IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 226 OF 2004

BETWEEN

1. BENARD WAMBUA MBENZI

2. PAUL KITUKU MUTISYA

3. PAUL KATIKU MUSYOKA ……APPELLANTS

AND

REPUBLIC……..……...……...……RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Machakos (Osiemo, J.) dated 25th July, 1995

in

H.C.Cr.C. No. 14 of 1994)

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JUDGMENT OF THE COURT

The appellants, ***Bernard Wambua Mbenzi, Paul Kituku Mutisya*** and ***Paul Katiku Musyoka*** were arraigned in the superior court at Machakos with the offence of murder contrary to section 203 as read with ***section 204*** of the Penal Code. The particulars of the information were that on 14th day of January, 1992 at about 9.00 p.m. at Kavete village in Mitaboni Location of Machakos District within Eastern Province they jointly murdered ***Charles Kiio Mulei***, the deceased. The deceased owned shop business at Kavete village. He was in his shop on 14th January, 1992 at around 9.00 p.m. when thugs invaded the shop and killed him. His wife ***Nzisa Kiio*** (PW1) who came to see the deceased at the shop during that night became suspicious when she found it locked from inside and also heard strange movements therein. She raised an alarm and neighbours came to the shop. They included ***Daniel Mbatha Kitungu (PW2), Timothy Munyao (PW3), Peter Mwangei (PW4), Peter Ndangili Mbithi (PW5), Daniel Mutisya Mbithi (PW6)*** and ***Peter Kyengo Manthi Mwova*** (PW12). PW2 to PW6 were at the scene when the thugs broke the main door of the shop and ran out. The neighbours chased one of them and arrested him

about 100 metres from the scene. He was the 2nd appellant. He was taken to Machakos Police Station where he was charged with this offence. The 1st and 3rd appellants were arrested later and taken to Machakos Police Station where the charge subject to this appeal was also framed against them jointly with the 2nd appellant.

When placed on their defence, the 1st appellant testified that he was arrested at Lukenya, where he had gone to look for one Wambua Kabo, on suspicion that he was a cattle thief. He was then escorted to Machakos Police Station where he was then charged with the offence of murder which he knew nothing about. The 2nd appellant testified that indeed on the date of the incident he had met his friend Mutua Kangethe who told him to escort him to see his relative at Kavete. He owed Mutua Kangethe some money. When they arrived at the deceased's shop they found many people and were told to wait outside. Later the 2nd appellant and Mutua Kangethe were called into the shop where an argument arose between the deceased and Mutua Kangethe over a debt the former had refused to pay the latter. A struggle ensured between the deceased and Mutua. Meanwhile Mutua had arranged with the 2nd appellant to recover the aforesaid debt through a robbery. But in course of this they heard an alarm sounded from outside and when Mutua broke the shop door for the robbers' escape the 2nd appellant was arrested after a chase.

The 3rd appellant denied the offence and said he left Gikomba in Nairobi where he sells mitumba to go to his rural home on 23rd December, 1991 where he stayed up to 5th January, 1992 when he returned to his work place He stayed there up to 10th March, 1992. He was still in Nairobi on 13th June, 1994 when Police accompanied by ***Kyengo Mwove*** and ***Paul King'oo*** arrested him and took him to Ruaraka Police Post where he was locked up. He was then escorted to Machakos Police Station where he was charged with the offence subject of this appeal which he denied.

At the close of the prosecution and defence cases the superior court *(Osiemo, J.)* concluded:

"After carefully considering the evidence by the prosecution and the defence, I find that the prosecution has proved its case against all the 3 accused persons.

The two assessors returned a verdict of innocence for accused 1 and guilty of murder for accused 2 and 3 but I find that there is even more evidence against accused 1 than accused 3 apart from accused 2 who admitted. I convict all the accused accordingly."

The appellants were dissatisfied with this verdict and have lodged their appeals through their respective counsel. The firm of ***M/s Ondieki & Ondieki Advocates*** for the 1st appellant relied on a supplementary memorandum of appeal dated 23rd October, 2008 and filed on 28th October, 2008. It has 11 grounds of appeal as follows:-

"***1. That the superior court erred in law and fact by failing to resolve that constitutional rights of the appellants under sections 70(a), 72(2) 72(3)(b), 74(1), 77(1)(a) of the Constitution had been violated.***

2. That the superior court erred in law by failing to resolve that section 77(2)(b)(f) of the Constitution as read with section 198 of the Criminal Procedure Code (Cap. 75) Laws of Kenya was not complied with.

3. That the superior court erred in law by failing to analyze the plausible defence and alibi defence raised by the appellant.

4. That the superior court erred in law by convicting on the basis of identification that did not meet the required legal standards.

5. That the circumstantial evidence relied upon to convict the appellant did not meet the required legal standards.

6. That the superior court erred in law and fact by convicting on the basis of suspicion without cogent evidence.

7. That the learned trial Judge erred in law by admitting a statement under inquiry which had been obtained contrary to the law.

8. That the superior court erred in law by relying on the statements of co-accused which had no evidential value to the prejudice of the appellant.

9. That the superior court erred in law by failing to direct the assessors properly during the summing up.

10. That the superior court misdirected itself and applied wrong legal principles leading to a miscarriage of justice.

11. The superior court never complied with the mandatory provisions of section 169 of the Criminal Procedure Code (Cap. 75) Laws of Kenya."

For the 2nd and 3rd appellants the firm of ***M/s Owino & Owino Advocates*** relied on a supplementary memorandum of appeal filed herein on 3rd November, 2009 which also listed 11 grounds of appeal as hereunder:-

"1. The proceedings in the superior court are a nullity since the court was not properly constituted and coram taken.

2. The 2nd and 3rd appellants' constitutional rights as envisaged under section 72(3)(b) and 77 of the constitution had been violated.

3. The learned Judge erred in fact and in law in convicting the 2nd and 3rd appellants of murder in the absence of ….. Mens Rea.

4. The learned Judge erred in law and in fact when he convicted the 2nd and 3rd appellants on circumstantial evidence when the same had not satisfied the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellants.

5. The learned Judge erred in law when he convicted and sentenced the 2nd appellant despite not being explained his rights when recording his statement as required by law.

6. The learned Judge erred in fact and in law in failing to consider the whole of the 2nd appellant's evidence.

7. The learned Judge erred in law in convicting the 3rd appellant in the absence of proper identification.

8. The learned Judge erred in law in convicting the 3rd appellant based on suspicion alone.

9. The learned Judge erred in law in convicting and sentencing the 3rd appellant in absence of any evidence connecting him to the murder.

10. The learned Judge erred in law in failing to give the appellants reasonable doubt in the face of contradictory inconsistent evidence on record.

11. The learned Judge erred in law by finding the appellant guilty in the absence of malice aforethought."

The appeals were heard by this Court together. ***Mr. Ondieki*** and ***Mrs. Chesang*** appeared for the appellants. ***Mr. J. Kaigai***, Principal State Counsel appeared for the State. *Mr. Ondieki*, learned counsel for the 1st appellant complained thatthe trial court violated constitutional provisions which guarantees the 1st appellant's rights during criminal trials - viz ***sections 70(a), 72(2)*** and ***(3)(b), 74(1)*** and ***77(1)(a)*** of the Constitution.

He also, complained that the 1st appellant's trial had been unreasonably delayed and that on this ground alone the 1st appellant's appeal should be allowed. According to him it was not clear on record which language was used during the trial and hence it was a nullity. Counsel submitted that the statement under inquiry recorded from the 1st appellant was wrongly admitted in evidence. In his view it was not proper for a police officer who had taken an inquiry statement from a suspect to charge that same suspect. It was also his view that it was wrong for a co-accused's statement to be used against the 1st appellant; and that since the 1st appellant's alibi defence was not rebutted, it ought to have been believed.

Mrs. Chesang, learned counsel for the 2nd and 3rd appellants submitted that the court was not properly constituted and referred to the court orders of 20th September, 1994 and 27th June, 1995 to support her submissions. According to her no coram was recorded on those dates. She stated that the prosecution did not adduce evidence to establish malice aforethought and in her view that probably another offence may have been established but not murder. She submitted further that there was no evidence adduced to link the 3rd appellant with the offence charged; given in particular that that appellant was arrested 2 to 3 years after the commission of the offence. She also complained that the 3rd appellant did not feature at committal proceedings. According to counsel the identity of the 3rd appellant was mistaken because while his name was ***Paul Katiku Musyoka***, the evidence referred to one ***Paul Kokili Mutua***. In her submissions she stated it was not enough to suspect that the3rd appellant was at the scene of crime and to convict him merely on such suspicion.

Mr. Kaigai, Principal State Counsel supported the appellants' convictions and referred to the evidence of PW2 and the postmortem report which established the intention on the part of the appellants to kill the deceased. He referred to the inquiry and cautionary statements of the appellants which implicated them with the commission of the offence. He stated further that the 2nd appellant was arrested at the scene of crime.

Being a first appeal we have the duty of re-considering and to re-evaluating the evidence afresh in order to draw our own independent conclusions as to whether the judgment of the superior court should be upheld, see ***Okeno v Republic [1972] E.A. 32***, and also ***Collins Elim Lemukol v. Republic Eldoret Criminal Appeal No. 336 of 2008*** *(unreported)* and ***Kinyua v R. [2003] KLR 301***. Starting with the 2nd appellant the evidence of PW2, PW3, PW4, PW5, PW6 and PW7 confirmed that he was one of the thugs who ran out of the deceased's shop after they broke its front door open after the commission of the offence. He was chased and arrested at a nearby river and brought back to the scene of murder. This was strong evidence which placed this appellant at the murder scene. And during investigations, an inquiry and cautionary statements were recorded from this appellant by ***C.I. Langat*** (PW4) of Machakos Police Station and ***IP. David Kipyegon*** (PW16) of the same Police Station. In both these statements the 2nd appellant admitted that he was in company of one Paul Kokili Mutua at the deceased's shop on 14th January 1992 and that he witnessed when the said Paul Kokili Mutua killed the deceased. He even admitted that Paul Kokili Mutua gave him Kshs.2,000/= part of the money robbed from the deceased. He repeated this when he gave his evidence in his defence before the learned Judge. However in all these statements and the evidence the appellant maintained that his mission in this exercise was to rob the deceased of money but not to kill him. The two statements were subjected to a trial within a trial after the appellant retracted them and alleged they were obtained from him through torture. But when he testified in his defence and admitted his participation in the intended robbery he did not allude this as due to torture by police or anybody else. The learned Judge warned himself about the danger of convicting the 2nd appellant on a retracted and uncorroborated statement under inquiry and/or cautionary statement but after being satisfied that they were true and after also considering that the appellant was arrested at the

scene of the murder with some of the money that the deceased was robbed of he convicted him of the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. In light of the foregoing and after re-considering and re-evaluating the evidence and subjecting it to fresh scrutiny, we are satisfied the learned Judge was right in convicting this appellant for murder as aforesaid and we find no merit in his appeal which we hereby dismiss.

As regards the 1st appellant no direct evidence was adduced to connect him with the offence of the murder of the deceased. The evidence against him was of his statement under inquiry to ***IP. David Kipyegon*** (PW16) and a charge and caution statement recorded from him by ***IP. Simon Kisabo*** (PW15). These statements were recorded on 26th August, 1992 and 27th August, 1992 respectively. The 1st appellant's statement under inquiry was quite long and it explained how he was asked by a friend he called Musyoki Kioko to accompany him to Mitaboni to demand his debt from a shop owner to whom he had delivered his wares. His fare was even paid for by the said Kioko and when they reached the shop; the 1st appellant was instructed to keep watch outside while Kioko and the other colleague whom he called Philip went into the shop. It would appear the deceased told the two that he had no money to pay them and when they came out they refused to leave the compound and instead hatched a plot to rob the deceased of his money. The two went back to the shop and it is then this appellant heard the deceased scream twice. Soon thereafter Kioko and Philip came out. They gave the 1st appellant Kshs.2,000/= being part of the money they had robbed the deceased and they disappeared in different directions. His cautionary statement was short and it said:

"I did not murder the said deceased. He was murdered by Musyoki Kioko as I was outside on guard checking whether people were coming."

The trial Judge subjected both the 1st appellant's statement under inquiry and cautionary statement to a trial within trial after the appellant retracted them on the ground that they were extracted from him through intimidation. This is what he said about it in his judgment:-

"I have warned myself that the trial court should direct itself that it is dangerous to convict upon a statement which has been retracted in the absence of corroboration in some material particular but the court might do so if it *(sic)* ***fully satisfied in the circumstances of the case that the confession is true. The trial court should accept a statement or confession which has been retracted with caution and must before founding a conviction on such confession he fills*** *(sic)* ***satisfied in all the circumstances of the case that this confession is true. A court will only act on the confession if corroborated in some material particular by independent evidence acceptable by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot be but true."***

The learned Judge did not say anything more about the 1st appellant's confession or his statement under inquiry. We have however considered these statements. The former was detailed and it included the 1st appellant's home Shimba Hills where he said he went to during the relevant period. He was in transit to Nairobi to look for a job but he alighted at Athi River to look for a friend called Gitau at Lukenya. It was there that he was arrested by members of the public. These details appear in this appellant's statement of defence which he gave at his trial. He even repeats that he was given Kshs.2,000/= part of the money the deceased had been robbed of. We do not believe that PW16 could just sit in his office and craft a statement under inquiry to include all these details and attribute them to the 1st appellant if he did not speak about them. In the same statements the 1st appellant reiterated he was just left outside to watch in the event people came around. His mission was to ensure the offence was committed. This must have been the reason why the learned Judge ruled that the two statements from the 1st appellant were voluntarily given by him and he admitted them in evidence. On the basis of these statements, and the appellant's conduct, we are of the view that the learned Judge was justified in finding the 1st appellant guilty of murder. He was a principal participant in the commission of the murder. We find no merit in the 1st appellant's appeal also and we dismiss it.

As for the 3rd appellant, the only evidence implicating him in the murder is that he was mentioned by the 2nd appellant in his statement under inquiry. He called 2nd appellant as Peter Kioko.

"Who hit him with a sugarcane."

But in his defence he referred to a person called Mutua Kangethe as the person whom he escorted to demand or collect his debt from the deceased. The learned Judge considered the 2nd appellant's statement as implicating the 3rd appellant with the deceased's murder. Such statement is usually referred to as self-serving and of no evidential value against a co-accused. Before the court acts on such statement it is desirable that it warns itself with regard to the danger of acting on such uncorroborated evidence because of the danger of a co-accused seeking to extricate himself; – see ***Bakari & Another v Republic [1987] KLR 173.*** Also ***Wanjiku v Republic [2002] 1 KLR 825.***

In regard to this appellant, the learned Judge recorded his unsworn evidence in defence and then said:-

"Accused 3 was mentioned by accused 2 in his statement under inquiry but he could not be arrested immediately because he had gone underground. He was arrested about 2½ years *(sic).* ***The disappearance reveals a conduct which is corroborative to the offence."***

But in the defence of the 3rd appellant he stated that he had frequented home from time to time within the 2½ years and at one time he had gone to see a sick relative, who later died on 8th July, 1993. He attended the funeral of this relative. This evidence was not rebutted and could not have amounted to "***conduct corroborative***" of the offence. It is true the 2nd appellant mentioned the 3rd appellant in his statement under inquiry which he retracted. But in his defence he did not mention the 3rd appellant. Instead he mentioned one Mutua Kangethe and a third person whose name he did not give. He did not say if Mutua Kangethe was the same person as the 3rd appellant. In these circumstances we are not persuaded the 3rd appellant was sufficiently implicated in the deceased's murder. In any case this appellant did not feature in Committal Proceedings, though the State Counsel, one ***Mrs. Ntarangwi*** talked about him in court on 20th September, 1994. He appeared in court on 17th October, 1994 but there are no Committal Proceedings committing him to the High Court to stand trial. In the ultimate result we allow the appeal in respect to the 3rd appellant, quash his conviction and set aside the sentence of death meted out to him. Accordingly we order that he be released forthwith unless he is otherwise held for some other lawful cause.

As regards the 1st and 2nd appellants we dismiss their respective appeals, and confirm the sentences imposed upon them by the superior court. These are the orders of the Court.

Delivered and dated at Nairobi this 16th day of April, 2010

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR