IN THE COURT OF APPEAL

AT NYERI

(CORAM: CHUNGA CJ, SHAH & OWUOR JJ A)

CRIMINAL APPEAL NO 112 OF 2002

BETWEEN

JACOB NJUKI WARUI Alias WAMWEA WARUI.............APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from a judgment of the High Court at Nyeri, Juma J, in High Court Criminal Case No 1 of 1998 dated 24th February 2000)

JUDGMENT OF THE COURT

The appellant, Jacob Njuki Warui alias Wamwea, was tried, found guilty and convicted by the High Court (Juma, J) sitting at Nyeri upon an information which charged him with murdering James Mukono Kiige (the deceased) on 9th August, 1996 at Kiriti village in Kirinyaga District within Central Province, contrary to sections 203 and 204 (as read together) of the Penal Code, Cap. 63 Laws of Kenya and was duly sentenced to death.

The facts leading to the conviction are that the deceased left his home at Kiriti village aforesaid on the morning of 9th August, 1996 never to return. Efforts to trace the deceased's whereabouts on 10th August, 1996 came to nought. His body was eventually found floating in the Tana River on 12th August, 1996. The appellant was the last person seen in the company of the deceased on 9th August, 1996. On that day the deceased visited the premises of Jacinta Wangithi Maina (PW7) (Jacinta) who was selling local brew known as '*Muratina*'. He was accompanied, according to Jacinta, by the appellant. They came there at about 5.00 pm. Both had a cup of '*Muratina*' each. One James Mwangi Gititu (PW4) (Gititu) joined them, had a drink and left them. The appellant and the deceased after taking some time over their drink left Jacinta's place together. The fact that the appellant and the deceased drank together at Jacinta's place was confirmed by Gitutu who was the deceased's cousin. Although the sequence of Gitutu's arrival at Jacinta's place is different it is a fact that the deceased and the appellant were drinking together at Jacinta's place. Jacinta said that Gititu arrived whilst the deceased and the appellant were having their drink whereas Gititu stated that they came when he already had one drink and had ordered a second one. The common factor, evidentially, however, is that Gititu left the two drinking at Jacinta's. After that the deceased was never seen alive again.

The appellant confirmed to the deceased's wife Consolata Wambuchi Mukono (PW2) (Consolata) that he was with the deceased at 6.00 pm on 9th August, 1996. He also confirmed that Gititu had joined them for a while. Consolata stated that whilst the search for the deceased was on, she was told by James Murithi Kibunya, who was the second accused in the trial, not to look for the deceased as his body was seen being

dragged towards the river from near the house of one Kiama Daudi. He did not tell her who was seen dragging the body. He also did not tell her whether the deceased was then alive or dead. Consolata went to the scene, followed the track (presumably caused by the dragging), saw the deceased's underpants 'floating in the river', held by a stick. The body, as pointed out earlier was found floating in River Tana on 12th August, 1996.

Simon Kamendi Warui (PW5) (Simon) is the deceased's nephew. The appellant is his brother. Simon and the appellant lived in the same house in two rooms and the access to the appellant's room is through Simon's room. Simon testified that the appellant left home on 9th August, 1996. He was then clothed in a yellowish long-sleeved shirt, faded jeans and white shoes. According to Simon, the appellant left to apply mud to the deceased's house. This was presumably on 10th August, 2002.

Lawrence Mwangi Kariuki (PW6) (Lawrence) who was an Assistant Chief of Thigirishi sub-location and under whose jurisdiction Kiriti village fell was taken to the scene of dragging by Consolata and there he saw a trail of blood. Lawrence later recovered a watch near the appellant's house. The watch belonged to the deceased, according to Consolata.

Constable George Macharia (PW10) went along with Consolata and Simon when they identified the body of the deceased at Muranga Hospital. He requested the doctor to take blood samples for ascertaining the deceased's blood group. He passed the samples on to Inspector Karuma, the investigating officer.

A Government Analyst, Simon Adubi Atebe (PW12) found that the deceased's blood group was 'O' and that the accused's blood group was 'B'. The soil sample he examined showed traces of blood group 'O'. The white shoes (North Star) and the faded trouser he examined had traces of blood group 'O'. The blood group 'O' is relevant for the purposes of this appeal and we will revert to it later on in the course of this judgment.

Simon Karumbi (PW13), an inspector of police who was then the Deputy OCS Sagana Police Station visited the scene of dragging of the body. He saw bloodstains there. He concluded that the trail was caused by dragging of a body. The trail led to the home of the appellant and continued some 20 yards from there to the home of the second accused Kubunya. The said wristwatch was collected from there. The trail ended at the river bank. So it is apparent that the trail began some 20 yards before the appellant's house and ended in the river. He went to the appellant's house where he heard the appellant say in Kikuyu language "*Kai ndi mukigu*" meaning *"how silly I am"*. In the house Inspector Karumbi recovered a pair of North Star white shoes and blood stained jeans as well as a jacket with Bob Marley monogram, a shirt and a metal pipe. He then proceeded to the house of the second accused where he took possession of a pair of blue jeans as well as a shirt. All these were given to the Government Analyst whose findings, so far as material, we have already mentioned.

Inspector Karumbi then recorded a statement under inquiry from the appellant, the production whereof was objected to by the defence, but admitted after a trial within a trial. The statement under inquiry is a detailed one. The appellant did state therein that he was with the deceased at Jacinta's place, that he talked to him. Even James, he says, was there. He explains how he was to be paid to kill the deceased by one Eliza Muceeru. He caught up with the deceased near Kibe's place. In material part he says:

> *"Muceeru hit him with the stick he had and he fell down on the road. He screamed once and asked us why are you hitting me. We all of us then attacked him and beat him and dragged him into a nearby bush and killed him. After he died we then pulled him heading towards Tana River and when we neared the house of Muriithi, two ladies stopped there to wait for us there. We then dragged his body to the river Tana just near the place where we had been drinking chang'aa, for (sic) his clothes were torn we removed his clothes and then threw him into the river and also his clothes."*

We have re-evaluated the evidence as we are bound to do on a first appeal. The evidence connecting the appellant with the murder is purely circumstantial and this factor was duly appreciated and noted by the learned judge.

Mr. Kahiga who appeared for the appellant raised two grounds of appeal as follows:

> *1. That there was no proof beyond reasonable doubt.*
>
> *2. That the superior court analysed the circumstantial evidence wrongly. He stated that this ground would include his arguments on the retracted confession.*

The crux of Mr. Kahiga's argument is that there was no cogent evidence to show that the appellant was the last person seen with the deceased before he met his death. He urged that between the time the two were together and the time or date the deceased died there was a gap sufficient enough to raise a doubt in that it was not clear how the two parted company. He further urged that the actions of the appellant after the two met were such as to raise a presumption that the appellant was innocent. If he was guilty why should he help in applying mud to the deceased's house or why should he behave normally, he argued. The appellant's conduct after 6 pm on 9th August, 1996 was not that of a guilty person, he urged. The deceased could well have met his death long after the two of them parted company.

At this stage it becomes necessary to inquire into the sequence of events after discovery of the death. The police found in the appellant's house shoes which obviously belonged to the appellant. One of the shoes had traces of blood group 'O'. By itself this factor cannot lead to conviction but when looked at overall, the question that arises is: why should the shoe be blood stained unless the appellant took part in the killing? This evidence circumstantially incriminates the appellant coupled with the confession even though retracted. The remark *"how silly I am"* sounds innocuous enough if considered in isolation but when looked at in all the circumstances of the case suggests that the appellant was lamenting the fact that he did not dispose off incriminating evidence. The retracted confession is corroborated by the finding of the shoe in question as well as a pair of blood stained trousers. If the appellant had nothing to do with the murder he would not have had in his possession such incriminating evidence.

It was urged that the learned judge did not take into account the retracted confession in convicting the appellant. It is so. The learned judge makes no reference thereto in the judgment. However, the fact of the appellant having been the last man with the deceased whilst he was alive coupled with the finding of incriminating evidence was, in our view, sufficient to support the conviction. Although the learned Judge overlooked the retracted confession in delivering his judgment it was in evidence before him and he must have had it in mind when he said:

> *"Having considered the evidence before me I am satisfied that prosecution has proved its case beyond reasonable doubt—"*

Mr. Oluoch, Senior Principal State Counsel, who appeared for the Republic at first conceded that the appeal ought to be allowed as the retracted confession was made to an investigating officer. In so stating he relied on the case of *Karura v. Republic* (1982-1988) KAR 1165 wherein this Court held that an Investigating Officer should not record a confession statement by an accused person so as to avoid any charges of tailoring evidence to support the prosecution case and allegations of use of force upon the accused to extract the confession. The decision of this Court in the *Karura* case has been held to have been made *per incuriam*. The Court's attention was not drawn to the famous case of *Bassan and Wathioba vs. Regina* [1961] EA 521. The predecessor of this Court said at 533:

> *"We certainly do not think that the court in Njuguna's case (1954) 21 EACA 316 at 322), intended to lay down a rule of law that a statement recorded by an investigating officer upon charge and caution of a suspect is to be automatically excluded from evidence. Nor do we think that the court in Israel's case (1956) 23 EACA 52 at p 521), can have intended to say that it is necessarily improper for an investigating officer to take any statement from a suspect. If it did, we must respectfully dissent. There may be many suspects in the early stages of an investigation into a case, and it is hardly a practicable proposition that a fresh and independent police officer should be procured to take a statement from each."*

Mr. Oluoch promptly retracted the concession and went on to argue at some length the appeal in opposing

it and we think he eventually took correct action. There was some criticism leveled at the learned judge for not giving sufficient reasons for admitting the retracted confession. There is merit in this criticism but eventually nothing turns on that. The confession is sufficiently detailed and tallies with the movements of the appellant so as to make it properly admissible. Additionally, we are satisfied that it was voluntarily made by the appellant and was correctly admitted in evidence.

We would have liked to see proper reasons advanced by the learned Judge for admitting the retracted confession and we do recommend that in future this be done. We would also have preferred to have the learned Judge's views on how the retracted confession is corroborated. However, as a first appellate court it is within our province to re-evaluate the evidence in its entirety which we have done and we are of the view the confession corroborated by circumstantial evidence as pointed out by us earlier clearly proves the case beyond reasonable doubts against the appellant. Accordingly, we find no merit in the appeal and we order it dismissed in its entirety.

Dated and delivered at Nyeri this 13th day of December, 2002

B. CHUNGA

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CHIEF JUSTICE

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR.</u>