IN THE COURT OF APPEAL

AT MOMBASA

CORAM: OMOLO, O'KUBASU & GITHINJI, JJ.A.

CRIMINAL APPEAL NO. 88 OF 2003

BETWEEN

JOHN NDEGWA NJUGUNA

DAVID NJUGUNA KIIRU …… APPELLANTS

AND

REPUBLIC ……. RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa (Justice Waki) dated 13th November, 2001

in

H.C.CR.C. NO. 5 OF 1999)

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JUDGMENT OF THE COURT

The two appellants, ***John Ndegwa Njuguna*** and ***David Njuguna Kiiru,*** were convicted of murder contrary to ***Section 203*** as read with ***Section 204 of the Penal Code***.Each was sentenced to death as mandatorily provided by the law.

The facts of the case may be briefly stated.The deceased, ***Ingerborg Escoffey Wiesner*** and the 1st appellant John Ndegwa Njuguna (John) were either married or enjoyed a boyfriend/girlfriend relationship and were residing together in a rented house at Ukunda prior to the date (7th March, 1997) when the crime is alleged to have been committed.According to the evidence of Benjamin Muinde Masau (PW7) a salesman at Toyota Kenya, the deceased and the appellant John visited their showroom on 17th October, 1996 when the deceased identified a minibus *"matatu"* Nissan registration number KAD 313X.The purchase price was agreed at KShs.350,000/= and the deceased paid a deposit of KShs.300,000/= and Masau (PW7) issued her with a receipt.The balance of KShs.50,000/= was paid on 22nd October, 1996 by the deceased in the company of John.The vehicle was being operated as a passenger vehicle commonly known as a *"matatu"*.

On the 7th March, 1997 at about 7.55 p.m. the landlord of this couple (deceased and John) reported to Inspector John Muthuita Ndaiga (PW3) and PC Adego (PW1) that he had heard some groaning from the couple's house.As a result of this report Inspector Ndaiga led a team of police officers to the house in question.The police officers peeped

through the window and saw a body of a woman lying in a pool of blood.The police officers decided to break the main door to enter only to find that the woman was still alive.They lifted her in order to rush her to hospital but she died in their hands.They informed the D.C.I.O., Chief Inspector Jacob Katana (PW10) and O.C.S. Diani, Inspector Ndaiga and these two senior police officers joined the others at the scene of alleged crime.The police officers called scenes of crime personnel who took photographs of the scene.

The police noticed that there was a brake disc lying near the head of the deceased.There was also a spanner near the deceased.The brake-disc and spanner were blood stained with blood group B according to Government Chemist Judah George Lawrence (PW12).It should be pointed out that when the deceased's blood was tested, it was found to be of blood group B.Dr. Mandalya (PW1) conducted post-mortem examination on the body of the deceased and produced his report as Exhibit 1.Dr. Mandalya observed that internally eight ribs were fractured.The chest cavity was full of blood.The head was fractured on the greater wing of the skull and there was bleeding from two spots on the brain surface.In his opinion the injuries were caused by a blunt object and death was due to internal haemorrhage due to internal and head injuries.

The Police circulated the information about the death to all police stations in Coast Province.The Officer on duty at Voi Police Station, on receiving this information, relayed it to the Highway Patrol under the command of Cpl. Lacton Mwalimu (PW4).The police officers at the scene of crime had established the registration number of the matatu vehicle that the deceased and John had been operating.This vehicle registration number KAD 313X was nowhere to be found and so was John.That same evening at about 10.00 p.m. PC Newton Kirunya (PW6) was on normal traffic duties along Mombasa – Nairobi road when he stopped a vehicle registration number KAD 313X a Nissan *"matatu"*.The vehicle had three occupants.There was the driver of the vehicle, the second person in the middle seat and the third occupant in the rear seat.The way the occupants were sitting in that Nissan *"matatu"* surprised PC Kirunya (PW6) who immediately became suspicious.At that time Cpl. Mwalimu (PW4) arrived at the scene and the occupants in this vehicle KAD 313X which had been reported as stolen were arrested.The occupants were the two appellants and another person.Inside the vehicle were two bags which were later found to contain belongings of the deceased woman.The appellant John later led the police to a bush where he had thrown the deceased's passport.Further investigations revealed that the shoes of the 2nd appellant David Njuguna Kiiru (David) had blood stains of blood Group B - the same blood group of the deceased.

Both appellants were taken to Diani Police Station for further interrogation.On 13th March, 1997 Chief Inspector Katana (PW10) recorded a statement under inquiry from the 1st appellant.The statement was admitted in evidence after a trial within the trial.In that statement the 1st appellant gave a detailed explanation of his involvement in the killing of the deceased.His statement amounted to a confession.

When put to their defence each appellant elected to make unsworn statement.The 1st appellant told the trial court that he worked as a disc-jockey and he jointly owned a Nissan *"matatu"* with the deceased.On 7th March, 1997 he was picked up from their house by the driver of the matatu, one Francis Muchai and they went to work on the Ukunda/Likoni Ferry route leaving the deceased in the house with their house boy one Paul.After a few trips on that route they went into town during rush hour routes.At about 10.30 a.m. they saw passengers who wanted to travel to Voi and they picked them to Voi where they arrived at 1 p.m.From Voi they took some passengers to Wundanyi and by the time they returned from Wundanyi it was getting dark.At the Voi/Mombasa/Nairobi roads junction, they found traffic policemen who stopped them.The vehicle was searched but nothing was found in it.They were however, taken to Voi Police Station where the vehicle was detained.They were then transported to Diani Police Station where they were told about the murder charge.The 1st appellant concluded his unsworn statement by saying that he knew nothing about the murder as he had left the deceased alive and well and that they had never quarreled.

On his part, the 2nd appellant stated that on the morning of 7th March, 1997, he left Voi town and proceeded to Taveta as he was a dealer in second-hand clothes.He did not find anything to purchase at Taveta and so he left Taveta for Voi at 5 p.m.On reaching Mwatate, their vehicle broke down.He waited for another vehicle until 8 p.m. when he boarded a matatu.This vehicle was stopped by the police at the junction of Voi/Mambasa/Nairobi roads.The police asked where they were going and he said "Maungu".The Police arrested and took him to Voi Police Station.The following day he was taken to Diani Police Station where he was charged with an offence he knew nothing about.The 2nd appellant concluded his unsworn statement by saying that he did not know his co-accused, that is, the 1st appellant.

After final submissions by the appellant's counsel and the learned State Counsel, the learned trial Judge summarized the evidence and the law applicable to the assessors who returned a unanimous verdict of guilty for both appellants.

In a reserved judgment the learned trial Judge evaluated the evidence before him and in the end came to the conclusion that the two appellants were guilty as charged convicted and sentenced each of them to suffer death as prescribed by the law.

In convicting the appellants the learned trial Judge made the following observations in his judgment:-

> *"I believe the 1st accused led the police to the recovery of the passport of the deceased as explained by the Investigating Officer PW 10.The explanation by the two accused was that they were innocently at the spot at Voi where the Police say they arrested them.I do not believe them.In saying this I cast no burden on them to prove their alibi as there is no burden.It is for the prosecution to prove that they were at the scene of the crime when it was committed and not at any other place they claimed they were.Nevertheless, it would have been easy for the two accused to give a consistent account of their alibi between the time of the alibi warning given in their committal for trial and the time of their defence.The accounts given here are not consistent but it matters not.*
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> *I believe the prosecution evidence that at the point of their arrest at Voi the two accused persons were trying to make good their escape from Mombasa and were both found in recent possession of property belonging to the deceased.The chain of events at that point corroborates in material particulars the retracted confessionary statement of 1st Accused John.Taken together the entire evidence leads to one inescapable conclusion that the two accused jointly took part in the murder of deceased."*

Mr Obura who appeared for both appellants submitted that there was no corroboration of circumstantial evidence and that there was contradiction of the evidence of PW4 and PW10 as regards the manner in which the passport was recovered.He submitted that at the time of arrest none of the items listed by PW10 were recovered.Mr. Obura was of the view that the finding of recent possession of the goods of the deceased was not backed by evidence.

As regards the statement under inquiry it was Mr Obura's submission that the statement ought not to have been admitted in evidence as the 1st appellant alleged to have been tortured while in police custody.

As regards the 2nd appellant (David) Mr Obura contended that he was arrested at a road block and that there was no evidence that the pair of shoe with blood stains belonged to the 2nd appellant.

In conclusion Mr. Obura argued that there was no eye witness to the commission of the offence and that malice aforethought was not proved.

In supporting the conviction of the two appellants, counsel for the Republic, Mr. Ogoti submitted that evidence of serious injuries on the deceased was sufficient to establish malice aforethought.He submitted that the two appellants were found in possession of goods stolen from the deceased and that they (both appellants) were trying to make good their escape from Mombasa.

The appellants come to us by way of first appeal.It is, therefore, 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 Njorogev.R [1982-88] 1 KAR 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 conclusions 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 **Pandyav.R [1957] E.A. 336, Ruwallav.R [1957] E.A. 570)**".*

From the outset we wish to observe that in this case the prosecution relied on circumstantial evidence as there was no eye witness to the commission of the offence.Indeed in his opening address before the trial court, the learned State Counsel is recorded to have said, inter alia:-

> *"Prosecution case is that the accused were solely responsible for the death.The post-mortem showed deceased had been assaulted.We will produce the murder weapon.We will rely on circumstantial evidence.Witnesses will also testify that there was a dispute over the vehicle".*

In this case, there can be no dispute that the 1st appellant and the deceased cohabited as husband and wife and that during that cohabitation they acquired a Nissan *"matatu"* which they operated along Ukunda/Likoni route.It was the deceased who paid for the purchase price of this vehicle.It is to be noted that on the material evening of 7th March, 1997 the deceased was seriously assaulted which led to her death.The 1st appellant as a husband who would have been, in normal circumstances, at home was nowhere to be seen and the vehicle KAD 313X was also not parked at home as had been the practice.It would appear that the 1st appellant was the immediate suspect.As a result of this incident the information was circulated to all police stations in Coast Province.This was picked up by Voi Police Station who alerted the traffic police along Mombasa-Nairobi road.According to prosecution evidence, the appellants with one other person were found traveling from Mombasa towards Nairobi in a vehicle registration number KAD 313X.This is the same vehicle that the deceased and 1st appellant had been operating as a *"matatu"*.According to the 1st appellant he was innocently operating the vehicle as a *"matatu"* when they were arrested at the police road block.As far as 2nd appellant was concerned he was an innocent passenger in that vehicle.But prosecution relied on circumstantial evidence to the effect that this vehicle which belonged to the deceased was intercepted at Voi and in it were various items which belonged to the deceased.It is important to consider the time factor.The deceased was found groaning at about 7:50 p.m. on 7th March, 1997.She died immediately thereafter.That same evening at about 10 p.m. the two appellants are found in the Nissan *"matatu"* registration number KAD 313X.In that vehicle, the police recover a large number of property belonging to the deceased.Then the 1st appellant makes a statement to the police in which he makes a confession to having committed the offence.The 2nd appellant's shoes are found with bloodstains of blood group B which is the same blood group as the deceased.It is these pieces of evidence that the trial court considered and came to the conclusion that the two appellants were guilty.The chain of events was such that the deceased is found groaning as a result of freshly inflicted severe injuries which led to her death and only about two to three hours later the two appellants are found in possession of the deceased's property including her passport about 100 miles away at Voi.The two appellants were in a vehicle KAD 313X which vehicle belonged to the deceased.Each appellant gave explanation as to how he came to be in that vehicle at the road block and the trial court considered their explanations but rejected them.

In **R.v.Taylor, Weaver and Donovan [1928] 21Cr. App. R. 20)** the principle as regards the application of circumstantial evidence was enunciated in these words:-

> *"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.It is no derogation of evidence to say that it is circumstantial".*

And the requirements for conviction in a case dependant wholly on circumstantial evidence was set out in **R. V. Kipkering arap Koske and Another [1949] 16 EACA 135 at p. 136** in which the Court of Appeal quoted from **WILLS ON CIRCUMSTANTIAL EVIDENCE** (6th Edn p. 311):-

> *"In order to justify 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 guil*

In the present case, the two appellants were found in recent possession of the property belonging to the deceased in the circumstances suggesting that they were escaping from Ukunda (the scene of crime) towards Nairobi.

There was the issue of retracted confession by the 1st appellant.On this we would point out that in **Bakari Omari and John Martha Komorav.R. [1983] 1 KAR 349** this court citing **Tuwamoiv. Uganda [1967] E.A. 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.*

We would observe that the 1st appellant's statement under inquirywas a very detailed account of what took place and hence it was only the 1st appellant who was in a position to provide those minute details.We are satisfied that the statement was properly admitted.We further observe that if corroboration was needed, this was readily available from the 1st appellant's own conduct for example, leading the police to where the passport of the deceased was found in the bush and from independent testimony of other prosecution witnesses.The second appellant's shoe was found to be stained with blood of same group as that of the deceased.There is no available explanation as to how the blood-stain came to be on his shoe and the only logical explanation is that he was at the scene of the murder.It is to be remembered that the judge and the assessors rejected his explanation that he was a mere passenger in the deceased's vehicle.

On our part, we have re-evaluated the evidence as recorded by the learned trial Judge and having given it fresh and exhaustive examination come to the same conclusion as did the learned trial Judge, and the assessors.

In conclusion, we are of the view that having considered both direct and circumstantial evidence in this case together with the retracted confession by the 1st appellant, we are satisfied that the conviction of the appellants by the superior court was inevitable.Accordingly, this appeal must be and is hereby dismissed.

Dated and delivered at Mombasa this 22nd day of November, 2003.

R.S.C. OMOLO

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JUDGE 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