REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, O'KUBASU & WAKI, JJ.A.)

Criminal Appeal 40 of 2004

BETWEEN

PAUL NJENGA KARIUKI ……..……..……...… APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Justice Ondeyo) dated 10th December, 2003 in H.C.CR.C. NO. 25 OF 2001)

****

JUDGMENT OF THE COURT

The genesis of this appeal is a charge sheet dated 12th March, 2001 in which the appellant, **Paul Njenga Kariuki,** (as the third accused) was jointly charged with his two brothers, **John Mwangi** (as 1st accused) and Joseph Njuguna Kariuki (as 2nd accused) with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were that on the 11th day of February, 1992, at Lesirko Scheme in Nyandarua District of the Central Province the three jointly and unlawfully, with another not before the Court, killed Kariuki Marima.The fourth person stated to be not before the court was the mother of the three men and the victim of the crime was the father of the three and the husband of the one who was not before the Court. The one not before the court had been arrested but escaped from the police custody and has never been traced. This is a sad case in which three sons and their mother were alleged to have killed their own father and husband respectively.

It was the prosecution case before the superior court that the appellant and his two brothers were sons of the deceased, Kariuki Marima who had six sons. Their mother, Jerusa, was the first wife of the deceased who lived at Ol Jororok – Lesirka scheme with his three sons (the three accused persons). The second wife of the deceased lived at Ngarua where the deceased had a farm.**Onesmus Maina Kariuki,** (PW4) another son of the deceased lived about 200 metres away from Jerusa's house. Kariuki (PW4) was married and lived with his own family. It was the evidence of Kariuki that prior to 1992, the deceased sold a piece of land to a certain teacher which transaction his wife (Jerusa) did not approve of. This led to a disagreement between the deceased and his wife Jerusa. Prior to the disagreement the deceased had

asked Jerusa to move to the farm at Ol Ngarua so that the deceased could concentrate on farming in Ol Ngarua but Jerusa refused to move to Ol Ngarua. PW4 went on to testify that the deceased informed him that he (deceased) was left with no option but to take on a second wife who could live on the farm at Ol Ngarua. That is when the deceased married the second wife and settled her on his farm at Ol Ngarua.

On 11th February, 1992, PW4 returned to his house and learnt that the deceased had been to his (PW4's) home but missed him. The deceased left a message that PW4 should see him (deceased) the following day (12th February, 1992) at 6:30 a.m. at Jerusa's house. The following day PW4 went to Jerusa's house (where the deceased lived with Jerusa). PW4 entered the kitchen and found John Mwangi Kariuki (1st accused) and Joseph Njuguna Kariuki (2nd accused). PW4 asked his two brothers whether the deceased had woken up and the two young men told PW4 to ask their mother Jerusa, who was washing clothes behind the house. On inquiring from Jerusa whether the deceased had woken up, PW4 was informed by Jerusa that the deceased had left early in the morning for North Kinangop to visit his elder son.On 13th February, 1992 PW4 travelled to Nairobi and when he returned on 15th February, 1992 he checked on the deceased but Jerusa informed him that the deceased had not returned. A few days later PW4 travelled to his brother's home in North Kinangop but the deceased could not be traced. PW4 came back from North Kinangop and informed Jerusa that the deceased was not in North Kinangop. The deceased was not at Ol Ngarua either as his second wife had come over to Lesirko Scheme looking for him. It was then clear that the deceased was missing and so the matter was reported to the police. Police investigations led to the arrest of Jerusa and her son John Mwangi Kariuki (1st accused) but they were released three days later. The mystery of the disappearance of the deceased remained unresolved from March, 1992 until April, 2000.

Joram Kinyemu Gatimu (PW1) testified before the trial court to the effect that on 16th April, 2000 was a Sunday when he conducted a service at Full Gospel Church at Kangui. After preaching, Gatimu (PW1) made an altar call to those who wanted to be saved to step out and go to the front of the Church for prayers. The appellant who was in the congregation was the only person who stepped forward for prayers. PW1 asked the appellant to confess his sins. It was at that stage that the appellant, speaking through the microphone, told the congregation that he remembered having a father whom he could no longer see.The appellant went on to state that he had for a long time wanted to be saved but something had stood in his way. The appellant confessed that one night his father (the deceased) was having supper with his mother (Jerusa) when the said Jerusa, the appellant and his brothers set upon the deceased whom they beat to death. He said that he was disturbed by what he, his brothers and their mother had done and asked for forgiveness. According to the testimony of PW1, although the appellant said that he with his mother and his two brothers had killed the deceased, the appellant did not give the names of his two brothers who had allegedly participated in the killing of the deceased.

The alleged confession by the appellant led to his arrest as well as that of his mother (Jerusa) and his two brothers who were 1st and 2nd accused during the trial in the superior court. It should be pointed out that it was the evidence of **Chief Inspector John William Mahiana** (PW9) that on 22nd April, 2000 Jerusa escaped from police custody at Ol Jororok Police Station and had never been seen again.

On 20th April, 2000 the appellant led Chief Inspector Mahiana (PW9) and his team to his parent's home where there were many people who had come to witness the unfolding events.The appellant led the police team to a pit latrine in which he said the body of the deceased had been dumped. The latrine was demolished and the process of recovery of the deceased's remains commenced. One of those involved in this work was **Andrew Kibuika Ndula** (PW3) who spent the first day exhausting the pit latrine but nothing was recovered. The work continued on the following day when a jaw and three teeth were recovered. On 22nd April, 2000 the work continued when a human skeleton consisting of a skull, hand and legs was recovered, together with shoes and clothes. PW3 recognised the clothes and shoes as those which the deceased used to wear during his life time.

Dr. David Kariuki (PW7) performed postmortem examination on the recovered skeleton and it was his evidence that from the pelvic, he identified it to be a skeleton of a male adult. Having examined what was before him, Dr. Kariuki was of the opinion that the deceased died as a result of injuries following fractures of various parts of the body. His conclusion was that the cause of death must have been cardiac

arrest due to trauma in the chest, skull and the brain.

A charge and cautionary statement by the appellant was produced after a trial within the trial had been conducted as the appellant retracted the statement. In that statement, the appellant narrated how the deceased came home on 11th February, 1992 and how the appellant, his brothers and their mother beat up the deceased and threw his body into a pit latrine.

When put to his defence, the appellant in his unsworn statement told the trial court that he remembered a day in **1992** when he was in primary school he came back home with his sisters and their mother Jerusa told them that if anyone came and asked for their father (the deceased) they should say that he had gone to Kinangop. So from that day whenever people asked for the deceased, the appellant would tell them that the deceased had gone to Kinangop. The appellant went on to state in his unsworn statements that early in the year 2000 his mother Jerusa started drinking alcohol, something she had never done before. One day in April, 2000 Jerusa came home drunk and told the appellant that although she had told him that the deceased went to Kinangop he actually fell in a pit latrine.The appellant kept this information to himself but later thought of telling a church elder who was a neighbour, one, **Joram Kinyemu Gatimu (**PW1). The following day the appellant went to church at Kangui Full Gospel Church where he discussed the matter with Gatimu (PW1) and another elder. After the Sunday service, the appellant went home and it was agreed that the appellant and the two elders would meet on a Wednesday, but before the meeting the appellant was arrested.

The learned trial judge (Ondeyo, J.) summed up the evidence to the assessors after final submissions by counsel appearing for the State and for the appellant and his coaccused.The first assessor was of the view that all the accused person were not guilty while the second assessor informed the trial court that **"Accused 3 was only 13 years.** ***He could not reason".*** And the third assessor returned a verdict of "not guilty" in respect of the appellant.

The learned trial judge considered the evidence adduced before her and came to the conclusion that the evidence against the appellant's co-accused (1st and 2nd accused) was only what was contained in the appellant's charge and cautionary statement which evidence required corroboration, and as there was no such corroboration she acquitted the appellant's co-accused.As regards the appellant the learned trial judge concluded that the appellant's charge and cautionary statement was true and hence proceeded to convict the appellant as charged. In the course of her judgment, the learned Judge said:

> ***"I do not understand the defence of the 3rd accused person to be that, he was intimidated into signing the statement. All he says is that he did not know the contents of the statement that he signed. This statement therefore requires corroboration from some other independent evidence [see JOSEPH NJARAMBA KARURA VS REPUBLIC (1982–88) 1 KAR 1165]. Such other independent evidence is to be found in the testimony of PW1.***
>
> ***I have read the contents of the said statements and I do not think that PW10 made up that statement. The details are such that, in view of the testimony of PW1, they must have been given by the 3rd accused. I believe that this statement is true and that it was recorded by the 3rd accused person, after he was arrested following his confession in the church on 16th April, 2000".***

Upon his conviction, the appellant was sentenced to death. He now appeals to this Court against both conviction and sentence and (through his counsel) has filed the following three grounds of appeal:-

> ***"1. THAT the Honourable Court erred in law and fact by basing its conviction solely on the retracted, uncorroborated and unbelievable extra-judicial confession presumably made by the appellant on otherwise inadmissible evidence.***
>
> ***2. THAT the Honourable court erred in law and fact by failing to appreciate that the prosecution had failed to prove its case to the standard required by law, i.e. proof beyond reasonable doubt.***

3. THAT the Honourable court erred in law and fact by sentencing the appellant to suffer death over the alleged offence without appreciating that he was a minor at the time when the offence was presumed to have been committed".

When the appeal came up for hearing before us on 26th September, 2005, Mr. Oduor appeared for the appellant, while Mr. Gumo appeared for the State. It was Mr. Oduor's submission that the death of the deceased was not proved as it was upon the prosecution to eliminate all the possibilities as regards missing persons. He went on to refer to the evidence of Dr. Kariuki (PW7) who in Mr. Oduor's view examined only bones as a result of which he, (PW7), could not tell how death occurred. Mr. Oduor argued that the doctor's conclusion had no basis since there was no nexus between the bones and the clothes said to have been recovered from the pit latrine.

As regards the confession by the appellant, it was Mr. Oduor's submission that the confession was inadmissible. He further argued that while the trial judge appreciated that retracted statement required corroboration, there was no such corroboration.

Lastly, Mr. Oduor submitted that as the appellant was only 13 years old at the time of the offence the death sentence imposed on him was contrary to ***section 25 (2)*** of the Penal Code.

Mr. Gumo, on his part, supported the conviction of the appellant as in his view the appellant had confessed committing the offence. On corroboration of the appellant's statement, Mr. Gumo referred us to the evidence of recovery of the deceased's remains as confirming the appellant's confession. Finally, Mr. Gumo conceded that the appellant ought to have been dealt with in accordance with ***section 25 (2)*** of the Penal Code.

We have carefully considered the record before us and it cannot be denied that the appellant's problems started with what happened at Kangui Full Gospel Church on Sunday the 16th April, 2000. That was the day when the appellant revealed that he, his mother and brothers had killed the deceased. This was revealed to the Church congregation when the appellant stepped forward to be prayed for and confess his sins.Although the appellant did not specifically admit having confessed to the congregation, there was evidence to the effect that after the appellant talked to the church elder Gatimu (PW1), the matter was reported to the police who immediately arrested the appellant, his mother and brothers. There was unchallenged evidence that it was the appellant who led the police to the pit latrine from which human skeleton was recovered. It was Dr. Kariuki's evidence that the human skeleton was that of an adult male. The deceased Kariuki Marima, the father of the deceased was, of course, an adult male.

There was then the charge and cautionary statement by the appellant, which statement the appellant retracted. In that statement, the appellant gave a detailed account of what led to the death of the deceased. The statement in our view, is a confession by the appellant. The appellant however, retracted the statement. In **TUWAMOI V UGANDA [1967] E.A. 84** at p. **89** Duffus Ag. V.P. said:

"The present rule then as applied in East Africa in regard to a retracted confession is that as a matter of practice or prudence the trial Court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true".

The above stated principle of law obtains as approved by numerous later decisions of this Court as can be seen from our own decision in **KINYUA V. REPUBLIC [2003] KLR 294 at p. 299** where we said:-

"***Considering the evidence adduced during the trial as a whole we are satisfied that the statement by the appellant was properly admitted. That evidence of confession has to be carefully considered before basing a conviction on it. In the celebrated case of TUWAMOI VS. UGANDA [1967] E.A. at p.91 it was stated:-***

"We would summarise the position thus- a trial court should accept any confession which

has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted 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 but be true".

The learned trial judge appreciated the fact that a retracted confession requires corroboration and such corroboration was to be found from the conduct of the appellant when he led the police to a pit latrine where the skeleton of the deceased was recovered.There was evidence from one of those present that the recovered shoes and clothes belonged to the deceased. Taking into account the evidence of Dr. Kariuki (PW7), who examined the recovered skeleton together with the evidence of those present, there can be no doubt that what was recovered from the pit latrine were the remains of the deceased. The appellant's statement and his conduct clearly point at the appellant as one of those who were involved in the unlawful killing of the deceased.

Having re-evaluated the evidence as a whole and subjecting it to fresh exhaustive examination as per **OKENO V. R [1972]** E.A. 32 we have come to the same conclusion, as did the learned trial judge, that the appellant was guilty of the offence as charged. We accordingly dismiss the appellant's appeal against conviction.

As regards the sentence it was conceded that the appellant was 13 years when the offence was committed. That being the position the appellant ought not have been sentenced to death.

Section 25(2) of the Penal Code provides:-

(***2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was***

under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained

shall be deemed to be in legal custody."

In view of the foregoing, the appeal against sentence is allowed to the extent that the death sentence imposed on the appellant is set aside and in its place we order that the appellant be detained at the President's pleasure. Those shall be our orders.

Dated and delivered at Nakuru this 30th day of September, 2005.

P.K. TUNOI

……..…..

JUDGE OF APPEAL

E.O. O'KUBASU

……..…..

JUDGE OF APPEAL

P.N. WAKI

……..…..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR