



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU**

**CRIMINAL APPEAL 93 OF 2005**

**ANASUERUS NAJARED LIKHANGA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Kakamega (Tanui, J.) dated 29<sup>th</sup> June, 2001**

**in**

**H.C.CR.C. NO. 11 OF 2000)**

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**JUDGMENT OF THE COURT**

The appeal before us was argued on two grounds summarized by learned counsel for the appellant, Mr. Moses Orenge, from a memorandum of appeal filed on 16<sup>th</sup> June, 2005 and a supplementary memorandum of appeal filed on 28<sup>th</sup> November, 2005 as follows: -

- 1) *That the whole trial was a nullity and a travesty of justice.*
- 2) *That the appellant’s confessionary statement was wrongly admitted in evidence.*

It is an appeal against the conviction of the appellant for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Upon his conviction on 29<sup>th</sup> June, 2001, the appellant was sentenced to death. We shall return to the grounds of appeal presently.

At about 7.30 a.m. on 22<sup>nd</sup> June, 1999, the body of **Bernard Khayimba Likhanga** (the deceased) was found in a coffee plantation belonging to Mukumu Mission, in Kakamega. **Brother William Oursborn** (PW14), a Dutch missionary in-charge of the farm, was informed by farm workers about it and he reported the matter to the police. The body was collected at about 3 p.m. the same day by three police officers including **Pc. Francis Boit** (PW10) and taken to Kakamega Provincial General Hospital mortuary. When he saw the body, **Pc. Boit** found it naked facing down with blood stains on the neck and the tongue was protruding. On postmortem examination by **Dr. Wycliffe Alusiola** (PW12) on 12<sup>th</sup> July, 1999, he found that there was a fracture of the neck by twisting and both lungs had collapsed due to lack of air. The tongue was protruding. There was no other injury on the body.

The deceased was the younger brother of the appellant here who was the eldest son in a family of six brothers and one sister. It would appear that the deceased had been to prison for sometime but when he came out he was staying with the appellant in the same house. Their relationship was not good.

The last time the deceased was seen alive was on 21<sup>st</sup> June, 1999. On that day, he went to the house of his married sister, **Bereta Amachitsi** (PW3) and told her that the appellant and another brother wanted to kill him on allegation that he had damaged their property. He wanted to borrow some money from **Bereta** for bus fare to escape to Nairobi. **Bereta** told him she did not have the money then, but promised to borrow from her Cooperative Society and give it to him on 23<sup>rd</sup> June, 1999. The deceased left. He was seen alive on the same day by four other people. One was his cousin **Elphas Luguyani Lumwachi** (PW8) who was in his shop at a shopping centre at about 5 p.m. when he saw the appellant with four other persons and the deceased whose hands were tied from behind with a rope. **Elphas** asked the appellant why the deceased was tied up and he said it was because the deceased had stolen Shs.500/= from him and they were taking him to the assistant chief. Along the way, at about the same time an elder from the village, **Paul Chiboli Muhati** (PW9) also met the group. He spoke to the appellant and asked why he had tied up his brother, the deceased. He answered that he had stolen Shs.500/= from him and was taking him to the assistant chief. **Paul** followed the group up to the assistant chief's house. At the assistant chief's house they found the deceased's nephew, **Nicholas Muhatia Ingotse** (PW5). The assistant chief was **Douglas Majani Lugule** (PW11) but he had a meeting with some Agricultural Extension Officers at the time and could not attend to the appellant and his group. But in the presence of **Nicholas** (PW5) and **Paul** (PW9), the appellant at first reported to the assistant chief that the four other persons accompanying him were police officers but upon identification being demanded by the assistant chief, he said they were his cousins from his mother's side. Asked why they had tied up the deceased, the appellant reported that he had stolen Shs.500/= and had taken away household goods belonging to the appellant. The assistant chief informed them that he was busy at the time and could not attend to their matter. He directed them to untie the deceased and take him before Bwimalia village elder, **Henry Mabilia** (PW4) to deal with the problem. The group stayed for about 20 minutes and left the assistant chief's home at about 5 p.m. They never went to the village elder. The following morning the deceased's body was found in Mukumu coffee plantation at 7.30 a.m.

When the deceased did not return on 23<sup>rd</sup> June, 1999 to collect the money he was promised by his sister, (PW3), she went to the appellant's home and asked him where the deceased was. The appellant told her the deceased had been imprisoned for 6 years at Kakamega. She went to the prison but did not find the deceased. She returned to the appellant and reported that she could not trace the deceased. The appellant then went into his house and came out brandishing a knife. PW3 ran away and reported her suspicions to an Administration Police Post nearby. She was advised to go to the mortuary. She did not find the body until 30<sup>th</sup> June, 1999 when police from Kakamega showed it to her.

On 26<sup>th</sup> June, 1999 the assistant chief, (PW11) met the village elder, (PW4) and enquired whether the appellant and the deceased had been to see him, but the village elder confirmed the negative. PW11 then went to the appellant's home and confronted him about the matter. The appellant told him they had taken the deceased to Kakamega Police Station and he had been imprisoned for 7 years. On checking with the police station, PW11 found no truth in that assertion. The appellant was arrested by PW11 and a village elder on 29<sup>th</sup> June, 1999 in connection with the disappearance of his brother, and was taken to Kakamega Police Station. The investigation of the case was handed over to **PC Maurice Chemasis** (PW15) who recorded statements from various witnesses and also interrogated the appellant. In the course of interrogation, the appellant offered to take police officers to Mukumu Mission Coffee farm and showed them the place where the deceased's body was collected. He also mentioned two other persons as having been involved in the killing of the deceased and the two were arrested. A radio given by the appellant to one of those persons as security for payment after execution of the murder was also recovered from one of the two other persons.

On 30<sup>th</sup> June, 1999 the appellant was taken before **IP Edward Tabani** and he recorded a statement in his own handwriting in English. It amounted to a confession of complicity in the murder of the deceased. The appellant was then charged with the offence of murder together with two of his accomplices but one

of them died in custody before the trial. The other was acquitted for lack of corroborative evidence although all three assessors were of the opinion that he was guilty. The appellant was however convicted and sentenced to death as stated above, hence the appeal now before us.

As this is a first appeal, we must re-evaluate the evidence on record because the appellant is entitled to expect that we will discharge that duty and arrive at our own conclusions in the matter. The only allowance is on credibility of the witnesses which the trial court was best placed to assess having heard and seen the witnesses in the witness box.

The learned Judge of the superior court, Tanui, J. appreciated and correctly so, that the case depended on circumstantial evidence and reminded himself about the principles applicable as enunciated in many previous decisions including **R v. Kipkering arap Koske & Anor [1949] 16 EACA 135** 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference – **Teper v The Queen [1952] AC.480**, at page 489.

The learned Judge pieced together the chain of events narrated by PW3, PW5, PW8, PW9 and PW11 and found them credible and consistent. He also considered the confessionary statement made by the appellant which was retracted during the trial but was admitted in evidence after trial within the trial. He found corroboration for that statement in the evidence of PW15 that the appellant led police officers to the spot where the deceased's body was recovered in a coffee plantation. He also accepted as corroborative evidence, the recovery of a radio given to one of the co-accused by the appellant as security for payment after commission of the murder. Finally, the learned Judge considered the sworn evidence of the appellant.

It was the appellant's evidence that the deceased had suffered a mental illness after their mother died in 1998. In January 1999 he burned the appellant's house and the assistant chief suggested that the deceased should be taken to the police for arson but their clan refused. Six months later on 19<sup>th</sup> June, 1999 the deceased warned the appellant for sub-dividing their family land between the brothers and he gave the appellant two days to move out if he wanted to remain alive. The appellant reported the matter to the assistant chief who advised him to get some people to arrest the deceased if he persisted in threatening him. Two days later on 21<sup>st</sup> June, 1999 the appellant arrived from church only to find that the deceased had thrown out his household goods and was standing near the appellant's house holding a panga. The appellant then went away and looked for some four people who came and arrested the deceased and took him to the assistant chief's home. They found the assistant chief had visitors and he advised them to take the deceased to the police. They left at about 4 p.m and headed for a bus stop at Mukumu. Then the deceased suggested that they should release him to go to Nairobi to look for money to pay for the appellant's house and the napier grass he had destroyed. The appellant agreed to the proposal and they released the deceased to go and spend the night at their aunt's home on his way to Nairobi the following morning. The appellant went home. Six days later on 28<sup>th</sup> June, 1999, the assistant chief went to his home and told him he was required by the police for questioning about a police uniform he allegedly possessed. At the police station however he was questioned about the deceased and the other people who had accompanied him when they arrested the deceased. He was threatened with death and was forced to admit that he killed his brother. That is when he self-recorded the confessionary statement. He denied that he killed or took part in the killing of the deceased. However, in view of the prosecution evidence which the learned Judge accepted as truthful, the appellant's defence was rejected.

As stated earlier, the decision of the superior court is challenged on two grounds. On the first ground, Mr. Orengo submitted that the trial was at some stage conducted without the aid of assessors and was

therefore in breach of **section 262** and **263** of the **Criminal Procedure Code** which provide in mandatory terms that all trials shall be with the aid of three assessors, subject to the qualifications in **section 298(1)** of the Code. He observed that the section was complied with throughout except on one occasion. That is during the trial within trial when the extra-judicial statement intended to be produced by PW13, **IP Tabani**, was objected to. The assessors were ordered to leave the court to facilitate a trial within trial but there is no record that they were recalled after the trial within the trial and the ruling admitting the statement. The next time they were heard of was at the commencement of the evidence of PW14. It was evident therefore, according to Mr. Orengo, that the statement which was admitted in evidence was read out in the absence of the assessors. Citing several authorities including **Vincent Munyi Boni Karukenya & 4 others v R. [1982-88] 1 KAR 540**, **Mwangi v. R. [1983] KLR 522** and **Charles Mwangi Muraya vs. R. Cr.A. 97/00 (ur)** on trials with assessors and the appropriate procedure during trials within trial, he submitted that the exclusion of the assessors from the trial incurably vitiated the whole trial. Even a retrial would not cure it because of effluxion of time and the possibility that some witnesses may have died or have faded memories.

It is certainly clear on authority, and as the law currently stands, that a trial conducted in the High court without the aid of assessors would incurably vitiate those proceedings and a retrial may be ordered unless it is likely to occasion injustice or where on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. Assessors may only be excluded when the admissibility of evidence intended to be adduced is challenged or a point of law otherwise arises. As regards the procedure in a trial within trial, this Court stated in the **Mwangi Case** (supra): -

**“It is essential that all the evidence and proceedings at the trial should be in their presence except when dispute arises as to the admissibility of evidence. It is necessary that all the evidence on which the prosecution case is based should be in the assessor’s presence. The prosecution cannot rely on the evidence given in the “trial within a trial” in the absence of the assessors to establish any of the essential facts of their case.”**

In the **Mwangi Case**, the essential fact that was heard by the court in the absence of the assessors was the recovery of some radio cassette said to belong to the deceased.

In the case before us, as we have already said, there is no complaint that the trial was not conducted in accordance with the law, as indeed it was so conducted over a period of 15 months from plea to judgment, in respect of 14 out of 15 prosecution witnesses, in the defence of the appellant, and in summing up to the assessors. But the record shows that on 13<sup>th</sup> June, 2000 when PW13, **IP Tabani** commenced his evidence, all the assessors were present in court. The witness gave his antecedents and narrated how, at the request of the investigating officer, **Pc. Chemasis** (PW15), the appellant was taken before him to record a statement under inquiry. He administered a caution on the appellant who elected to make his own handwritten statement in the English language. He gave him a paper and pen and the witness later went through the statement and asked the appellant whether he wished to make any alterations or corrections but the appellant did not wish to make any. The witness expressed his wish to produce the statement as evidence in court but at that point learned counsel for the appellant, Mr. Amasakha objected. The learned Judge then made an order, and correctly so, that the issue of admissibility of the statement would be determined in a trial within trial and he ordered that the assessors leave the court. The prosecution then called two witnesses on that issue, and the appellant testified, before the Judge made a ruling that the statement was made by the appellant voluntarily and without threats, inducement or promises by PW13. It was admitted in evidence. There is then no record that the assessors were called back before PW13 proceeded to read out the statement, which is the issue raised before us.

We have carefully examined the record and anxiously considered that issue, and we are of the view that it was unlikely that the assessors were not recalled after the trial within trial. The three assessors had faithfully attended the trial, even after adjournments since the commencement of the trial in March 2000. The trial was presided over by an experienced Judge and the appellant was ably represented by learned counsel while the Republic was similarly represented. Furthermore, PW13 was cross-examined by the appellant’s counsel at some length and was re-examined by the state counsel. In our view the cross examination and re-examination process could only have been for the benefit of the assessors. Indeed, in

summing up to the assessors the learned Judge reminded them about the retracted statement and the need for corroboration in law and the assessors considered the statement. We do not in the circumstances take seriously the submission that the assessors were completely excluded from the trial, although the issue of their presence ought to have been put beyond doubt by recording expressly that they were in fact present. Nor do we think that the apparent omission caused injustice to the appellant (see *section 382, Criminal Procedure Code*). That ground of appeal fails.

The second ground argued by Mr. Orengo is that the confessionary statement was in any event wrongly admitted in evidence. That is because it was not made voluntarily and the prosecution did not discharge the onus of proof that it was so made. Mr. Orengo referred to the appellant's evidence in the trial within trial in which the appellant asserted that he was arrested by the assistant chief (PW11) on 28<sup>th</sup> June, 1999 and was locked up in police cells. On the advice of the assistant chief that he should admit the killing of his brother in order to protect himself from torture, he recorded the confession the following day. It was therefore the apprehension about his safety that led the appellant to confess when he ought not to have done so but those circumstances were not considered when the statement was admitted in evidence.

We have carefully examined the record of the trial within trial and it shows that the prosecution called two witnesses to establish that the statement in issue was voluntarily recorded. *IP Tabani* swore that he took the statement from the appellant without any threat or inducement of any kind; he did not know the appellant before; only the two of them were in his office; the appellant was fluent in the English language which he said he would use; he was cautioned that he was not obliged to make any statement but if he did, it may be produced in evidence; the appellant looked fit and did not complain to the officer about any torture by any police officer or threat by the assistant chief; he opted to write his own statement and a pen and paper were provided for that purpose; and after clarifications made in the statement, the appellant did not wish to amend or alter any part of it. The other witness was the investigating officer, *Pc. Chemasis*, who requested that the statement be taken. He was with the appellant for most of the day before the statement was recorded as the appellant took them to the scene of crime and to point out his accomplices. None of the police officers threatened or beat him up until he was handed over to *IP. Tabani* for the statement under inquiry. In his own evidence the appellant stated: -

**“I was not beaten at both Khayega and at police station. What I recorded is what the assistant chief had told me but I had believed what he told me. No police officer tried to beat me. DCIO did not promise anything. I recorded the statement with him. I was conversant with dates. I started recording it on 29/6/99 for (sic) 30<sup>th</sup> June, 1999. I gave the statement freely to the inspector. If I did not record it I might have been tortured.”**

In assessing the entire evidence in the trial within trial, the learned Judge believed, as he was entitled to, the evidence of the two prosecution witnesses and the admission by the appellant that he was not threatened or promised any inducement by the officer recording his statement or the other police officers involved in the matter. The appellant had said nothing to those officers about any promises or threats made to him by the assistant chief. His apprehension about being tortured if he did not record the statement therefore rings hollow. Like the learned trial Judge we would have found no difficulty in admitting the statement in evidence and acting on it. That ground of appeal also fails.

The statement itself is fairly lengthy and detailed over twenty five pages. It reveals, amongst other things, that the appellant was well educated up to Kings College, Budo in Uganda before joining a Police college in Uganda as a trainee and graduating as a sub-Inspector of Police. He left the Ugandan Police Force in 1960 to join journalism there before returning to Kenya in 1961 and working as an Horticultural Technical Assistant in 1962. When his father died he became the head of the family and handled various land and other disputes. He was certainly a sane man of considerable intelligence and knowledge about police operations. The minute details given in the statement about the roles played by the persons who were involved in the deceased's killing and the manner of that killing which is consistent with the post mortem report, could only have come from someone who was present at the scene. On the totality of the evidence on record, the appellant could not escape the conviction for the offence charged and we uphold it.

It only remains for us to state that the learned Principal state counsel, Mr. Musau supported the decision of the superior court.

The upshot is that the appeal is dismissed in its entirety.

*Dated and delivered at Kisumu this 23<sup>rd</sup> day of June, 2006.*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR