REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, WAKI & ONYANGO OTIENO,JJ.A)
CRIMINAL APPEAL 7 OF 2003
BETWEEN

CALEB NYANG'AU MANYIZA…….....……APPELLANT

AND

REPUBLIC…….RESPONDENT

(Appeal from conviction & sentence of the High Court of Kenya at Kisii

(Wambilyangah, J) dated 20th January, 2003

in

H.C. cr. Case No. 23 of 2000)

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JUDGMENT OF THE COURT

On 12th July, 1999 at about 9.00 a.m., R K (PW 1) was at her farm harvesting millet. She was with her NN N(to whom we shall hereinafter refer as "the deceased''), aged 3 years and 8 months. The appellant, **Caleb Nyang'au Manyiza,** was also working in a farm adjacent to R farm. After sometime at about lunchtime, the deceased left her home, which was about one kilometer away. The appellant also left his farm at the same time but did not accompany the deceased as he left his farm. At about 1 p.m., the same day, K N **(PW 5**) a student in Std. VII at a nearby primary school, who had left school for lunch, found the appellant and the deceased at their (K) home sitting outside the house.

She (K) prepared ugali and served the appellant and the deceased. The two ate outside as K returned to school. The appellant later returned to R farm and asked R, if the deceased had returned to her. By that time, R had been told by K that she (K) had left the appellant and the deceased eating ugali and so R told the appellant that she knew that the appellant and the deceased had eaten ugali in the house of K. The appellant then left her and went away. R continued working in the farm up to 6.00 p.m. and then went home. On her return home, R did not find the deceased and despite several efforts to search for her and assistance by several other people, such as P G M **(PW 2)** and the husband, J N M**(PW 4),** R failed to trace the deceased. They then reported the matter to Abraham Ongaki Mochache **(PW3**), the then assistant chief in their area.

R alleged that she fell asleep that night and dreamt that the deceased was in a pit which was on her other farm which they had leased out. The next day, acting on that dream, she saw some fresh soil in that other farm, became suspicious and called a lady whom she led to the pit. With the assistance of P G M, the pit

was dug and the deceased's body was found in that pit. The assistant chief came and escorted R to Nyangusu Police Station where a report was made. The police officers accompanied them back to the pit and the deceased's body was removed from a hole which was one metre deep. She was dead. R looked at the body and it appeared as if the deceased was sexually defiled before she died. The police then removed the deceased's body, and the appellant, who had earlier been arrested by members of the public after R implicated him with the offence, was rearrested by Sgt. Robert Maluki Masira **(PW9).** On 15th July, 1999, a post mortem was carried out on the body of the deceased by Dr. Shivelenje. He gave the cause of death as cardiopulmonary arrest due to asphyxia and cord injury statement from the appellant and on 14th July, 1999. Chief Inspector Charles Kamito (PW 11) took an injury statement from the appellant and on 16th July, 1999, Supt. Charles Korotoko took a charge and caution statement from him. The appellant was thereafter charged with the offence of murder contrary to **Section 203** as read with **section 204** of the penal Code, the particulars of which were that:

" On the 12th day of July, 1999 at [*particulars witheld*] in Gucha District within Nyanza Province, murdered NNN.''

After the procedural requirements then applicable in the Magistrate's Court, he was on 3rd May, 2000 committed to the superior court on the same charge. He pleaded not guilty. His case was heard by Wambiliangah, J. and the facts above reflect the evidence that was adduced before the superior court by the prosecution. The appellant stated in his defence that he was at a funeral on 12th July, 1999 and was not involved in the death of the deceased. After full hearing the learned. Judge convicted the appellant of the offence of murder stating *inter alia* as follows:

"In the result I hold that the accused killed the deceased as he was raping her and I reject his denial of that fact. Defilement of girl (sic) of tender years is undoubtedly a felony contrary to s.144 (sic) of penal code and under s. 206 of the Penal code the killing of a person during the perpetration of a felony is murder: malice aforethought being inferred from the fact of the perpetration of the felony.

To my mind the crime with which the accused was charged and tried in this case was proved against him beyond any shadow of doubt. The 3 assessors were unanimous that he is guilty of murder as charged. I accordingly convict him as charged."

The appellant was then sentenced to suffer death as prescribed by the law. He was dissatisfied with the conviction and sentence and hence this appeal now before us, which is premised on seven grounds. The first three grounds o appeal are raising a complaint on the manner in which the superior court handled the statement under inquiry, the admission of which was objected to but was admitted after a trial within trial. The other four grounds are that the trial court erred in not ascertaining from the defence the moment the charge and caution statement was mentioned as to whether there was going to be an objection to it and if not, why not; that there was no evidence of proper identification of the body of the deceased prior to the post mortem performed at Kisii District Hospital; that the statement of the appellant in his defence was not considered at all by the superior court and that the learned judge misdirected himself in considering the prosecution case in isolation and drawing conclusions, thereby precluding himself from considering or sufficiently considering the appellant's defence.

Mr. Menezes, the learned counsel for the appellant, contended that the statement under inquiry which was taken by C.I Charles Kamito on 14th July, 1999 was not properly taken and should not have been admitted in evidence. He pointed out several grounds for that contention but mainly that the statement was not voluntary as the police officer gave no option to the appellant and the appellant had been tortured and that the learned judge in considering the admission of the statement shifted the burden of proof onto the appellant.

The appellant objected to the admission of the statement under inquiry, which was purportedly taken from him by Chief Inspector Kamito. Immediately after the objection, the record shows that the court ordered a trial within trial. This was proper. Chief Inspector Charles Kamito was the first witness in the trial within the trial. He stated *inter alia* as follows:

"He was brought by my officer whose name I cannot recall. I remained with the accused alone. I cautioned him that an inquiry is being made into the murder of a child named N.

I told him that he was a suspect. <u>I told him that he had to give me a statement under inquiry</u>."

(Underlining supplied)

Although the above was followed by a statement that the appellant was also cautioned, that he was not under obligation to say anything unless he wanted to say so, we think that the words **" I told him that he had to give me a statement under inquiry"** were sufficiently strong and conveyed a command from a police officer to a layman. The appellant cannot be faulted if he felt that he was obliged to give chief Inspector Charles Kamito a statement. In our mind, the caution required at that stage is as framed in the actual statement under inquiry which was produced as extracted, in court. Unfortunately, what the witness stated in his evidence was apparently different from what he put down in writing. Secondly, the same witness stated in evidence in cross-examination that he cautioned the appellant in English whereas the appellant told him that he could not understand English. The effect of that is that the appellant may not have understood the caution which was in English as there is no evidence that the caution was repeated in Kiswahili once the witness realized that the appellant could not understand English very well. In our opinion, the correct approach for any officer seeking either a statement under inquiry or charge and caution from a suspect is to first ascertain the language that the suspect understands well and only proceed to caution him after arrangements are put in place for translation or after the officer is certain that the suspect understands English very well. If the officer proceeds as happened here, it may result into a suspect giving a statement without first understanding the caution and without considering his options at all.

Thirdly, the learned Judge in his ruling admitting the statement under inquiry stated as follows *inter alia:-*

"Whereas it is the duty of the prosecution to demonstrate clearly that the cautioned statement was voluntarily extracted from an accused, an accused person who on his part retracts a confession of the allegation if (sic) ill treatment and inducement by the police (to extract the said confession) has the onus to prove such ill treatment and inducement……

To mind (sic) an accused is easily able to discharge the duty placed in (sic) him if he appears credible about his allegation that he was induced or assaulted in order to make him give a confession. In the present case the accused said that the Chief Inspector himself did not assault him or induce him into making the statement. He also denies that he complained to the Inspector that he had been assaulted elsewhere. But then he is not then convincing as to why he still ended up confessing was illegally induced (sic). But the accused is totally silent as to why he did not bother to complain to court that he was assaulted while in police custody."

This part of the ruling did shift the burden of proof to the appellant to prove that he was ill treated or induced in order to make the statement under inquiry. We note that the learned Judge relied on **<u>Sarkar</u>** on the Law of Evidence, albeit cautiously, as he was at all times aware that that was the law in India. In Kenya, we think the law is as spelt out in the case of **Rashidi and Another vs. Republic (1969) EA 138** where the predecessor to this Court was faced with a similar situation where the Judge of the superior Court in Tanzania had stated that it was the duty of the accused, if they wished to reject the statements, to show that they were made in circumstances which under the law were not acceptable to the court. The court stated as follow:

"With respect this is of course wrong, the onus being always on the prosecution to prove the admissibility of any statement by an accused person. Such onus never shifts to the accused."

On allegation of torture, we see no effect of the allegation on the taking of the statement under inquiry as the documents produced to prove the same were almost two and half years old and could not prove torture during the time the statement was taken.

We are certain on r minds, and we have no hesitation in saying so, that in admitting the statement under inquiry taken by Chief Inspector Kamito on 14th July, 1999, the learned trial Judge erred, and Mr. Menezes is perfectly on sound ground in his submissions on the first three grounds of the appeal. The statement under inquiry was for exclusion as part of the evidence.

However, having, as we have, excluded that part of the evidence, the question still remains – is the evidence that is remaining sufficiently strong and could the court base the conviction of the appellant on it?

Mr. Musau, the learned Senior State Counsel, submitted that it was enough, and that is what we must now consider.

According to the evidence on record, K N was the last person, apart from thee appellant, to see the deceased alive. She served the appellant and the deceased with ugali. They ate it and then K went back to school at 2 p.m after taking the keys for the house to her mother, N N **(PW 6),** who was with R in the farm. She told her mother that she had left the appellant and the deceased eating ugali. That was at 2 p.m. She had served the food sometime between 1p.m and 2p.m according to her (K's) evidence which was not challenged. No other evidence was adduced to the effect that anybody else saw the deceased after she had ugali with the appellant. In short, the appellant was the last person who was with the deceased and who saw her alive. Later after 2.pm., the appellant went to the farm where R and N were and asked them whether the deceased had gone to the farm to which both answered in the negative. Further, that evidence by R and N that the appellant went to the farm after 2 p.m. i.e after his lunch with the deceased gets support from the evidence of J K E **(PW 7)** who testified that she gave the appellant milk to take to the people who were in the shamba. That was at the house of N N, and it was immediately after 2 p.m, yet J did not find the deceased who was left with the appellant by K taking lunch together.

The appellant's defence concerning his whereabouts on 12th July 1999 was as follows:

"On 12-7-1999 I was at a funeral. I had gone there on 11-7-1999. I left there on 12.7.99. I arrived at home at 6.00 p.m. My cousin had come from Nairobi was at home (sic). We talked about the funeral. We were to go back on the next day. But on that next day we had (sic) noises and we went to where the noises came from. We found many people had gathered and were told by D M I as to what happened. But the relatives of deceased hit me and said that I am the one who killed their child. My relatives rescued me."

This defence flies in the face of the evidence of R who saw the appellant digging in the nearby farm till about lunch time when he left. It also flies in the face of the evidence of K who gave the appellant and the deceased ugali just after I p.m and left them eating. It attempts to contradict the evidence of R and N who testified that the appellant went back to the farm and asked them if the deceased had returned there and that was after 2 p.m. and, lastly, it flies in the face of the evidence of J K E who gave him milk to take to the people who were in the shamba. It was not surprising that the superior court rejected the appellant's evidence in defence, as indeed the alibi was attempting to raise could not hold at all. The evidence displacing the alibi was overwhelming and having on our own analyzed that part of the evidence that was before the superior court, we are of the view that the appellant was with the deceased as stated by the prosecution witnesses, and he was the last person seen with the deceased on 12th July, 1999 before the deceased's body was found the following day on 13th July, 1999. The appellant had an opportunity to commit the offence. Further, and to strengthen that evidence, there is also the charge and caution statement which the appellant gave to Supt. Charles Korotoko **(PW 12).** That statement wad admitted after the appellant, through his learned counsel, stated that he did not object to its admission. Mr. Menezes submitted that that statement was admitted as a result of the mistake of the learned counsel for the appellant and urged us not to visit the mistakes of the advocate for the appellant. On our consideration, we see no mistake made by the advocate when he did not object to the admission of the statement. The appellant has not alleged that he instructed his counsel to object to the statement but his counsel failed to do so. The counsel acted on instructions and we cannot read any mistake in that. Mr. Menezes also submits that looking at the questions raised in cross-examination of Korotoko, it was clear that the statement had been retracted albeit belatedly. In our mind, if the appellant wanted to retract the

statement, and instructed his counsel to do so, the same would have been done outright and not by way of putting questions in cross-examination. In our view, the charge and caution statement was properly admitted and correctly acted upon by the superior court. That charge and caution statement was short and we reproduce it here for ease of reference. It stated:-

"I had carnal knowledge of the said N N and after the act I found that she was dead. She died while having carnal knowledge with me."

This charge and caution statement, which as we have stated, was properly admitted, clearly makes clean breast of what happened and when read together with the overwhelming evidence that was before the court that the appellant was the last person seen with the deceased and was left alone with the deceased by K eating ugali outside N's house and thus establishing clear evidence of opportunity, the irresistible conclusion that must be arrived at is that the appellant was guilty of the offence as charged.

Mr. Menezes also submitted that the learned Judge did not consider the appellant's defence in his judgment. We have carefully perused the judgment, but we cannot detect any evidence in support of this submission. The learned Judge in his judgment clearly set out the appellant's defence and proceeded to analyze the same coming as he did, to the conclusion that the appellant's defence, viewed from the evidence of the prosecution witness and from the appellant's own charge and caution statement must be rejected. From what we have stated hereinabove, we cannot fault the learned Judge on that conclusion. Nothing turns on the ground that the deceased was not properly identified for post mortem as the body was clearly identified to the doctor by her father, the evident confusion in names notwithstanding. In any case, her first name remained the same throughout the record.

In conclusion, even if the statement under inquiry is excluded from the evidence that was before the court as we have on our own consideration, excluded it, there was still sufficient evidence upon which a finding of guilty could be entered. Analyzing the evidence on our own, as we have done on a first appeal, we are satisfied that the appellant was properly convicted and we decline to interfere with the superior court's decision.

In the result, the appeal against conviction and sentence is dismissed. Ordered accordingly.

Dated and delivered at Kisumu this 11th day of March, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR