REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 179 of 2002

KAZUNGU CHARO KENGA ……………………...……………….. APPELLANT

AND

REPUBLIC ……………………………………………………….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Khaminwa, Commissioner of Assize) dated 26th September, 2002

in

H.C.CR.C. NO. 26 OF 1998)

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JUDGMENT OF THE COURT:

The appellant, ***Kazungu Charo Kenga***, was tried with the aid of assessors, and convicted on a charge of Murder contrary to ***Section 203*** as read with ***Section*** 204 of the Penal Code and sentenced to death by the superior court (Khaminwa, the learned Commissioner of Assize – as she then was). The particulars of the offence were that on the 5th day of May, 1997 at Viragoni village in Mwanamwinga location within Kilifi District of the Coast Province, the appellant murdered Kenga Charo Kenga.

The facts of the case may be briefly stated. On 3rd May 1997 Charo Kenga Charo (PW1) woke up and found the appellant's daughter named Zawadi very sick. The appellant was away in Chonyi where he worked in a bar. The sick girl was taken to a medicineman but nothing happened. She died that same day at about 5.00 p.m. A message was sent to the appellant but he did not come home. The elders then decided to bury the appellant's daughter in his absence. The appellant arrived in the evening and found members of his family mourning. They were sitting by a fire in accordance with the local custom. This was fire lit outside and the mourners were to sleep close together by the fire. At about 2.00 a.m. on 5th May, 1997 Charo (PW1) saw the appellant bending over the head of the deceased holding a long pounding stick (pestle). The appellant then dropped the stick and ran away. There had been some commotion and when those around the fire checked on what had happened, they found that the deceased's

head had been completely broken. The deceased had died. Among those who were at the scene were Safari Charo Kenga (PW2), Mdzmbo Mkare (PW3) and Kwisa Keriga Buko (PW4). From the scene the appellant ran to the house of Assistant Chief John Athanas Mlewe (PW6) who accommodated him until the following morning when he was taken to the police station. The body of the deceased was removed from the scene to the mortuary where postmortem examination was performed by Dr. K. N. Mandalya (PW9). According to Dr. Mandalya the deceased died due to intracranial haemorrhage due to skull and spinal fractures. While the appellant was in police custody Chief Inspector Humphrey Njau recorded a statement under inquiry from him in which he (appellant) admitted killing the deceased. The statement was however objected to by the defence and it was only admitted in evidence after a trial within the trial.

When put to his defence the appellant elected to make unsworn statement in which he denied having committed the offence. He said that on the material night he was told by the son of the deceased that someone had killed his father. He then went to the Chief in the company of the son of the deceased. He was then taken to the police station where he was placed in the cells.

The learned Commissioner of Assize summarized the evidence to the assessors who returned a unanimous verdict of guilty.

In convicting the appellant the learned Commissioner of Assize stated inter alia:-

"***The prosecution evidence was given by several family members the only witness who first heard the noise and saw the accused leaning on the head of the deceased checking on it was PW1 the son of the deceased. He is the only one who saw the accused running away and dropping the big stick near the body. Others PW2, PW3 and PW4 heard the noise and woke up immediately. They did not see the accused at that time but they came to know that he had gone to the Chief's house at night".***

Having so stated the learned Commissioner of Assize then concluded her judgment as follows:

"In the circumstances, I find there was direct evidence and much circumstantial evidence which points to the accused as the only man who had the chance and who deliberately decided to kill his brother the deceased. I convict him of the offence of murder as charged and sentence him according to law to the mandatory sentence of death".

In arguing this appeal before us Mr. Omollo for the appellant submitted that the conviction was unsafe as there was no direct evidence to connect the appellant with the offence. He pointed out that none of the witnesses actually saw the appellant hit the deceased.

As regards the alleged confession by the appellant Mr. Omollo submitted that it was unsafe to rely on such confession as it was made to on investigation officer.

The third point in attacking the conviction of the appellant related to summing up to the assessors. Mr. Omollo faulted the trial court for not warning the assessors on the dangers of convicting on retracted confession. He was also of the view that the assessors ought to have given specific reasons for their verdict.

Lastly, Mr. Omollo argued that circumstantial evidence against the appellant could not satisfy the principles set out in the ***R v. Kipkering Arap Koske & Another*** (1949) 16 EACA 135.

Ms. Kwena the learned State Counsel supported the conviction on the ground that there was both direct and circumstantial evidence. In her view, PW1 was an eye witness to the commission of the offence. She pointed out that the evidence of Dr. Mandalya corroborated the evidence of PW1. Then there was the confession by the appellant. She invited us to consider the conduct of the appellant. She invited us to consider the conduct of the appellant of disappearing from the scene when he ran to the house of Assistant Chief.

The appellant comes to us by way of first and final appeal. It is our duty to re-evaluate the evidence

and draw our own conclusions but bearing in mind that we have neither seen nor heard the witnesses. In ***Gabriel Njoroge v. R*** (1982 – 88) 1KAR 1134 this Court said at p.1136:

"***As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law, to demand a decision of the court of the first appeal, and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and concludsions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R [1952] E.A. of 336, Ruwalla v. R [1957] E.A.570).***"

Bearing the above in mind we have to examine the evidence on record and make our own conclusion as was said in ***Okeno v. R*** [1972] E.A. 32. We observe that when the appellant came back home and found that his daughter had already been buried he was certainly unhappy about it. He nevertheless joined the family members in mourning his daughter in accordance with the local custom. On the fateful night all were around a fire when PW1 saw the appellant holding a big stick and bending over the deceased. The appellant then ran away as the other people around went to the assistance of the deceased whose head had already been crushed. There was the evidence of all those present to the effect that the appellant ran away to the home of the assistant chief. According to the Assistant Chief the appellant was alone when he went to see him but the appellant in his evidence said that he was accompanied by the son of the deceased. The son of the deceased who was PW1 did not support the appellant. The Assistant Chief stated that as a result of what the appellant told him, he visited the appellant's home and found Kenga Charo Kenga dead.

The appellant made a statement to Inspector Njau which statement amounted to a confession. The appellant however retracted the statement. Such statement requires corroboration 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 (see ***Tumamoi v. Uganda*** [1967] E.A. 84). The statement was rightly admitted in evidence but even if it had been excluded, there was other overwhelming evidence to prove the charge of murder.

Having considered both direct and circumstantial evidence in this case together with the retracted confession by the appellant, we are satisfied that the conviction of the appellant by the superior court was inevitable.

The upshot of the foregoing is that this appeal must be and is hereby dismissed.

Dated and delivered at Mombasa this 8th day of August, 2003.

R. S. C. OMOLO

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JUDG OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR