



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MAKHANDIA, OUKO & M'INOTI JJ.A.

CRIMINAL APPEAL NO. 1 OF 2013

BETWEEN

SANGO MOHAMED SANGO.....1<sup>ST</sup> APPELLANT

SOFIA SWALEH HASSAN.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya

at Malindi, (Meoli, J.) dated 12<sup>th</sup> April 2013

in

H.C.CR. C. NO. 7 OF 2011)

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**JUDGMENT OF THE COURT**

On 12<sup>th</sup> April 2013, the High Court (*Meoli, J.*), in exercise of its original criminal jurisdiction, convicted and sentenced the two appellants, *Sango Mohamed Sango (1<sup>st</sup> appellant)* and *Sofia Swaleh Hassan (2<sup>nd</sup> appellant)*, to death for the offence of murder. Aggrieved by the decision, they lodged the current first appeal and invited us, on the basis of five grounds of appeal which we shall consider shortly, to find that their conviction was based on errors of fact and law and to allow the appeal, quash the conviction and set aside the sentence. The respondent thinks otherwise and contends that the conviction and sentence was well founded, merited and unimpeachable.

The information upon which the appellants were tried and convicted charged them with the murder of *Salim Omar Said (deceased)* on 2<sup>nd</sup> February 2011 at Ngongoni Market in Magarini District, Kilifi County. Also charged jointly with them was one *Ali Mohamed Sango*, a brother of the 1<sup>st</sup> appellant, who the trial court later acquitted after finding that he had no case to answer.

The deceased and the 1<sup>st</sup> appellant were stepbrothers while the 2<sup>nd</sup> appellant was a niece of the deceased, being the daughter of a sister of the deceased. The prosecution case, founded on the evidence of 8

witnesses, was that the appellants had murdered the deceased because of a protracted family dispute arising from the deceased's intention to sell his mother's house in Gongoni. The mother of the deceased together with the appellants strongly opposed the deceased's plan, leading to very strained family relations.

According to the prosecution case, on 2<sup>nd</sup> February 2011 at about 4.00 am, the deceased, who was in a *matatu* en route to his workplace in Mombasa, requested the driver to stop at the 2<sup>nd</sup> appellant's house in Gongoni, so that he could collect his bag. He was driven there and that was the last time he was ever seen alive. Shortly thereafter his body was discovered outside the 2<sup>nd</sup> appellant's house with severe head injuries from which the deceased never recovered. The prosecution case was that the appellants murdered the deceased; that the appellants' neighbours heard the commotion as the two were killing him; that those neighbours heard and recognised their voices as they vowed to finish the deceased; that the 1<sup>st</sup> appellant was shortly thereafter seen wielding a *panga*; and that subsequently the appellants had confessed to several witnesses that they had indeed murdered the deceased.

**Dr. Beryl Kaudia, (PW1)** who conducted a postmortem examination on the body of the deceased testified that he had sustained multiple superficial cuts and grazes on the upper limbs suggestive of defensive wounds; deep cut wound on the elbow with no fracture but chipped bone; multiple cut wounds on the skull with fracture and brawn matter leaking out; and the entire internal cavity exposed. He formed the opinion that the cause of death was cardiopulmonary collapse due to sever penetrating head injury with hemorrhage.

When the appellants were put on their defence, they gave unsworn statements and called no witness. The 1<sup>st</sup> appellant's defence was that on the material morning at about 4.00 am, he was aroused from his slumber by noises outside his house as though people were struggling. When he stepped outside, he saw two people running to a *matatu* on the road, which drove off. Upon looking closely, he discovered the dead body of the deceased, whereupon he screamed and drew his neighbours from their houses.

As for the 2<sup>nd</sup> appellant, her defence was that as she slept in her house on the material morning, she heard the deceased calling. She did not get out of the house until she heard the 1<sup>st</sup> appellant screaming. Outside her house, she found the body of the deceased after which the 1<sup>st</sup> appellant sent her to call the Sub Chief.

Satisfied that the prosecution had proved its case beyond reasonable doubt, Meoli, J. convicted and sentenced the appellants as aforesaid, resulting in this appeal. The appellants' supplementary ground of appeal filed by their learned counsel, **Ms. Aoko Otieno** on 28<sup>th</sup> October 2015 contend that the trial judge erred by:

1. ***failing to find that murder was not proved beyond reasonable doubt;***
2. ***failing to find that the inconsistencies in the prosecution evidence raised reasonable doubt;***
3. ***convicting the appellants on the basis of circumstantial evidence which was unsafe;***
4. ***meting out the sentence of death without the benefit of a social enquiry report.***
5. ***improperly admitting and acting on inadmissible confessions;***

Urging the appeal, learned counsel opted to combine ground 1 and 2, 3 and 4 and to argue ground 5 separately. It was submitted that whilst the prosecution had proved death of the deceased, it had failed to prove that it was the appellants who caused it, or who caused it with malice aforethought. All that the prosecution witnesses confirmed, it was contended, was that they had heard what appeared to be a bitter quarrel outside the 2<sup>nd</sup> appellant's house. According to counsel, one of the witnesses had even assumed that it was a drunken brawl. In these circumstances, it was submitted that there was no evidence upon which the appellants could be convicted of murder of the deceased. Specifically as regards the 2<sup>nd</sup>

appellant, we were invited to find that it was her testimony that she had depended upon the deceased since 2002 and had nothing to gain from his death.

On what the appellants considered to be inconsistencies in the prosecution case, it was submitted that the prosecution evidence was not clear whether the deceased was killed in the 2<sup>nd</sup> appellant's house or outside where the body was found; that the evidence of lighting at the scene was contradictory and unsatisfactory with PW 4 stating that it was partially lit and partially in darkness while PW8 had to use a torch to navigate to where the body of the deceased was; that the murder weapon was not dusted for the appellants' finger prints; and that it did not have any special or distinguishing features to make it stand out.

Ms. Otieno further urged that PW2 who testified to having received a telephone call from the 2<sup>nd</sup> appellant urging him not to disclose what he had witnessed neither gave a telephone number nor produced any call log from the telephone service provider to confirm that the telephone call was indeed made; that the evidence of PW8 who testified to having received a call from his brother informing him of the murder of the deceased suffered from the same lack of a telephone number and call log; that the prosecution witnesses were not consistent regarding the time of commission of the offence with some testifying that it was at 3.30 am, other at 4.00 am and PW2 saying it was 3.30 pm; and that the specific role played by each appellant in the murder was not established.

On circumstantial evidence and the appellants' confessions, we were urged to find that the evidence against the appellants was purely circumstantial and that it did not unerringly point at the appellants as the perpetrators of the murder. The evidence of PW2, PW3 and PW4, it was submitted, amounted to proof of confessions against the appellants and was inadmissible. It was contended that under sections 25 and 26 of the Evidence Act, a confession as a general rule is not admissible, save in the enumerated instances and that in the circumstances of this case the trial judge erred in admitting and relying upon the alleged confessions by the appellants. The ruling of the High Court in **REPUBLIC V. SIMON NGAHU NJUGUNA, HCCRC NO. 21 OF 2008 (Nakuru)**, where the court refused to admit a confession made to a member of the public was relied upon.

Lastly we were invited to find that the learned judge had erred by sentencing the appellants to death without proper mitigation and without requesting for and considering a social inquiry report. In counsel's view, the learned judge was obliged to conduct proceedings akin to a trial within trial before determining whether to sentence the appellants to death, but failed to do so.

**Mr. Monda**, learned Assistant Director of Public Prosecutions opposed the appeal and urged us to dismiss the same. In his view, the totality of the evidence adduced by the prosecution proved beyond reasonable doubt the offence with which the appellants were charged. That evidence, it was contended, placed both appellants at the *locus in quo* on the morning and at the time the deceased was murdered.

Counsel further submitted that the appellants were well known to the key prosecution witnesses who were their neighbours and recognized their voices. As regards the conditions of the lighting at the scene, it was submitted that the same were properly described, considered by the court and found to be conducive for proper identification. On the confessions by the appellants that they had killed the deceased, it was argued that they made the confessions voluntary without any threats or inducement and that the same were properly admitted in evidence. The respondent relied on **MARY WANJIKU GITONGA V. REPUBLIC, CR APP NO 83 of 2007** to support the admission of the confessions.

In the view of counsel for the respondent, malice aforethought was proved because the postmortem report disclosed that the deceased had suffered serious head injuries and had died instantly. Counsel invoked **section 206** of the Penal Code and submitted that from the circumstances of this case and the nature of injuries sustained by the deceased, the trial court had properly inferred malice aforethought on the part of the appellants.

On the contradictions in the prosecution evidence, we were invited to find that if indeed there were contradictions, the same were not material or fatal to the conviction of the appellants. Lastly we were

urged to bear in mind the fact that the trial court, which had the advantage of seeing all the prosecution witnesses and the two appellants testify believed the evidence of the prosecution witnesses rather than the appellants.

The respondent concluded by submitting that the trial court had heard and taken into account the appellants' mitigation statements before sentencing them to death and to that extent the trial court had complied with the law and did not commit any error.

A first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, the Court must weigh conflicting evidence, make its own findings and draw its own independent conclusion. (See ***OKENO V. REPUBLIC [1972] EA 32*** and ***KILU & ANOTHER V. REPUBLIC [2005] KLR 174***).

In reappraising the evidence, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule therefore, the Court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. (See ***JOSEPH KARIUKI NDUNGU V. REPUBLIC CR. APP. NOS. 183 & 186 OF 2006***).

There is no dispute that the evidence against the appellants was circumstantial evidence to the extent that the prosecution did not adduce any direct evidence regarding the murder of the deceased. But as has been stated time and again, that in itself does not render circumstantial evidence valueless, because, subject to satisfying well-known conditions, circumstantial evidence is as good as any other evidence and can prove a case with the accuracy of mathematics. At times, it is deemed the best evidence ever. (See ***MUSILI TULO V. REPUBLIC, CR. APP. NO. 30 OF 2013***). In ***SAWE V. REPUBLIC (2003) KLR 364***, this Court stated that to pass muster, circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances.

According to the evidence of the wife of the deceased, ***Salma Geoffrey Karisa (PW6)***, the deceased left his house at Gongoni on 2<sup>nd</sup> February 2011 at about 4.00 am to board a *matatu* to his place of work in Mombasa. This witness also testified on the poisoned relationship between the deceased and the appellants provoked by the former's intention to sell his mother's house.

The evidence of ***Lelan Sheikh Fadhali, (PW8)***, the *matatu* driver, corroborated that of PW6 in material particulars. PW8 testified that on the eve of his death, the deceased approached him to arrange transport to Mombasa. Early the next morning, PW8 picked the deceased from his house after which the deceased requested to be driven to the 2<sup>nd</sup> appellant's house to collect his luggage. PW8 obliged and drove to the 2<sup>nd</sup> appellant's house. He parked the *matatu* close to the 2<sup>nd</sup> appellant's house and the deceased went into the house. The time according to PW8 was about 4.00 am. He waited for approximately 15 minutes but the deceased did not come out of the house. He telephoned him but he did not pick the phone. Concerned that he was getting late, PW8 decided to proceed on his journey to Mombasa, leaving the deceased behind.

Three witnesses, namely ***Mohamed Bakari (PW2)***, ***Hidaya Ali Swaleh (PW3)***, and ***Martin Jillo Godana (PW4)*** testified on what happened at the scene. All the three were neighbours of the appellants at Gongoni and were well known to them.

PW2's house was only about 13 meters from that of the 2<sup>nd</sup> appellant. He knew the appellants, the deceased and other members of their family for about five years. On the material day at 3.30 pm he heard noises outside his house and a person calling out for help. He stepped out and found the 2<sup>nd</sup> appellant standing outside her door. He inquired from her what was going on, but she told him to mind his own

business. Shortly thereafter the 1<sup>st</sup> appellant appeared wielding a *panga* and declared that he had already killed and was prepared for any consequences, including incarceration. The exact words he is said to have uttered in Kiswahili were:

***“Mimi Kuuwa nishauwa. Litakalotokea litokee. Kama Serikali inataka kunifunga inifunge. Nitatumikia.”***

It was the evidence of PW2 that when he left the scene, he received a telephone call from the 2<sup>nd</sup> appellant who informed him that the deceased had died and that he should not disclose to anyone what he had seen.

PW3’s house was separated from that of the 2<sup>nd</sup> appellant by only one other house. This witness knew the appellants and their family for more than twenty years, having initially been a tenant of the 2<sup>nd</sup> appellant’s mother for two years. Her evidence was that at about 4.00 am on the material morning she was woken up by a lot of noise from the 2<sup>nd</sup> appellant’s house. She stepped out of her house and stood about five steps from the 2<sup>nd</sup> appellant’s door. From inside the house, she heard the appellants and the deceased shouting. The deceased shouted he was being killed while the 1<sup>st</sup> appellant accused someone of trying to sell the house and the 2<sup>nd</sup> appellant was urging that someone should be gagged and strangled. Assuming that it was a drunken brawl, the witness retreated into her house and went back to sleep.

Three days later, the 1<sup>st</sup> appellant approached PW3 and informed her that together with the 2<sup>nd</sup> appellant and Ali Mohamed Sango he had killed the deceased who was bothering them and that the next person to be killed would be ***Bashe Hussein Bashir***, the assistant chief of Gongoni location, for signing approval for the sale of the house. Alarmed, she passed on the information to the assistant chief.

The evidence of PW4, yet another neighbour was very similar to that of PW2, confirming being woken up at about 3.30 a.m. by noises and going out of his house and seeing the appellants. The witness confirmed seeing PW2 at the scene, the 2<sup>nd</sup> appellant asking PW2 to mind his own business and the 1<sup>st</sup> appellant, who was armed with a *panga*, stating that he had killed and was ready to be jailed. This witness added that he noticed the body of the deceased lying on the ground. The witness stated too that the scene was illuminated by electric light from security lights from a neighbouring house.

***Bashe Hussein Bashir (PW5)***, the assistant chief of Gongoni sub-location confirmed that the 2<sup>nd</sup> appellant went to report to him the death of the deceased at about 4.45 am. According to this witness, the 2<sup>nd</sup> appellant claimed not to have seen the body of the deceased. He accompanied her to the scene and found the body of the deceased lying right next her house and close to it was the deceased’s bag and driving license. He also confirmed having received reports of threats to his life for allegedly facilitating the sale of house of the 1<sup>st</sup> appellant’s mother by the deceased.

The necessity of close scrutiny of evidence where a conviction is based solely on identification, particularly under difficult or unfavourable conditions, cannot be gainsaid. This Court has stated time and again that even honest witnesses tend to make genuine mistakes when it comes to identification of close relatives and friends. (See ***WAMUNGA V. REPUBLIC [1989] KLR 424***). It is on that basis and to mitigate the risk of unsafe convictions that close evaluation of identification evidence is insisted upon, including the need for the trial court to warn itself of the danger inherent in such evidence.

In this case the trial court itself questioned PW4 on the nature of illumination at the scene, and was satisfied that it was lit by electric from nearby security lights. What stands out about the identification of the appellants in this case is that three separate neighbours identified them. These were neighbours who knew them very well, one for about 20 years and another for about 5 years. The appellants were identified at the 2<sup>nd</sup> appellant’s house, which was also known to the witnesses. In addition the identification was not from a fleeting glance; the witnesses even had time to talk to the appellants at the scene.

We are satisfied that in the circumstances of this appeal, the identification of the appellants was safe

because three different witnesses recognized them. In **ANJONONI & OTHERS V. REPUBLIC [1976-80] 1 KLR 1566** this Court held that recognition is more satisfactory, more assuring and more reliable as it depends upon personal knowledge of accused person in one form or another. The identification of the appellants is made safer by the fact that three prosecution witnesses were also familiar with their voices. In **KARANI V. REPUBLIC [1985] KLR 290**, this Court stated that identification by voice nearly always amounts to identification by recognition, whilst in **CHOGE V. REPUBLIC [1985] 1 KLR 1**, the Court stated thus:

***“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”***

(See also **LIBAMBULA V. REPUBLIC [2003] KLR 683**).

Lastly, that the identification of the appellants was safe is assured by the fact that in their defences, both appellants placed the deceased and themselves at the *locus in quo* on the date and at the time the offence was committed.

The next issue is the propriety of the admission into evidence and reliance upon the confessions by the appellants. **Section 25** of the Evidence Act defines a confession thus:

***“25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”***

Broad as section 25 appears to be, a confession must still be sufficiently clear that the accused person admits all the elements of the offence charged. As the former Court of Appeal for Eastern Africa stated in **REX V. KITUYAN S/O SWANDETTI (1941) 8 EACA 56**, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.

As regards the 1<sup>st</sup> appellant his confession was at the *locus in quo* where he is said to have declared in the hearing of the PW2 and PW4 that he had killed someone and was ready for the consequences. The statements attributed to the 1<sup>st</sup> appellant at the scene do not make any reference to the deceased as the person who the 1<sup>st</sup> appellant had killed. However, taken in conjunction with other proved facts like the bad blood between the appellants and the deceased, the arguments heard from 2<sup>nd</sup> appellant’s house, the appearance of the 1<sup>st</sup> appellant at the scene armed with a *panga*, and the discovery of the body of the deceased immediately thereafter, a reasonable inference may be drawn that he had killed the deceased. The other occasion when the 1<sup>st</sup> appellant is alleged to have confessed to having killed the deceased is three days later when he told PW3 that he had, together with the 2<sup>nd</sup> appellant and his brother, Ali Mohamed Sango, killed the deceased for trying to sell his mother’s house. We shall revert to this confession shortly.

In respect of the 2<sup>nd</sup> appellant her words at the scene when she asked PW2 to mind his own business cannot by any stretch of imagination constitute a confession of the murder of the deceased. She merely told PW2 that what was happening was none of his business. The only other time she is alleged to have confessed to the offence is when she called PW2 and informed him that the deceased had died and urged him not to disclose what he had seen. We agree with counsel for the appellants that proper evidence that this alleged phone call was made by the 2<sup>nd</sup> appellant to PW2, including, the number from which the call was made, the number to which the call was made, the time, the date, the ownership of the respective telephone numbers, among others, should have been led. As it is, there is no credible evidence on record that the call was ever made.

In **PARVIN SINGH DHALAY V. REPUBLIC, CR. APP. NO. 10 OF 1997**, while this Court was not

prepared to hold that telephone conversations are only admissible when they are contemporaneously recorded, the Court stated that when guilt or innocence depends on telephone conversation, the court has a duty to treat it with great caution, particularly where the telephone conversation is challenged. This is to avoid the dangers of concoction or innocent misrepresentation of what was said or meant.

Secondly, the words that the 2<sup>nd</sup> appellant is alleged to have uttered to PW2 cannot constitute a confession that she had killed the deceased. Her entreaty to PW2 not to tell anyone what he had seen cannot in itself be deemed to be a confession because PW2 had not seen the 2<sup>nd</sup> appellant killing the deceased.

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 ***“would be enlarging the provisions of section 25A (of the Evidence Act) beyond reasonable limits.”*** The Court concluded:

***“It was agreed that it was the appellant herself who went to Titus in Nairobi and told Titus what had happened between her and the deceased. Titus, we have held, was not a person in authority over the appellant and the evidence of Titus could not be held to be inadmissible on that basis. The evidence could be disbelieved and rejected but it was admissible.”***

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).*

(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***).

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. Thus for example, in ***EKAI V. REPUBLIC (1981) KLR 569*** this Court sounded the concern in the following terms:

***“Accusations of ill-treatment are often made against police officers, sometimes with justification. In fairness both to the police and to the accused person, we would like to suggest that consideration be given to amending the Evidence Act to provide that no statement in the nature of a confession made to a police officer of whatever rank be admissible in evidence against a person accused of a criminal offence. Such statements should only be admissible if made to a magistrate, no policeman being present and a carefully prescribed procedure should be followed by the magistrate including giving a formal charge and caution followed by questions as to whether the accused person has any complaints relating to his treatment or is***

*suffering from any injuries and if apparent a note should be made of such injuries, and of any complaint which may be made.”*

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.

*Peter Murphy*, in his book, *A Practical Approach to Evidence*, Blackstone Press, 2<sup>nd</sup> Edition, 1985, page 201, states as follows regarding confessions:

*“A confession, like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the maker. Usually, confessions are made to police officers or other investigators as a result of interrogation, but may equally be made to the victim of an offence, a friend or relative or any other person.”*

The real issue in the appellants’ alleged confessions is whether they should, in the circumstances of this appeal, have been admitted, because the trial court must be convinced first about the voluntary nature of the confession and secondly that the confession has the ring of truth.

We have found that as regards the 2<sup>nd</sup> appellant there was no proper confession before the court. As regards the 1<sup>st</sup> appellant there was before the court a confession, the only issue being whether in the circumstances of this case, the trial court should have acted on it.

The defence did not object to the admission of the confession as they ought to have done, to enable the trial court determine the circumstances under which it was made and whether it ought to have been admitted. Nevertheless, from the cross-examination of PW3 as well as the defence put forward by the 1<sup>st</sup> appellant it leaves no doubt that the 1<sup>st</sup> appellant was denying ever having made the confessions. As this Court stated in *KANINI MULI V. REPUBLIC, CR. APP. NO. 238 of 2007*, even after the trial court has ruled a confession admissible, the accused person is still entitled to call evidence to show that the confession cannot be acted upon. Earlier in *LAKHANI V. REPUBLIC, (supra)* the appellant had not objected to the admission of his confession of theft made to his branch manager and as a result the confession was admitted without a trial within trial being held. Later in his defence, the appellant denied making the confession. On appeal the Court of Appeal for Eastern Africa held that the trial court ought to have asked the appellant at the time when the evidence of his confession was about to be given, whether he wished to repudiate or retract it or whether he agreed to its admission in evidence, and that as soon as the appellant repudiated his confession, a trial within trial ought to have been held.

In *WAMBUNYA V. REPUBLIC [1993] KLR 133* this Court stated that a trial court should accept any confession, which has been repudiated or retracted with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. (See also *TUWAMOI V. UGANDA [1976] EA 91* and *THIONGO V. REPUBLIC [2004] 2 KLR 38*).

Other than stating that the appellants had confessed to killing the deceased, the trial court did not consider the circumstances under which the confessions were made. Nor did it address the question of a trial within trial after the appellants, in their defences, repudiated the confessions. The trial court too did not warn itself of the danger of relying on repudiated confessions or even address its mind to the reliability of the repudiated confessions. We are satisfied that the confessions were not safe and ought not to have been relied upon in this case.

From what we have stated above however, even when the confessions are excluded, we are satisfied that there was sufficient circumstantial evidence from which the court could properly convict the appellants. Looking at the prosecution evidence in its totality including the bad relations between the deceased and the appellants; the early morning visit by the deceased to the 2<sup>nd</sup> appellant; the commotion emanating

from the 2<sup>nd</sup> appellant's house immediately thereafter; the presence of the appellants and the deceased at the scene at the time of the commotion; the words that were uttered during the commotion; the identification, by recognition and by voice, of the appellants by three witnesses who were known to them for several years; the presence of the 1<sup>st</sup> appellant at the scene armed with a *panga*; the effort by the 2<sup>nd</sup> appellant to fend off inquisitive neighbours; and the discovery of the deceased's body just next to the 2<sup>nd</sup> appellant's house point, unerringly to the appellants as the person who committed the murder.

In addition the appellants' defences that the deceased was murdered outside the house of the 2<sup>nd</sup> appellant by two persons who subsequently ran off in a *matatu* is quite implausible, and was, in our view properly rejected by the trial court. That defence could not stand in the face of the evidence of PW8, the *matatu* driver, to whom it was never suggested that he had wittingly or otherwise facilitated the escape of the alleged murderers in his *matatu*. His evidence was clear that he drove off after waiting for the deceased for about 15 minutes and there was no reference to him having picked other passengers at the scene.

On the question of malice aforethought, the court is entitled, in determining its presence or absence, to take into account among other things, factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased. (See REX V. TUBERE S/O OCHEN (1945) 12 EACA 63, and CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004). In this case, the gory nature of the injuries inflicted upon the deceased which resulted in instant death are consistent with an assault intended to cause no less than death. The head injuries, inflicted with a dangerous weapon like a *panga*, which resulted in a fractured skull and leakage of brain matter is consistent with the unlawful killing of the deceased actuated by malice aforethought. (See section 206, Penal Code).

Turning to what the appellants contend to be inconsistencies in the prosecution evidence, having carefully reviewed the entire record we are satisfied that there are no inconsistencies or contradictions in the evidence adduced by the prosecution that would warrant, on their own, interference with the findings of the trial court. For example, looking at the totality of the evidence that was adduced by both the prosecution and the defence, there is no dispute that the offence was committed in the morning of 2<sup>nd</sup> February 2011 between 3.30 am to 4.00 am. That is also the time frame that was mentioned by the appellants in their defences. The reference to 3.30 pm by PW2 is clearly a typographical error. We would reiterate as correct what the Court of Appeal of Uganda stated in TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001 regarding inconsistencies in evidence:

***“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***

Lastly learned counsel for the appellants invited us to find, on the authority of GEOFFREY NGOTHO MUTISO V. REPUBLIC, CR. APP. NO. 17 OF 2008, that the learned judge had erred by sentencing the appellants to death without proper mitigation and without requesting for and considering a social inquiry report. In counsel's view, the learned judge was obliged to conduct proceedings akin to a trial within trial before determining whether to sentence the appellants to death, which she had failed to do.

Sections 216 and 329 of the Criminal Procedure Code empower the trial court, before passing sentence to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. Although the above provisions are couched in permissive terms, this Court has held over time that it is imperative for the trial Court to afford an accused person an opportunity to mitigate before he or she is sentenced, even in offences where the prescribed sentence is death. Thus for example, in AMOS CHANGALWA JUMA V. REPUBLIC [2009] ECLR this Court stated:

***“Before we conclude this judgment, we must say something about the manner the learned Judge dealt with the sentence. We have reproduced the concluding paragraph of the learned Judge’s judgment and it is clear that the learned Judge sentenced the appellant to death in his main***

*judgment without recording mitigating factors, if any. This was clearly improper. As we have stated previously in other judgments, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person (or his counsel) before sentencing him/her. This obtains even in the cases where death penalty is mandatory. The reasons for requirement are clear in that when the matter goes to appeal as this matter has come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing appropriate sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal, or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for clemency. Thirdly, matters such as age, pregnancy in cases of women convicts may well affect the sentence. It is thus necessary that mitigating factors be recorded even in cases of mandatory death row sentence.”*

(See also, HENRY KATAP KIPKEU V. REPUBLIC, CR. APP. NO. 295 OF 2008 (ELDORET), and DORCAS JEBET KETTER & ANOTHER V. R. CR. APP. NO. 10 OF 2012.

From the record, it is sufficiently clear that the appellants were offered an opportunity to mitigate before sentencing and that they indeed presented their mitigation statements as required by the Criminal Procedure Code, which were considered by the court before it, meted out sentences. In GEOFFREY NGO THO MUTISO V. REPUBLIC (*supra*), which was relied upon by learned counsel, the appellant in that case had no opportunity to mitigate. In addition that decision, which held that the death penalty was not a mandatory sentence in some offences, must be considered in light of the subsequent decision of the five-judge bench in JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC, CR APP NO. 5 OF 2008, which held otherwise.

Ultimately we have come to the conclusion that this appeal lacks merit and the same is hereby dismissed. It is so ordered

**Dated and delivered at Mombasa this 4<sup>th</sup> day of December, 2015.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**