



**IN THE COURT OF APPEAL
AT NAIROBI**

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

CRIMINAL APPEAL NO. 94 OF 1991

BETWEEN

GEOFFREY MUTHOKA MUNYAO APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Mr Justice Mango)
dated 12th August 1991**

in

HCCrC No 4 of 1990)

JUDGMENT OF THE COURT

The appellant, Geoffrey Muthoka Munyao, was convicted, after a trial, of murder contrary to section 203 as read with section 204 of the Penal Code and was thereafter given the mandatory death sentence. The particulars contained in the information were that on the 9th day of November 1988 at Makongeni Estate Nairobi within the Nairobi Area jointly with others not before the court, the appellant murdered John WekesTah eW astirkiea.l of the appellant commenced before the late Mango, J. with the aid of assessors, on 30th May 1991 and the judgment delivered on 12th August 1991 when the appellant was sentenced to death.

The prosecution case was that the deceased was a young man aged about 19 years who lived with his mother, Mary Paskaline Wandiru (PW 10) at Zimmerman in Nairobi but at times the deceased used to stay with his friends at Mbotela. On 26th October 1988 Wandiru came back home and was informed by her children that two young men had been looking for the deceased. Wandiru became inquisitive on being informed that the two young men had stayed in her house for a long period. Her daughter Julie Shire Wasike (PW 8) then aged 12 years had come back from school and found the two young men who introduced themselves as Geoffrey and Adiwa. Julie was able to recognize the appellant as one of the young men who had introduced himself as Geoffrey. Then on 28th October, 1988 at about 7.30 p.m. the appellant visited that home again where he was seen by Julie. On 30th October 1988 which was a Sunday Julie saw the appellant and Adiwa at their gate at about 8.00 a.m. On 9th November 1988 at about 8.00 p.m. Tabitha Ndunge Kioko (PW 5) was at her house within Mbotela Estate when three men visited her.

She was selling liquor (changaa). Out of the three men she recognized the appellant and the deceased whom she knew. It was the deceased who paid for the liquor that the three young men consumed. The following morning (10th November 1988) Cpl. Francis Muthee (PW 3) received a report from members of the public that a dead body was lying in the drainage. As a result of that report Cpl. Muthee proceeded to the scene within Makongeni Estate where he found the dead body under a bridge. He called scenes of crime personnel who took photographs and the body was removed to the City Mortuary where postmortem examination was performed after the body had been identified by the relatives of the deceased.

According to the postmortem report the cause of death was chest injury with lung and liver perforations consistent with assault with a sharp instrument. A few days later the appellant was arrested on 19th November 1988.

While in police custody the appellant gave a detailed inquiry statement in which he admitted having been involved in the commission of the offence but he repudiated that statement during the trial. The inquiry statement was however admitted in evidence after a trial within a trial.

When put to his defence the appellant elected to give evidence on oath. He testified that he was arrested on 19th November 1988 along River Road where he had gone to buy clothes. He was taken to Kamukunji Police Station where he was locked up as a suspect for theft. He was taken to Makongeni Police Station where he denied having murdered anybody. From there he was taken to Buru Buru Police Station and then to an Inspector of Police who gave him blank papers to sign showing that he was to be examined at Mathari. He told the Inspector that he knew the deceased as they used to play soccer at Mbotela Estate.

The learned trial Judge having considered the evidence before him came to the conclusion that the appellant was guilty as charged and hence proceeded to impose the mandatory death sentence. We should point out that each of the three assessors returned a verdict of guilty.

Mr. Kiage, who appeared for the appellant in this appeal, submitted that the learned trial Judge erred in admitting the appellants's retracted confession and that the trial court ought to have accepted the appellant's version to the effect that he signed blank papers. The second ground of appeal was argued to the effect that while the learned trial Judge was correct in saying that the appellant's statement needed corroboration he erred when he made a finding that previous visits by the appellant to the deceased's home provided such corroboration.

Mr. Kiage then went on to argue that there was no direct evidence implicating the appellant and that there was only circumstantial evidence against the appellant. In his view, circumstantial evidence in this case might have been strong but it did not irresistibly point to the appellant.

Lastly Mr. Kiage submitted that there was no "mens rea" proved as malice aforethought was displaced by the fact that there was a possibility of a fight in which one Adiwa was also involved. Mr. Kiage urged us to consider a conviction on a charge of manslaughter.

We have set out what we considered as salient points in this case and it is now clear that the appellant's conviction was based on circumstantial evidence and his own confession which he later retracted during the trial. It is so because there was no eye witness account on how the deceased was killed. The record shows that a few days before the death of the deceased the appellant and his companion Adiwa had visited the home of the deceased in Zimmerman. The appellant and Adiwa made several visits to Zimmerman looking for the deceased. Then on 9th November, 1988 the appellant, the deceased (and possibly Adiwa) were buying changaa at the house of Tabitha (PW 5) at Mbotela Estate. It was the deceased who paid for the liquor. Tabitha testified to the effect that she knew the deceased well and she was able to recognize the appellant, that evening. Then the following morning the deceased's body is found with stab wounds. The appellant and his companion Adiwa were nowhere to be seen. When the appellant was arrested he gave a detailed account on how they had stolen some money as they assisted in pushing a bread van along Jogoo Road. The appellant explained how the deceased took the money and how the appellant and Adiwa visited the home of the deceased severally. In that statement the appellant

explained how on the same night the appellant and Adiwa started beating the deceased and then left him bleeding in a water channel.

The inquiry statement recorded by the appellant was detailed and placed the appellant at the scene of crime. It makes him the culprit. But when the case went for trial the appellant denied having made that statement. The law relating to retracted and repudiated confession was stated in Tuwamoi v. Uganda [1967] EA 84 at P.91 as follows:

"We would summarize the position thus - a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the 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".

In the present case the confession by the appellant refers to visits to Zimmerman in search of the deceased. Then there is reference to the visit to Mbotela where the appellant and his colleagues bought liquor. There is evidence from Tabitha that she saw the appellant in the company of the deceased and one other young man at about 8.00 p.m. on 9th November, 1988 when she was selling liquor to them. All these pieces of evidence provide the necessary corroboration. There was complaint that inspector Ngatia having been involved in the investigation of the case ought not to have recorded a statement from the appellant. We agree that it would be undesirable for the investigating officer to record a statement under charge and caution which turns out to be a confession from an accused person in this case the statement was one under inquiry and Inspector Ngatia was entitled to record it. In our view the appellant's statement was so detailed that it was enough to be acted upon and to secure the appellant's conviction without corroboration. But as we have already demonstrated there was ample corroboration.

As already indicated earlier in this judgment the appellant's conviction was also based on circumstantial evidence. We have shown how prior to the deceased's death the appellant and his colleague (Adiwa) made frequent visits to Zimmerman's home of the deceased. Then the three young men are seen on the fateful day consuming changaa at the house of Tabitha who knew the deceased well and was able to recognize the appellant. That same night the deceased is killed and his body is found dumped in a drain in Makongeni Estate adjacent to Mbotela Estate where the three young men had been consuming the illicit liquor. Taking the sequence of events from the visits to Zimmerman through Mbotela Estate where illicit drink was consumed and then over to Makongeni Estate where the body of the deceased was recovered ending up with the disappearance of the appellant and Adiwa, surely there cannot be any other reasonable hypothesis than that it was the appellant who was involved in the unlawful act. As stated in Blackstone's Criminal Practice, 1995 Edition F1, 10 at p.1777

"Circumstantial evidence is evidence of facts from which the existence or non -existence of facts in issue may be inferred. It 'works by cum ulatively in geometrical progression, eliminating all other possibilities'. It is however necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co -existing circumstances which would w eaken or destroy the inference".

This Court alluded to the foregoing in a recent decision in Moses Mwangi Ngugi v. Republic - Criminal Appeal No.51 of 1997 (Unreported).

And in the often cited case of Kipkering Arap Koske and Another v. Rex (1949) at E.A.C.A 135 at p. 136 the Court of Appeal for Eastern Africa had the following observations:-

"As said in Wills on 'Circumstantial Evidence' 6th Edition p. 341 in order to justify the inference of guilt the inculpatory facts must be incompatible with the in nocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving

facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused".

We are satisfied upon a careful analysis that the circumstantial evidence and the retracted confession by the appellant in the instant case do irresistibly point to the appellant as one of the people who inflicted the fatal injury upon the deceased.

Before we conclude this judgment we must consider the issue of mens rea. According to the inquiry statement recorded by the appellant the deceased died as a result of a fight between the three young men - appellant, deceased and Adiwa.

Since these were young men who had taken strong illicit drink known as changaa there is merit in Mr. Kiage 's argument that since death was as a result of a fight then a conviction of manslaughter ought to have been preferred and the learned Judge erred in not having put it to the assessors during the summing-up. We accept that argument particularly in view of the fact that the learned Judge did not direct his mind or that of the assessors to this aspect of the matter and we now substitute a conviction of manslaughter contrary to section 202 as read with section 205 of the Penal Code in place of murder contrary to section 203 as read with section 204 of the Penal Code. We impose a sentence of 15 years imprisonment which sentence shall run from the date the appellant was convicted by the High Court. Those shall be our orders.

Dated and delivered at Nairobi this 2nd day of August, 2002.

R.S.C.

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OMOLO

JUDGE OF APPEAL

P.K.

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TUNOI

JUDGE OF APPEAL

E.O.

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O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR