REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 189 of 2002

JOHN KIVUVA MBUVI ……..…….....……...APPELLANT

AND

REPUBLIC …….....…….…….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi-Msagha, J.) dated 25.04.2002

in

H.C.CR.A NO. 94 OF 1998)

****

JUDGMENT OF THE COURT

The appellant ***JOHN KIVUVA MBUVI***, appeals to this Court against his conviction by the superior court (Mbogholi-Msagha, J.) for the offence of murder contrary to ***section 203*** as read with **section 204** of the ***Penal Code***. It had been alleged in an Information filed by the Attorney General on 5th February 1998, that the appellant, jointly with others not before the court, had on the night of 16th and 17th September, 1992 at Pangani Estate, Nairobi murdered ***Mohamed Omar Rajput***. Upon his conviction on 25th April, 2002 he was sentenced to suffer death as by law provided. Apparently there was earlier Information filed by the Attorney General on the same facts soon after the appellant's arrest in September 1994 but the trial was terminated before O'Kubasu J (as he then was) in 1998 before the fresh Information was filed. That explains the delay between the arrest of the appellant and the conviction he now challenges.

As this is a first appeal, we are duty bound to reconsider the evidence on record, evaluate it and draw our own conclusions. Those guidelines have been repeated time and again by this Court and we need only refer to **Okeno v R [1972] EA 32** at page 36 where the predecessor of this Court said:

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses,***

see <u>Peters v. Sunday Post, [1958] E.A. 424</u>"

It is also an established principle of law that a court on appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see **Chemagong v Republic [1984] KLR 611**.

The facts of the case are not complex. On the morning of 17th September, 1992 the body of ***Mohamed Omar Rajput*** *("the deceased")* was found lying in a pool of blood in his house on Bustani Lane, off Agoi road, in Pangani area of Nairobi. Both hands were tied to the back side of the body with a sisal string and the same string tied both legs. A piece of cloth was tied around the head to cover his mouth. The body had four fresh wounds on the stomach, two on the left front side of the shoulder and two others on the rear left shoulder. A postmortem conducted the same morning by police pathologist ***Dr. Samuel Odero Ywaya*** (PW6) confirmed that the eight deep wounds found on the body were caused by a sharp object and he expressed the opinion that the cause of death was massive bleeding in the chest cavity due to tear of the heart and lungs.

The state of the house that morning as described by the Scenes of Crime police and other witnesses was in total disorder. Four rooms including the master bedroom and the sitting room had been ransacked and wardrobes, metal boxes and a steel safe forced open. The telephone cable was cut and several items including tape-recorders, jewellery, watches, clothes, shoes and the deceased's Citroen car were missing. The car was found two days later in Kilimani area of Nairobi.

The deceased lived alone in the house which had an adjoining workshop or garage. But he had a house-help, who doubled up as a cook and guard, and was living in adjoining staff quarters. He was the appellant. The deceased's son, ***Mohamed Raffi*** (PW4) who was a mechanic worked with him in the workshop but was residing with his mother at Nairobi West. The mother, ***Guiser Begum*** (PW2) and the deceased were separated at the time due to matrimonial differences and the deceased had married another woman, one ***Nagina Pervin***, who was staying in another house of the deceased in Mugoya Estate, Nairobi South C.

Raffi had telephoned the house the previous night intending to talk to his father but the call was answered by the appellant who informed ***Raffi*** that the deceased was not in. The following morning however when ***Raffi***, his mother ***Begum*** (PW2), sister ***Nazin*** (PW1) and the police arrived at the scene, the appellant was nowhere to be found. He had also taken away his belongings from the staff quarters which he had occupied. He became the prime suspect in the grisly homicide but was not traced and arrested for two years until 26th September, 1994. The explanation is that the police investigation team which included ***Supt. Mohamed Amin*** (PW8), who was then an Inspector of Police, and Cpl. ***John Namulundu*** (PW7) were making enquiries which led them to Machakos, Kibwezi and back to Nairobi where they traced the appellant's brother at Lunga Lunga in Industrial area. The brother led them to the house of their brother-in-law which the appellant frequented. It was then confirmed that the appellant would visit the house on the evening of 26th September, 1994, and the police laid an ambush. He was arrested and was taken to Kasarani Police Station. On being questioned about the murder, the appellant admitted complicity in the offence to ***Spt. Amin*** (PW 8) and named three other accomplices: ***Maingi***, ***Simon*** and ***Chege***, all residents of Kibera Line Saba slums. He then led the police to the Kibera residence of ***Maingi*** where they found Maingi's mother and wife, ***Ndima Mbiti*** (PW5). A search was conducted in the house in the presence of PW5, and the appellant pointed out a radio cassette, cassette recorder, calculator and a gas-lighter which had the identification mark of the deceased's garage. The recovered items were positively identified by ***Raffi*** (PW4) through production of documents as the property of the deceased. ***Mbiti*** (PW5) confirmed that the items belonged to her husband ***Maingi*** who had disappeared from the house on 25th September, 1994. The appellant then took the police officers to the houses of ***Simon*** and ***Chege*** but they were not found.

On 27th September, 1994, the appellant was taken before Chief Inspector ***Simon Wanyeki*** (PW11) for recording an inquiry statement. A caution was duly administered before the statement was recorded and

the appellant gave a 12 page handwritten statement. In it, he confessed that he participated in the killing of the deceased, with the three other persons he named, and specifically said he stabbed the deceased once with a kitchen knife. He explained however, that they were hired to eliminate the deceased by the deceased's second wife or concubine, ***Nagina Pervin***. At the trial, the appellant denied that he ever made any statement to the police. All he remembered was that he was taken to ***CIP. Wanyeki*** who was with two other police officers and was told that he had killed the deceased. When he denied that, and protested his innocence, they all produced pistols and started beating him. He was returned to the cells screaming and was subsequently taken to Karura forest at night. On being returned to the cells, he fainted. He never gave any statement or thumb-printed the statement produced in court which he said was manufactured by the police officers themselves. The statement was nevertheless admitted in evidence after a trial within trial.

In his defence at the trial, the appellant did not deny that he worked for the deceased but said he only worked as a watchman, not a cook, and the period was between 1988 – 1991. He then left employment and went to his rural home in Machakos until 1994 when he returned to Nairobi. When he heard that the police were looking for him in September, 1994, he surrendered to them but never gave any statement or took them to Kibera or anywhere else. He did not know where Kibera was. He only learned from the police that the deceased had died. When he worked for the deceased, he said, there were other employees – a gardener, maid and a night watchman. He was not residing within the deceased's premises but had rented a house in Mathare from where he commuted every morning to work and returned in the evening. He had left the deceased living with his wife and two children, but the deceased also had a mistress. He did not know ***Raffi*** and he did not talk to him the night before the murder of the deceased. The deceased was otherwise a good employer and always assisted the appellant financially.

On being properly directed on the facts and the law, the assessors returned a unanimous opinion that the appellant was guilty as charged. They believed that there was cogent evidence that it was the appellant who led the police to the house from where some of the stolen items were recovered; that the confessionary statement was truthful; and that the appellant was the only person working for and living with the deceased and had spoken on telephone to the deceased's son ***Raffi*** the night before the murder. The superior court accepted that opinion and was in no doubt that the prosecution had proved its case on the totality of the evidence on record. The Judge delivered himself thus: -

"**The prosecution has proved beyond any reasonable doubt that a male adult Asian was murdered on the night of 16th and 17th September, 1992. The body was positively identified by close relatives as that of Mohamed Omar Rajput. The doctor who performed the post mortem endorsed the race of the deceased as African. He was questioned by counsel for the accused on the same. I believe nothing turns on that discrepancy and no prejudice has been occasioned to the accused.**

It is true that there is no direct evidence that the accused murdered the deceased. Nothing incriminating was found in his possession. There is also evidence from the son and daughter of the deceased that there were no differences between them, that is, the deceased and the accused.

PW2 and PW4 were in my view sincere when they said that they thought the relationship between the deceased and the accused was cordial. That being the case, I also believe that they were honest that the accused was working for the deceased as at the date he was murdered. They were also truthful in saying that the accused resided in the staff quarters within the compound of the house.

Having said so, I have no reason to doubt the evidence of PW4 Raffi – that, on the night of 16th September, 1992, he called the house of his father wanting to talk to him and that it was the accused who answered the call and said the deceased was not in the house.

The foregoing evidence shattered the defence taken by the accused person. I believe he did not tell the truth when he said he rented a house in Mathare and never lived in the compound of the deceased's house in the staff quarters. I also find that it is not true that he left Nairobi in March, 1991 and never returned until 1994. He also lied when he said he never talked to Raffi on telephone

on the night the deceased was murdered.

The evidence on the arrest of the accused is instructive. At no time was it suggested to the prosecution witnesses that the accused actually surrendered to the police, or that he never led the police to Kibera – Maingi's house – as alleged. The evidence is corroborative and stood all forms of cross examination. It is not true therefore that the accused surrendered to the police. It is in fact the efforts of the police that traced him from 1992 to the date of his arrest. His defence that he did not know where Kibera is, is to say the least dishonest.

It is the accused who led the police to Maingi's house. The goods belonging to the deceased were found there in. The wife of Maingi confirmed this in court. She is a simple rural woman. Young and untainted by crime. She said the truth.

The said property was positively identified as that of the deceased. Radio permits matched the same. Some of the property had the logo of the garage of the deceased. The source could only be one. The house of the deceased.

There is then the confession made by the accused. It gave graphic details of the plan to kill the deceased. He mentioned the role he played in the killing. Specifically, he is the one who went to the kitchen picked a knife and stabbed the deceased. It is significant that in the said statement he mentions the telephone call Raffi made that night. He gave details of the goods removed from the house, how they were transported and whereto. He mentioned Maingi, Simon and Chege, the same people he mentioned to the arresting officers. The statement corroborated the other incriminating evidence against him in all material particulars."

Aggrieved by those findings the appellant came before this Court and filed a "*Petition of appeal"* putting forward some 7 grounds of appeal. They were subsequently abandoned by learned counsel for the appellant ***Ms. Celyne Odembo*** and substituted with a memorandum of appeal containing 10 grounds as follows:

"**1. <u>THAT</u> the learned trial Judge erred in law and facts by believing the prosecution allegation that the appellant volunteered to lead the police to the recovery of the exhibited radio cassette in the absence of caution administered in contravention to the Judge (sic) rules.**

2. <u>THAT</u> the learned trial Judge greatly misdirected himself in both law and fact by treating the attributed statement ambiguously taken having been rejected at the 1st instance and again finding corroboration on the same contrary to law.

3. <u>THAT</u> the learned trial Judge erred in law and fact in relying on circumstantial evidence that was speculative and assumptuous in nature and was not based or supported by evidence.

4. <u>THAT</u> the learned trial Judge erred in law and in fact when the Judge failed to notice that the chain of events leading to the recovery of exhibited radio cassette, calculator, wrist watch and clothes were not sound in a way that the same could have safely based on a conclusion (sic).

5. <u>THAT</u> the ownership of the house in which the alleged exhibits were recovered was not in law established as the rightful owner was not called to testify.

6. <u>THAT</u> the learned trial Judge erred in both law and fact when he failed to see that there were two different post mortems as (sic) of two different people.

7. <u>THAT</u> the Defence case was not given adequate evaluation as the burden of proof was left to the party accused as against the laid (sic) statute.

8. <u>THAT</u> the appellant was convicted on account of his confession which he was forced to sign though this is against his constitution (sic) right which does not allow a person to give evidence

against himself and the right procedures not followed.

9. <u>THAT</u> there was no direct evidence adduced by the prosecution, no one saw, heard or even found him in possession of any recovered exhibits (sic) the evidence produced by the prosecution fell far short of the standard of proof required to comment (sic).

10. <u>THAT</u> the conviction is against the weight of evidence adduced."

Some of those grounds are repetitive in substance but Ms. Odembo emphasized four broad areas which we now summarize and deal with.

She argued firstly that the confessionary statement relied on by the learned Judge of the superior court was inadmissible in evidence for three reasons: it was obtained contrary to express provisions of the law; it was extracted by force; and there was no corroborative evidence in support thereof. The provision of the law that was contravened, according to Ms. Odembo, was the amendment to the ***Evidence Act, Cap 80***, which was introduced by the ***Criminal Law (Amendment) Act 2003 (L/N 5 of 2003)***. By that amendment, ***section 25A*** of the **Evidence Act** was introduced and it provides:

"**25A. 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."**

We need not belabour this point because we think, with respect, that the submission by Ms. Odembo that the amendment applied and further that it applied retrospectively, is misguided. The offence in this matter was committed on 16th September, 1992. The trial of the appellant was concluded on 25th April, 2002. The amendment in question was made on 18th July, 2003 and the commencement date for the operation of the Legal Notice is given as 25th July, 2003. There is no provision in the amendment that it would apply retrospectively or retroactively and, in our view, there could not have been as the law is clear. ***Section 9*** of the ***Interpretation and General Provisions Act (Cap 2)***, ***Laws of Kenya*** is on "*Commencement of Acts"* and states:

"**9. (1) Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the gazette.**

(2) (deleted)

(3) If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly."

We are in no doubt that the amendment was intended for confessions made after 25th July, 2003 and the provision alluded to is therefore irrelevant for consideration in this matter.

The submission by Ms. Odembo that the confession by the appellant was extracted by force is also inaccurate. The evidence by the appellant was that he did not make any statement at all to the police, not that he made one which was extracted from him by force. It was a *repudiation* of the statement rather than a *retraction* of one. Nevertheless both concepts have the same legal consequence; they require independent corroboration for the confession unless the court upon full consideration is satisfied on the truth of it. This Court in ***Bakari Omari & John Kamora v R [1982 - 1988] 1 KAR 349*** citing ***Tuwamoi's*** case with approval reiterated:

"**There is no rule of law or practice requiring corroboration of a retracted statement or confession before it can be acted upon, but it is dangerous to act upon it in the absence of corroboration in material particulars or unless the Court, after full consideration of the circumstances is satisfied of its truth".**

- See also ***Joseph Njaramba Karura v Republic [1982 - 1988] 1 KAR 1165***.

We have carefully examined and considered the evidence tendered in the trial within trial in this matter and we agree with the finding made by the superior court that the appellant did in fact record the statement produced in evidence by ***CIP Simon Wanyeki*** (PW11) and that the statement was made voluntarily in substantial compliance with the Judges rules. We have also read through the repudiated confession and we are satisfied and find, after full and careful consideration that the personal details of the appellant and the graphic narration of incidents and movements of the appellant and his accomplices could only have been known by the appellant or someone who was with him or with the deceased. There was corroboration for it in material particulars by other evidence including the evidence tendered by the appellant himself in his defence. As stated by this Court in ***David Kimani Njoroge v Republic*** Cr. App. No. 76/97 (ur):

"**Where an accused person has retracted an alleged confession and he gives sworn evidence in the main trial, that evidence, in so far as it is relevant, may provide corroboration to the retracted confession."**

The appellant gave sworn testimony and was cross-examined. He did not deny that he worked as an employee of the deceased. He only said he left employment one year before the incident and was nowhere near the scene of crime. His relationship with the deceased during the currency of the employment was good and that has support from other witnesses. That there was a telephone call made to the deceased but was answered by the appellant the night before the deceased was killed is corroborated by the evidence of ***Raffi*** (PW4) which was believed as truthful by the superior court and we have no reason to doubt it. The deceased was stabbed to death with a kitchen knife and there is corroboration from the post mortem report that the deep wounds on the deceased's body were caused by a sharp object. The names of the appellant's accomplices and their places of abode were given by the appellant and there is corroborative evidence that in the residential house of the one such accomplice, several items stolen from the deceased, were recovered. For those reasons we think the superior court made no error in admitting and considering the confessionary statement put in evidence. That ground of appeal fails.

The second broad submission made by Ms. Odembo was the inadequacy of the circumstantial evidence relied on to convict the appellant. The principle of law was not stated by the learned Judge, but he appreciated that there was no direct evidence that the appellant murdered the deceased. The principle as stated in ***Sawe v Republic [2003] KLR 364*** is that, in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and remains there. According to Ms. Odembo, the circumstantial evidence relied upon to convict the appellant did not point to the appellant, and none other, as the one responsible for the murder. There was only a strong suspicion raised but that is not sufficient to lead to a conviction. At all events, it was contradictory. The house from which stolen items were recovered, she submitted, did not belong to the appellant and there was no proof of ownership of the house. None of the exhibits produced in court were in possession of the appellant and he did not voluntarily lead the police to wherever they were recovered. There would otherwise have been a statement recorded from the appellant under caution before the process of recovery was embarked on, but there was none. In sum, the *alibi* relied on by the appellant that he was nowhere near the scene of crime on the night of 16th and 17th September, 1992 was not disproved by the prosecution.

For her part, learned Principal State Counsel, ***Mrs. Murungi***, strongly supported the findings that the appellant was the only employee of the deceased who resided with him upto and including the date of the deceased's death; that the appellant respondend to the telephone call made by the deceased's son on the night of the offence, and the appellant was therefore placed on the scene and not elsewhere; that the appellant disappeared the following day and took his belongings; that a search was made for him by the police over a period of two years before his arrest; and that he voluntarily led the police to the residence of his accomplices where part of the property stolen from the deceased was found and identified. That

chain of events, she submitted, even without the confession, was so complete that it could safely form a proper basis for the appellant's conviction.

We have carefully considered this aspect of the matter and we think, on our own evaluation, that the complaint made by the appellant has no merit. The evidence on record, which was accepted and acted upon by the trial court, was mainly based on the credibility of the witnesses who tendered it. The trial court was in a better position to assess that credibility since it saw and heard those witnesses. Such was the evidence of the deceased's daughter and son, (PW1 and PW4 respectively) that the appellant was employed by their deceased father as a house-help and guard and was the only other person with the deceased, living in staff quarters provided for him within the same compound. It was PW4's evidence that he telephoned the house on the night of the murder and the appellant answered the call. He was in the main house of the deceased. PW4 was believed on that assertion and we have no reason to differ. He knew the appellant well since the appellant had been employed by a neighbour of PW4 at Nairobi West before PW4 recommended to his father that he employs him because he was a good man. PW4 also used to work with the deceased at the workshop in the Pangani residence. On arrival at the scene on the morning of the murder, PW1 and PW4 did not find the appellant. He had collected his belongings from his room and disappeared. PW4 and the police then started looking for him as a prime suspect, but he was nowhere to be found for a period of two years before he was arrested. The conduct of the appellant escaping from the scene is a circumstance which was indicative of the appellant's guilt. – see ***Terikah v Uganda [1975] EA 60*** and ***Malova v Republic [1980] KLR 110***. There were no questions put to the prosecution witnesses to show that the appellant had only worked for the deceased upto 1991. There were no questions put to the police witnesses to suggest that the appellant voluntarily surrendered to the police before his arrest. The finding that the appellant was an employee of the deceased; was at the scene of the crime; and was arrested by the police after a two year search for him, has solid foundation in the evidence believed by the trial court and we have no reason to interfere. So is the evidence from PW4, PW5, PW7 and PW8 that the appellant voluntarily took them to Kibera slums to show them the abode of his accomplices and from one such abode, the deceased's property was recovered. It was the appellant who pointed out the property even before it was identified by PW4 through documents. In view of the prosecution evidence, the *alibi* put forward by the appellant and his assertion that he never lived with the deceased in one compound; had his own residence in Mathare, did not know where Kibera was; never spoke to PW4 on telephone and did not know him, all dissipate. The trial court was right to reject his defence. That ground of appeal also fails.

We think our findings on the two issues relating to confession and circumstantial evidence are sufficient to dispose of this appeal. Two minor issues raised by Ms. Odembo may however be quickly disposed of. One was the submission that there was no proof of death. That is because the postmortem evidence tendered to prove the cause of death was performed on the wrong person. ***Dr. Ywaya*** (PW6) did in fact indicate in his postmortem report that "*the body was of African male aged 53 years old"*. In his evidence in court however he said it "*appears to be that of an African-Arab origin"* and that "*it was that like of an Egyptian"*. Such description, in Ms. Odembo's view, created reasonable doubts whether the deceased in this case, who was of Asian origin, and possibly of Muslim religion who would have been buried soon after death, had been proved to have died. The same issue was raised before the trial court and was found to be inconsequential since the discrepancy caused no prejudice on the appellant. We are of similar thinking. The body of the deceased was identified to PW6 for postmortem by ***Abdi Wahid Khan*** (PW3) who was the deceased's nephew. There is no suggestion that he did no know his uncle well. The description of the body in the postmortem report is consistent with the description given by the Scenes of Crime Personnel ***IP Wilson Kipemu*** (PW9) who took photographs of it, and the Investigating Officer, ***IP John Kariuki*** (PW10) who visited the scene. It is the same body upon which the postmortem was performed and we do not take seriously the apparent misdescription of the deceased's race. At any rate there is no evidence that the deceased was a Muslim and was buried soon after his death. The death of the deceased in this matter was established beyond doubt.

Finally Ms. Odembo submitted that there was a distinct possibility that the deceased was killed by any of his two wives who had reason to do so since they had been disinherited by him. There is indeed evidence that the deceased had written a Will in which he bequeathed all his property to his son, ***Raffi***, (PW4). The two wives were disinherited. As correctly observed by the trial court however, the charge

facing the appellant did not allege that he was the sole perpetrator of the deceased's death. He was charged jointly with others not before court and there is no limitation period for charging any other person with the offence if the Attorney General so decided. That complaint has no merit.

On the whole, we do not find any merit in this appeal which we dismiss in its entirety.

Dated and delivered at Nairobi this 5th.day of May, 2006.

S.E.O. BOSIRE

……

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR