was evidence of their involvement in the death of the deceased. In the end, the Judge concluded:

"39. Accordingly, having considered the evidence that was adduced by the prosecution witnesses and that of the accused persons, their respective written submissions and the case law they relied upon, this court came to the firm conclusion that the prosecution proved its case to the required standard in criminal case, being proof of the case beyond reasonable doubt by demonstrating that the deceased met his death as a result of unlawful actions or omissions on the part of the accused persons and that the unlawful acts or missions were committed with malice aforethought on their part."

40. The accused persons did not adduce any oral or documentary evidence or coexisting circumstances that weakened or destroyed the prosecution case. In fact, they did not demonstrate that there was any existing grudge between him and the deceased person that would have persuaded this court to conclude that he had been framed for having caused the deceased's death."

With that, the trial court found the appellants guilty of the offence of murder and convicted them.

23. The appellants, through learned counsel **Mr. Mwanzia** holding brief for Geoffrey Were, have in written and oral submissions urged that the conviction, based as it was, on the alleged confession that was retracted, is not safe; that the statement under inquiry by the 2nd appellant was not admissible; that the requirements under Section 25A of the Evidence Act as read with the Evidence (Out of Court Confession) Rules, 2009 in recording the statement were violated; that the alleged witness, PW6, who purportedly witnessed the statement, is a police officer who was involved in the investigations and did not qualify as an independent third party; that PW6 was a person in authority and the presumption therefore arises that the confession was not voluntary. Reference was made to the case of **Kanini Muli vs. Republic [2014] eKLR**. Moreover, counsel submitted, the 2nd appellant was not informed of his rights before the alleged confession was taken; that having recanted the confession, it could not form the basis of the conviction without other collaborating evidence.

24. It was submitted further that the charge against Amina Ruwa was withdrawn on the basis that she would called as a prosecution witness which never happened, and an adverse inference should therefore be drawn that her testimony would have been favourable to the appellants. Furthermore, counsel submitted, the 1st appellant's alibi defence, that on the material night, he was in Malindi and not at the scene of crime was not controverted and nor was it considered by the court.

25. Regarding the sentence, counsel submitted that the imprisonment of the appellants for the remainder of their lives was manifestly unjust; that considering the variance in the age of the 1st appellant (52 years) and that of the 2nd appellant (38 years), it would mean the 2nd appellant would serve a longer sentence.

26. Opposing the appeal, **Mr. Fedha**, learned counsel for the Director of Public Prosecutions also relied on written submissions which he highlighted. He submitted that the 2nd appellant signed the confession within the parameters of section 25A of the Evidence Act; that it is not true that PW6 who witnessed the statement was the investigating officer as claimed but was a friend of the 2nd appellant; that the investigating officer was clearly PW 11 and not PW6; and that despite having been cautioned, the 2nd appellant elected to make the statement and chose PW6 as his witness.

27. Regarding the alibi defence, it was submitted that it was rebutted by the mobile phone data which demonstrated that the 1st appellant was at the scene of crime.

28. As for the sentence, Mr. Fedha submitted that regard should be had to the nature of crime; that a panga was used to inflict severe injuries leading to the death; that the deceased had a family. He suggested that a sentence of 40 years imprisonment including the time spent in custody and remand would be appropriate.

29. We have considered the appeal. This is a first appeal. We have, in accordance with our mandate under Rule 29 of the Court of Appeal Rules, re-evaluated the evidence on record to draw our own conclusions bearing in mind that the trial court was in the unique position of having heard and seen the witnesses. As stated by the Court in **Joseph Kariuki Ndungu & another vs. Republic [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006)**, we have a duty as a first appellate court:

"...To re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law." See also **Okeno vs. Republic [1972] EA 32.**

30. Keeping that in mind, the principal question in this appeal is whether the prosecution proved its case to the required standard. To sustain a charge for the offence of murder, the prosecution was required to prove, firstly, the death of the deceased and the cause of his death; secondly, that the accused persons committed the unlawful act which caused the death of the deceased; and thirdly, that in committing that act, the accused acted with malice aforethought. See the decision of this Court in **Abdi Kinyua Ngeera vs. Republic [2014] eKLR (Criminal Appeal No. 312 of 2012)**. See also **JMM vs. Republic [2013] eKLR** and **Peter Kiambi Muriuki vs. Republic [2013] eKLR**.

31. Regarding death of the deceased and the cause, there is no controversy that during the night of 21st April 2015 the deceased was attacked in his home in the presence of his wife (PW1) and that the attacker inflicted fatal injuries from which the deceased died. The postmortem report that was produced before the trial court by PW7 indicated that the body of the deceased was examined by Dr. Lucas Mwashighadi at Moi Hospital Voi on 22nd April 2015 when it was still fresh, and it had, among other injuries, a deep cut on the back of the neck which severed his spinal cord. The pathologist opined that the deceased died from cardiorespiratory arrest due to severe penetrating trauma to posterior neck with cord transection.

32. As to whether the appellants committed the unlawful act which caused the death of the deceased, nobody identified the assailant. The wife of the deceased, PW1, was the only person present in their house at the time of attack. She stated that she did not identify the attacker. She said that the attacker had a bright torch, that she asked him who he was, but he never spoke, and that she did not see his face because it was covered. In her words, ***"I do not know who killed my husband because I did not see the face of the attacker or hear his voice as the attacker never uttered a word."***

33. In the result, the appellants were convicted on the strength of circumstantial evidence and on the strength of a “*confession*” by the 2nd appellant. What then was the circumstantial evidence? The prosecution set out to establish that there was a land dispute between the deceased and his siblings, the 1st appellant, Stephen Mwanjale Mbele, Amina Ruwa and the late Mwake Mwaniki which was carried on by his son the 2nd appellant; that the dispute was escalated to the chief but remained unresolved; that the deceased was accused of being a witch and was evicted from the burial of the

2nd appellant’s father; that immediately prior to the attack, there was short message service (SMS) communication between the appellants and Amina Ruwa implicating them in the death of the deceased; that on 21st April 2015, the night of the murder, the 1st appellant visited the home of the 2nd appellant and informed him that he was going to kill the deceased. To that end, the prosecution led evidence of PW 10 and PW12 to establish that there was SMS communication between the phone numbers of the appellants and Amina Ruwa.

34. Circumstantial evidence can be relied upon to support the conviction if it points clearly to appellants as the persons who killed the deceased. In *Abanga alias Onyango vs. Republic, Cr. App No. 32 of 1990* this Court had this to say:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

35. In *Sawe vs. Republic [2003] KLR 364*, this Court held that:

“1. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.”

36. Regard must be had to the circumstances and “*each link in the chain*” should be “*closely and separately examined*” to determine whether there is evidence on which the inference of guilt can be safely drawn. In *Mwangi & another vs. Republic [2004] 2 KLR 32* the Court expressed:

“It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example *Rex vs. Kipkering Arap Koskei & Another* (1949) 16 EACA 135.”

37. In the present case, the circumstantial evidence was that there was disagreement between the appellants, other family members and the deceased regarding land inherited from the deceased’s father, who was the 2nd appellant’s grandfather. However, the 1st appellant’s testimony was that he had no interest in that land and was well settled on his own land in Malindi. There was also evidence that there was short message communication between the appellants and Amina Ruwa, who had been charged alongside the appellants. One such message, which according to the learned Judge implicated the appellants was what is in our view an unintelligible message sent by the 2nd appellant to the said Amina Ruwa in Taita language to the effect “*I have asked my father from Malindi he found he had finished the work and got flour and tell him not to talk or finish on phone.*”

38. Undoubtedly, the fact that it was established by the prosecution that there was communication between the appellants and Amina Ruwa on the day that the deceased was attacked, and the fact that the appellants were untruthful about such communication was sufficient to raise suspicion that they had something to hide. It is trite, however that that suspicion alone, however strong cannot form the basis of a conviction. See *Mary Wanjiku Chichira vs. Republic, Cr. App. No 17 of 1998*. We do not think that the fact that the appellants were less than candid about their dealings with each other and with the deceased was sufficient for the trial court to conclude that the prosecution had discharged its burden of proof to the required standard.

39. The law regarding the use of circumstantial evidence as a basis for a conviction is that it must be such evidence which irresistibly points at the person accused as the exclusive perpetrator of the crime charged and with no other co-existing circumstances which would weaken such a conclusion. It was the duty of the prosecution to prove the guilt of the appellants and that if at the end of the whole case there was reasonable doubt created by the evidence given by either the prosecution or the defence as to their guilt then they would be entitled to an acquittal. [See *Woolmington vs. DPP [1935] All E R 1*].

40. The other evidence on which the learned Judge relied was a retracted “*confession*” of the 2nd appellant. In his retracted statement under inquiry recorded by Chief Inspector Michael Mureithi (PW9), which the 2nd appellant claims to have been coerced into making, he stated that the 1st appellant knocked on his door and told him,

“Dadi, naenda kwa ndugu yangu na ninaenda kuua”; that the 1st appellant warned him not to say anything after which the 1st appellant left and shortly thereafter he heard people shouting and came to learn that the 1st appellant had killed the deceased. PW9 stated that he cautioned the 2nd appellant that he was not under any obligation to make the statement and that he also informed him that he was entitled to have a witness; that the 2nd appellant indicated that PW6 was his friend and requested he should be called in as his witness.

41. PW6 stated in his evidence that on 25th April 2015, accompanied by other police officers, including the investigating officer (PW11), they went to Buguta kwa Mwasi “for investigations following the death of Julius Mwalimu Mbele”; he went on to say that at the scene they found the 2nd appellant, Amina Ruwa and Stephen Mwanjala and “we” told them “that they had issues to answer after we interrogated them...”

42. Section 25 A of the Evidence Act provides that 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 Chief Inspector of Police, and a third party of the person’s choice. Although PW6 claimed to have been a friend to the 2nd appellant and that he was invited by the 2nd appellant to witness the statement under inquiry, he was clearly part of the investigating team. He could not be an investigator on the one hand and a witness on the other hand.

43. Moreover, apart from the fact that the “confession” was not compliant with Section 25A of the Evidence Act, it was retracted. In Tuwamoi vs. Uganda [1967] E A 84, the East African Court of Appeal held that a trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. In Anyangu and Others vs. Republic [1968] EA 239 the Court of Appeal for East Africa stated at pg. 240 letters G to I:

“..... It is the treatment of the statements [of coaccused] by the learned trial judge that has caused us some concern. The learned judge treated all the statements as evidence, albeit accomplice evidence against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial, be “taken into consideration” against that co-accused. It is, however, not only accomplice evidence but evidence of the “weakest kind” (Anyuna s/o Omolo and Another V. R (1953), 20 EACA 218) ; and can only be used as lending assurance to other evidence against the co-accused (Gopa s/o Gidambenya & Others V. R (1953), 20 EACA 318).”

44. Quite apart from the fact that the retracted confession by the 2nd appellant was inadmissible by dint of Section 25A of the Evidence Act, it was evidence of the weakest kind. The learned trial Judge did not interrogate the circumstances under which the statement was recorded. Neither did the trial Judge caution herself of the danger of relying on it. As this Court stated in Kanini Muli vs. Republic (above):

“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, threat or promise still remains intact and as heavy as ever.”

45. Furthermore, the defence of alibi raised by the 1st appellant was not displaced by the prosecution. Contrary to the submission by counsel for the state that the telephone communication established that the 1st appellant was at the scene, that evidence merely established that there was communication, but it did not speak to the location of the 1st appellant at the time the crime was committed. The prosecution also failed to prove common intention.

46. All in all, we do not think the conviction of the appellants was safe. They are entitled to the benefit of doubt. Consequently, we quash the conviction, set aside the sentence and order that the appellants be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July, 2021.

W. KARANJA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR