IN THE COURT OF APPEAL

AT NAIROBI

CORAM: P. KIHARA KARIUKI, PCA, MUSINGA & M'INOTI, JJ.A.

CRIMINAL APPEAL NO. 238 OF 2007

BETWEEN

KANINI MULI……..……..……. APPELLANT

AND

REPUBLIC ……..……..……..…… RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Machakos (Wendoh, J) dated 30th November, 2007

in

H.C.CR.CASE NO. 33 OF 2003

****

JUDGMENT OF THE COURT

The appellant, Kanini Muli, was convicted of murder by the High Court (Wendoh J) on 30th November, 2007 and sentenced to suffer death. The conviction was based on a retracted confession, there being no other evidence linking the appellant to the offence. The central issue in this appeal is therefore whether the appellant was properly convicted on the basis of that retracted confession. The facts of this appeal are quite peculiar and rather tragic for the appellant, her family and that of the deceased, Moki Shem Ndumbu.

From the outset, the theory put forward by the prosecution was that the appellant had killed the deceased because he had jilted her. The deceased, Moki Shem Ndumbu and the appellant were neighbours in Kisekini Village, Mulango location, Kitui. In the early 1990s, when the appellant completed her secondary school education, she had a love affair with the deceased. She subsequently gave birth to a baby girl, (JK) who she claimed was fathered by the deceased. The deceased however demurred and disowned the child.

The appellant pressed the deceased to marry her but he refused. The two families held meetings to discuss the matter, but the deceased adamantly refused to marry the appellant and instead married Beatrice Moki, with whom he had a baby girl. Even after the deceased married Beatrice, the appellant kept visiting his home pestering him to marry her, to no avail.

On 9th October, 1998, the deceased, his wife Beatrice and their young daughter retired to bed in their house in Kisekini Village. Early the next morning (10th October, 1998), between 4.00 am and 4.30 am, someone bolted the door of the room in which they were sleeping from the outside, poured inflammable substance, suspected to be petrol at the door, and set the house on fire. Nobody saw the person who started the fire; all that was recovered at the scene was a jerry can that witnesses told the court they suspected, from its smell, to have contained petrol.

The deceased and his wife suffered severe burns to which they succumbed on 20th October, 1998 and 18th October, 1998 respectively. Their baby girl sustained burns, but survived the ordeal. Dr Kirasi Olumbe conducted a postmortem on the deceased and Beatrice and found that both had suffered septic deep burns of the whole face, neck, chest, upper abdomen and upper limbs and that the eyes were congested. He formed the opinion that the cause of both deaths was septicemia following burns.

Not surprising, the appellant was treated as the first suspect. She was arrested and charged with the murder of the Moki Shem and Beatrice Moki. However, in 1999, she was set free for lack of evidence and an inquest under section 387 of the Criminal Procedure Code, cap 75 Laws of Kenya was ordered to inquire into the two deaths. ***Inquest No 17 of 1999*** opened before the then Senior Principal Magistrate, Kitui, Mr Maxwell Gicheru on 24th October, 2001. After taking the evidence of three witnesses, namely Shem Munyalu Ndumbu (the father of the deceased), David Muli Kasyo, (the appellant's father) and the appellant herself, the learned magistrate ruled that the appellant had confessed to the murder of Moki Shem and Beatrice Moki. He also found that the appellant had implicated her nephew, Mwendwa Katana Thomas and another person in the murders. The learned magistrate directed the District Criminal Investigations Officer to conduct further investigations with a view to charging the appellant and her accomplices with the offences.

On 10th February, 2004 the appellant and Mwendwa Katana Thomas were jointly charged before the High Court, Machakos, with two counts of murder contrary to sections 203 and 204 of the Penal Code. The particulars of the offences were that on 10th October, 1998 at Kisekini Village, Mulango Location in Kitui District of the Eastern Province, jointly with another not before the court, they murdered Moki Shem (count 1) and Beatrice Moki (count 2).

The prosecution called 6 witnesses to prove the charges against the appellant and her co-accused. Among the witnesses was PW 5, Senior Principal Magistrate Maxwell Gicheru, who produced the statement he had recorded from the appellant at the inquest. Although the appellant's co-accused, Mwendwa Katana Thomas, objected to the production of the statement, the appellant did not and eventually it was admitted as a confession. However, when the appellant was put on her defence, she retracted the confession in her unsworn statement. She told the trial court that the confession was involuntary and was extracted from her by her clan elders through compulsion and torture. The clan elders, she stated, were alarmed by the deaths in her family which they believed were caused by a traditional Kamba *Kithitu* oath that the father of the deceased had allegedly taken to avenge the deaths of his son and daughter in law. The clan elders, desperate to avert further deaths in the family of the appellant, had negotiated and reached settlement with the family of the deceased and the appellant was forced to make the confession to bring closure to the matter.

On 30th November, 2007, the trial judge found the appellant guilty as charged, convicted her for the murders of Moki Shem and Beatrice Moki and sentenced her to death. The co-accused, Mwendwa Katana Thomas, had been acquitted earlier on 8th May, 2006 when the court found that he had no case to answer.

Aggrieved by the judgement of the High Court, the appellant preferred the current appeal, in which she raised 5 grounds of appeal in a supplementary memorandum of appeal filed on 17th May, 2013 with the leave of this Court. At the heart of the five grounds of appeal is the question whether the trial court had erred in convicting the appellant purely on the basis of the confession recorded by the learned Senior Principle Magistrate, Mr Maxwell Gicheru (PW 5) in ***Inquest No. 17 of 1999*** which the appellant had subsequently retracted.

At the hearing, we called for the original record of the High Court for the purpose of perusing the statement recorded by PW 5 from the appellant. We established that the appellant's statement was not part of the record. We noted that after PW 5 testified on 30th May, 2005 the original record of ***Inquest No. 17 of 1999*** and the ruling by PW 5 were produced as exhibit 3(a) and (b). The trial court then made the following order:

> ***"Original file released to the lower court. Certified copy be left with this court as exhibit 3 (a) and (b), proceedings and ruling."***

On 2nd December, 2013 we directed the Registrar of this Court to have the original record of the ***Inquest No 17 of 2005*** availed to us from the Principal Magistrate's Court, Kitui, within 14 days. The record was not availed within the stipulated time or at all because the same could not be traced in the Court in Kitui. In the circumstances, the appellant will be entitled to the benefit of any doubts that we entertain regarding that statement.

Ms F. Njeru, Senior Prosecution Counsel, opposed this appeal on several grounds, namely that the appellant's statement before the inquest was made in court before a magistrate as required by section 25A of the Evidence Act; that at the inquest the appellant was not an accused person and therefore did not have to be cautioned before her statement was recorded; that the Evidence (Out of Court Confessions) Rules, 2009 that provide safeguards in the recording of confessions do not apply to confessions taken in court; that the appellant's statement before the inquest was a statement under oath, and the same was properly admitted and acted upon by the trial court; that it was not necessary to hold a trial-within-trial before the appellant's confession was admitted; that the appellant did not object to the production of the statement at her trial and that her subsequent complaint that the statement was not voluntary was a mere afterthought.

We shall first deal with the submission that the appellant did not object to the production of her statement and that her subsequent assertion that her confession was involuntary were a mere afterthought. When PW5 produced the appellant's statement as an exhibit on 30th May, 2005, her advocate, Mr Mwangangi, did not object to the production of the statement. The only objection to the production of the statement was by the appellant's co accused, Mwendwa Katana Thomas.

The learned trial judge overruled the objection and admitted the

statement adding that:

> "…***in any event a conviction cannot be based on a confession entirely and that [the] court would need to look for other independent evidence"***.

That certainly is not a correct statement of the law, but we take it that the learned judge had in mind the rule of prudence or practice that a court should be cautious to act on a retracted or repudiated confession unless it is corroborated in material particulars (See ***TUWAMOI VS UGANDA (1967) EA 84*** and ***THIONGO VS REPUBLIC (2004) 2 KLR 38).*** The correct position is that the court can still act on a retracted or repudiated confession if it came to the conclusion in the light of all the circumstances that the confession could not but be true. (see ***ONYANGO OTOLITO VS R (1959) EA 986*** and ***WAMBUNYA VS R (1993) KLR 133).*** Although at the time the learned judge made the above statement the appellant had not retracted her statement, from the evidence of PW1, PW2 and PW3, there were already troubling questions, as we shall indicate later in this judgement, whether the appellant's confession was really voluntary.

Firstly, from the record we entertain serious doubt whether the appellant obtained the legal advice that she really deserved regarding the confession. After informing the trial court that he was not objecting to the production of the confession, Mr Mwangangi literally vanished from the case, never to return. Immediately after the admission of the confession, the record of the trial court reads as follows:

> ***"Mr Mwangangi for the accused has vanished though the court put aside the file for a few***

minutes. It will have to be adjourned to await the presence of Mr Mwangangi. Hearing now on 19/9/2005."

From the record Mr Mwangangi never returned to represent the accused and never even bothered to apply to be excused from further appearance in court. The defence of the appellant was then taken up, inappropriately in our view, by Mr Konya who was counsel for her co-accused, Mwendwa Katana Thomas. We entertain grave doubt whether Mr Konya could have effectively represented the appellant granted, the conflict of interest arising from the fact that his other client was on trial only because the appellant had implicated him in the murder.

The issue of the appellant's representation by Mr Konya became even murkier when on 25th October, 2006 Mr Konya applied to withdraw from further representation of the appellant "*due to personal conscience*". Mr Konya made remarks in court, which in our view were quite prejudicial to the appellant, to the effect that although she had closed her defence and despite his advice, she still wanted to give further evidence. In counsel's view, this was contrary to the Criminal Procedure Code and the Law of Evidence Act. After Mr Konya withdrew, a new advocate, whose role appears to have been restricted to making final submissions, came on record for the appellant. From record, it appears that the appellant's wish to give further evidence was never pursued or resolved.

When all these circumstances, and in particular the conduct of the appellant's defence and the appellant's wish to give further evidence (which was never resolved) are taken into account, we find the failure to object to the production of the appellant's statement unusual and questionable and on our part we would not, in these circumstances, hold it against the appellant.

Secondly it has for a long time been accepted that even after the trial court has ruled a confession is admissible, the accused is at liberty to call evidence to show that the confession was not voluntary. In **KINYORI S/O KARIDITU VS REGINA (1956) EA 480**, the Court of Appeal for Eastern Africa, after setting out the procedure that ought to be followed in a trial within a trial, made the following fundamental point:

"The broad principle underlying that procedure is that the accused is entitled to present, not merely to the judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the judge's ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually (or, where there is a jury, for the jurors) to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try and persuade them that he has good reason to retract or to repudiate the statement concerned or any part of it." (Emphasis added).

Thirdly, the learned judge, in admitting the confession indicated that she would look for independent corroborative evidence beyond the retracted confession. That she made that point suggests that she was not convinced that she could convict the appellant on the basis of her retracted confession alone. The learned judge however did not look for the independent corroborative evidence and, in our view, in the circumstances of this case she could not have come to the firm conclusion that the confession could not but be true.

We do not share the view, implicit in Ms Njeru's arguments, that where a confession is made before a judge or magistrate in court under section 25A of the Evidence Act that confession is admissible automatically and as of right in a subsequent trial of the maker of the confession and that the trial court is not obligated to inquire into the circumstances under which the confession was made before the judge or magistrate. Section 25A provides as follows:

"(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 Chief Inspector of Police, and a third party of the person's choice.

(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 circumstances where the confession is not made in court.

Pursuant to section 25A (2) of the Evidence Act, the Evidence (Out of Court Confessions) Rules, 2009 have been made. These rules constitute a statutory version of the Judges Rules and focus on the procedure and safeguards to be observed in the recording of confessions by the police.

The critical question therefore is, does section 25A as read with the Evidence (Out of Court Confessions) Rules, 2009 mean that a person who makes a confession before a judge or magistrate in court (other than the trial court) does not enjoy any safeguards?

We do not think so. Notwithstanding the provisions of section 25A, section 26 of the Act renders confessions that are procured by inducement, threat or promise inadmissible. Section 26 of the Evidence Act provides as follows:

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not 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".

Consequently, the mere fact that section 25A allows a confession to be made in court before a judge or a magistrate does not affect the fact that such a confession is not admissible under section 26 if for any reason it appears to the trial court that it was caused by inducement, threat or promise. Taken to its logical conclusion, Ms Njeru's argument would mean that a confession that had been procured through promise or threat is not admissible if made to the police, but the same is admissible if made to a judge or magistrate under section 25A. We do not see anything in sections 25A or 26 of the Evidence Act that would justify such a palpably illogical conclusion. 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. 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.

It has consistently been stated by the courts in this country that it is the duty of every trial judge and magistrate to examine with the closest care and attention, all the circumstances in which a confession has been obtained to ensure that it was made voluntarily. The rationale for insisting that a confession should be voluntary is to ensure that it is ultimately reliable. A confession that is made due to torture, threats, promise, inducement, or similar conduct is not reliable since it could have been made with no regard to the truth but purely to avoid harmful consequences or to gain some advantage. **(See *NJUGUNA S/O KIMANI & OTHERS VS REGINA* (1954) EA 316, *GITHINJI S/O NJAGUNA & ANOTHER VS REGINA* (1954) EA 410).** The duty of every trial court to examine with the closest care and attention, all the circumstances in which a confession has been obtained is not restricted to confessions recorded by the police. Rather, it applies to all extra-judicial confessions.

In this appeal we sensed some assumption that an extra-judicial confession is only one that is made to the police and not that which is made to a judge or magistrate in court under section 25A of the Evidence Act. In our opinion, extra judicial confessions are those made outside the trial court, while judicial confessions are those made before the trial court and which amount to pleas of guilty. A confession made before a judge or a magistrate under section 25A who is not the trial judge or magistrate is still an extra-judicial confession and its admission is subject to all the safeguards prescribed by the law. ***BLACK'S LAW DICTIONARY, 8th Edition, 2004*** defines an ***"extrajudicial confession"*** as ***"a confession made out of court and not as a part of a judicial examination or investigation***" and a

"***judicial confession***" as ***"a plea of guilty or some other direct manifestation of guilt in court or in a judicial proceeding."***

It is for that reason that confessions recorded by magistrates in (***REX VS NANTA S/O MDIMI (1944-1946) EA 83*** and ***NAYINDA S/O BATUNGWA VS R (1959) EA 688)*** and by a justice of the peace in ***(EZEKIA VS REPUBLIC (1972) EA 427***) were all treated as extrajudicial confessions.

On our part, we are far from persuaded, on the facts of this appeal, that the appellant's confession was voluntary or that it was admissible under section 26 of the Evidence Act. First, we are unable to follow Ms Njeru's submission that the appellant was not "an accused person" before the inquest court and therefore sections 25A and 26 of the Evidence Act did not apply to her. With respect, the person who makes a confession before the judge, the magistrate or the police does not necessarily have to be an accused person to fall within the ambit of section 25A and 26. Those provisions relate to a person who makes a confession before a judge, magistrate or the police and in his subsequent trial the prosecution seeks admission of the confession made earlier by him. The appellant did not have to be an "accused person" before the inquest court for her case to fall within the above two provisions. It was enough that she subsequently became "an accused person" before the High Court. Before the trial judge, she was an "accused person" and the prosecution was relying on the statement she had made before the magistrate in the inquest. That statement had to satisfy in full the requirements of section 26 of the Evidence Act.

In the same vein, we do not agree with the view that PW5 did not have to caution the appellant that the statement she was making in the inquest court could later on be used in evidence in criminal proceedings. Granted the serious charges that were later preferred against the appellant based on her statement at the inquest, the least that the inquest court could have done once it felt that the appellant's statement amounted to a confession, was to caution her that her statement may be used in court in future. In ***EKAI VS REPUBLIC (1981) KLR 569*** this Court, in proposing that confessions be recorded only by magistrates, also stated that magistrates before whom a confession is made must caution the person making the confession. That no rules have been made on the procedure to be used by a judge or a magistrate to take a confession in court under section 25A of the Evidence Act does not negate the need to caution an accused person before the making of the confession.

There are myriad authorities in this jurisdiction that attest to the necessity of such caution by magistrates and judges who take extra-judicial confessions. Way back in 1935 in ***REX VS KINGURU S/O KABUTI (1934-1936) EA 60,*** the Court of Appeal for Eastern Africa held that where a prisoner is questioned by a magistrate without any warning the confession cannot be regarded as voluntary, and all the more so if he is questioned on an inadmissible confession. Later in 1944, in ***REX VS NANTA S/O MDIMI (supra),*** the same Court reiterated the need to caution an accused person before his confession was recorded by a magistrate. In that case a confession had been recorded by a magistrate before the accused was subsequently tried for murder in the High Court. The Court of Appeal approved the reasoning in ***R. V O'DONOGHUE (1927) 20 Cr. App. R. 132*** that such an accused person has to be cautioned by the magistrate that he need not say anything unless he wished, and the record should show that in spite of the caution, the accused still wanted to make a voluntary statement. The Court further emphasized that the magistrate must ***"satisfy himself by all reasonably possible means that the statement about to be made to him is entirely voluntary".***

In ***NAYINDA S/O BATUNGWA VS R (supra)***, the same court once again emphasized the importance of a magistrate to administer a caution before taking a statement from an accused person. In that case, as in the present appeal, the appellant was convicted of murder by setting fire to the house in which the deceased was sleeping. The main evidence against the appellant was an extra judicial statement made by him to a magistrate. That statement was recorded without the appellant being cautioned by the magistrate. The Court of Appeal stated as follows regarding the failure to caution the appellant:

> ***"The Judges' Rules are not applicable to the taking of statements by magistrates, since they are rules drawn up for guidance of police officers engaged in the actual investigation of criminal offences. There is nevertheless, an established procedure which is normally followed by magistrates and which is designed to the same end, namely, to ensure that a statement taken by***

the magistrate is a voluntary one. To this end, we certainly think it advisable that a magistrate who is about to take a statement should administer a caution in the normal form as laid down in the Judges' Rules. If there was anything to suggest that the failure to administer a caution had resulted in the making of a statement which was not voluntary in the sense explained in R. VS VOISIN [(1918) 1 KB 531] a trial judge might well, in the exercise of his discretion, reject the statement." (**Emphasis added).**

It is also not lost to us that the practice of the courts in Kenya has been consistently to warn an accused person who, for example has decided to plead guilty to a capital offence, of the consequences of that action. ***(See Zaphania Okwoyo Gesure versus Republic Criminal Appeal No. 274 of 2008)***. We cannot see any valid reason why that could not have been applied to the appellant before the inquest court where she was an ordinary witness. We note further that the prejudice to the appellant was compounded by the fact that she did not have an advocate when she made her statement before the inquest court.

There is absolutely no scintilla of evidence that the appellant was ever cautioned before her confession was recorded. Worse still, there was sufficient evidence before the inquest court which should have warned the court that the purported confession by the appellant was not truly voluntary. When PW5 testified on 30th May, 2005, he informed the court, among other things that the appellant had confessed to the murders of the deceased and his wife ***"because of the deaths of her two brothers and the fear of God".***

Before the High Court itself, clear evidence was led by the prosecution which ought to have put the court on notice that the confession it was ultimately to be asked to admit had not, after all, been made voluntarily but had instead been made by the appellant on the desperate hope that she could avoid evil of a temporal nature, namely the deaths of members of her family.

The appellant's father, David Muli Kasyo (PW2), testified before the High Court on 16th November, 2004. The pertinent evidence, elicited by both examination in chief and cross examination, was that after the death of the deceased and his wife, the father of the deceased, Shem Ndumbu swore to use his own means to find out and punish the person responsible for the two deaths. Indeed, before the High Court Shem Ndumbu (PW1) himself told the court on cross examination that ***"I did a lot to ensure that she [appellant] paid the penalty"***. Thereafter two of the appellant's brothers, Mwangangi Muli and Muthami Muli died in quick succession. Alarmed that the deceased's father had taken the dreaded Kamba *Kithutu* oath and that his entire family was going to perish, the appellant's father sought the intervention of an elder, James Mwandikwa Mutia (PW4), to sue for peace with the family of the deceased and to offer compensation for the death of the deceased Moki Shem and his wife so that his family could be spared further deaths. A meeting between the two families was held, chaired by PW4 and the appellant's father agreed to compensate the family of the deceased with Kshs 263,000. To raise the said sum, he sold his land which fetched only Kshs 155,000. As of the date of the trial, he had an outstanding balance of Kshs 108,000 to pay to the family of the deceased.

PW 4 confirmed having chaired the meeting between the two families where the compensation was agreed upon. Significantly, he told the court that the appellant's father had requested the meeting between the two families because his children had died due to the *Kithitu* oath and that the family thought an oath had been taken ***"because of things done by Kanini"*** [the appellant].

Section 26 requires that for a confession to be inadmissible, the inducement, threat or promise upon which the confession is procured must proceed from "a person in authority". In ***REX VS TODD (1901) 13 Man LR 364*** Bain, J stated thus:

"A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason it is a rule of law that confessions made as a result of inducement held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to posses may well be supposed in the majority of instances both animates his hopes of favour on the one hand and on the other to inspire him with awe."

(See also ***MURIUKI VS REPUBLIC*** **(*1975) EA* 223**).

A chief was regarded, for purposes of statements made to him by an accused person, as a person in authority in ***REX VS ERIYA KASULE & OTHERS (1947-1949) EA 148***, while in ***GOPA S/O GIDAMEBANYA & OTHERS VS REGINA (1952-1953) EA 318***; a headman was treated as a person in authority. In an Africa context like that in which the appellant found herself, we would be slow to say that clan elders are "not persons in authority" in this case. On the evidence, the elders and the family of the appellant brought pressure to bear upon her to make the confession and to open negotiations with the family of the deceased so as to avoid evil of a temporal nature, namely further deaths in the family believed to be caused by the *Kithutu* oath. To that extent, the appellant's statement was one extorted from her either by fear of prejudice to her family or hope of the advantage of preventing further deaths in the family. We would add even sheer terror of the oath.

We need only add that the onus of proving that a statement by an accused person is voluntarily made and not obtained by improper or unlawful methods is upon the prosecution and where there is doubt as to whether the confession was voluntary, the prosecution has not discharged the onus upon it. ***(See NJUGUNA S/O KIMANI & OTHERS VS REGINA (supra), EDONG S/O ETAT VS REGINA (1954) EA 338*** and ***EZEKIA VS REPUBLIC (supra).***

The trial court is obliged to treat a retracted confession with utmost caution and should convict on it only if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true or if the confession is corroborated in some material particulars by independent evidence. (See ***TUWAMOI VS UGANDA (supra)*** at **page 91, *ONYANGO OTOLITO VS R (supra)*** and ***WAMBUNYA VS R (supra)***

Having fully re-evaluated the evidence and arrived at our own conclusion as we are duty bound to do ***(See OKENO VS REPUBLIC (1972) EA 32)***, we find that the appellant's confession was not voluntary and absent that confession which was irregularly admitted in evidence, there was no other evidence upon which the appellant's confession for murder could be sustained. We also find that from the facts of this appeal, this was a proper case in which the trial judge should have exercised her discretion to exclude the appellant's confession, even without recourse to section 26 of the Evidence Act. In ***NJUGUNA S/O KIMANI & OTHERS VS REGINA*** **(supra)** it was held that:

> ***"A trial judge has discretion to exclude a statement which has been obtained by improper questioning or other improper means, the objection to admissibility not being confined strictly to the ambits of the Indian Evidence Act, section 24 (present section 26, Evidence Act)."***

In the circumstances we allow the appellant's appeal, quash the conviction and set aside the sentence and order that the appellant be set to liberty forthwith unless she is otherwise lawfully detained.

Dated and delivered at Nairobi this 24th day of January, 2014.

P. KIHARA KARIUKI, PCA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR