



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GICHERU, O'KUBASU & KEIWUA, JJ.A.)**

**CRIMINAL APPEAL NO. 127 OF 2001**

**BETWEEN**

**BENJAMIN NDAMBU SUKU..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at**

**Nairobi (Githinji & Oguk, JJ.) dated 23rd March, 1994**

**in**

**H.C.CR.A. NO. 588 OF 1990)**

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**JUDGMENT OF THE COURT**

The appellant, Benjamin Ndambu Suku, was jointly charged with another person with robbery with violence contrary to section 296(2) of the Penal Code. They were both convicted of the offence and sentenced to death. They appealed to the High Court and while the appeal of the appellant's co-accused was allowed the appellant's conviction was upheld and so was the mandatory death sentence. The appellant therefore comes to this Court by way of second appeal.

The facts of the case may be briefly stated. On the morning of 12th November, 1987 the deceased Laximiben Kantilal Shah aged about 72 years was left at her home along, 2nd Avenue Parklands, Nairobi when the other members of the family i.e. her husband, S. K. Shah (P.W.1) and N. C. Shah (P.W.6) went to work. The deceased was left with the appellant who had just been employed in that home as househelp. At about 11.00 a.m. Shah (P.W.1) was called back home by a telephone message and as a result went back home where he found his mother (the deceased) lying on the bed with her hands and legs tied up. The cupboards in the bedroom where jewellery had been kept had been broken and all jewellery and Shs.30,000/= in cash missing.

The appellant who was the only workman in that home was nowhere to be seen. Shah telephoned the police as he rushed his mother to the nearby Aga Khan Hospital where the old lady was pronounced dead. Postmortem examination on the body of the deceased was conducted by Dr. Samuel Odero Ywaya (P.W.2) who formed the opinion that cause of death was as a result of asphyxia due to manual

strangulation.

The appellant was the key suspect as he had just been engaged on temporary duties by the deceased's family while its usual employee was away on leave. The appellant had been brought to the family on 4th November, 1987 by one Gilbert Munyambu Mwandai (P.W.3) who was the house servant to the parents of P.W.6. It was the evidence of Mwandai (P.W.3) that he knew the appellant well as they had been classmates in school and that they both hailed from Kitui District. The appellant was finally arrested on 22nd April, 1988 at his rural home in Matungulu location of Kitui District. After his arrest the appellant was interrogated by the police and on 28th April, 1998 made a statement under inquiry which statement was recorded by Supt. Bakari Omari (P.W.8). This statement was a confession but as the appellant objected to its production it was only produced in evidence after a trial within a trial. There was also a charge and cautionary statement which was recorded from the appellant and as the appellant objected to its production it had to be admitted in evidence after a trial within a trial had been conducted.

When put to his defence after close of the prosecution case the appellant elected to make unsworn statement in which he narrated how he had been taken by Munyambu (P.W.3) to the house of the deceased's family where they discussed about his employment. He was told that he would work for Shs.12/= a day which he thought was too little. It was then agreed that he would work for only two days (5th and 6th November, 1987) while his work was being evaluated. It was his evidence that he left after two days as his employers refused to pay him more and so he went home where he remained till his arrest. As regards the statements he is alleged to have recorded it was his evidence that he was tortured by police officers before he agreed to sign the statements whose contents were never read to him.

As already stated the appellant's appeal to the High Court against both conviction and sentence was dismissed. The High Court (Githinji and Oguk, JJ) re-evaluated the evidence adduced before the trial court and came to the conclusion that the conviction of the appellant was based on circumstantial evidence and his confession in his repudiated statements (Exhibits 3 and 4). The High Court also considered the defence of alibi put forth by the appellant. In dismissing the appellant's appeal (who was the 2nd appellant in that Court) the learned judges of the superior court expressed themselves thus:

***“On our own assessment and evaluation of the record, we have come to the same conclusion as the learned trial magistrate that the 2nd Appellant was left with the deceased on the material morning and the complainant's home, 2nd Avenue Parklands, where he was employed. We are not persuaded by his statement that he was at his rural home in Kitui that day. We find that his alibi defence cannot be true. It is false. The circumstantial evidence relied upon to convict the Appellant was that soon after the said robbery, he disappeared from his place of work. He was nowhere to be found. P.W.3 led the police to his house in Nairobi and he was not there. It was not until the 22nd of April, 1988 that he was found in his rural home in Kitui which was several miles away from Nairobi. His conduct in disappearing from the scene of crime without informing his employer (P.W.6) soon after the said incident is, in our respectful view a sign of some guilt conscience on his part.***

***Upon our independent evaluation of the recorded evidence, we are satisfied that the conviction of the 2nd Appellant was safe. His appeal fails and is therefore dismissed”.***

Both the trial court and the first appellate court found that the appellant's conviction was based on circumstantial evidence and his confession which confession was later retracted. Mr. Mogikoyo for the appellant attacked his client's conviction as being an error in both law and fact because it was based on retracted confession and that the appellant's defence of alibi was not properly considered. As regards the defence of alibi it is to be noted that the first appellate court was indeed alive to that fact when it stated:

***“He raised an alibi defence to show that he was then at his rural home in Kitui and nowhere near the scene of crime. An alibi raises a specific defence and an accused who puts forward an alibi defence as an answer to the charge preferred against him does not in law thereby assume the burden of proving that answer and it is sufficient if alibi as it stands introduces in the mind of the court that it is not unreasonable Said v. Republic (1963) E.A.6. The burden of proof is throughout on the prosecution”.***

From the foregoing, we are satisfied that the defence of alibi put forward by the appellant was properly considered and rejected. As regards retracted confession we wish to point out that in **BAKARI OMARI AND JOHN MARTHA KOMORA V. REPUBLIC [1983] 1 KAR 349** this Court citing **TUWAMOI V. UGANDA [1967] E.A.** at P.84 with approval reiterated:

***“There is no rule of law or practice requiring corroboration of retracted statement of 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”.***

Again in **JOSEPH NJARAMBA V. REPUBLIC [1982 - 88] 1 KAR 1165** this Court re-emphasized that a retracted and repudiated confession of an accused person requires independent corroboration. In this appeal there was such corroboration from the conduct of the appellant soon after the incident. For example, the appellant who had been left at home with the deceased was nowhere to be seen soon after the offence had been committed. He was not at his house in Nairobi. He disappeared until his arrest in Kitui some six months after the incident.

We have carefully considered circumstantial evidence implicating the appellant together with his repudiated confession vis-a-vis his defence if alibi and it is our view that the two lower courts adopted proper approach to this matter and came to the right conclusion which was to the effect that the appellant indeed participated in the commission of the offence with which he was charged.

For the foregoing reasons, we are satisfied that the appellant’s conviction was inevitable and his appeal to the High Court was rightly rejected. Consequently his appeal to this Court is accordingly dismissed.

**Dated and delivered at Nairobi this 7th day of February, 2003.**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**M. KEIWUA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**