IN THE COURT OF APPEAL

AT KISUMU

(Coram: Chunga CJ, Lakha and Owuor JJ A)

CRIMINAL APPEAL NO 56 OF 2001

CHAOL ROTIL ANGELA ……. APPELLANT

VERSUS

REPUBLIC…..……..…….....…….. RESPONDENT

(Being an appeal from the decision and Judgment of ICC Wambilyangah J dated 25th July, 2000 at Kisumu in HC Criminal Case Number 7 of 1994)

JUDGMENT

This is a first appeal from the judgment of ICC Wambilyangah J dated 25th July, 2000 in the High Court of Kenya at Kisumu. The appellant, Chaol Rotil Angela was charged, prosecuted, convicted and sentenced to the mandatory death penalty for murder charge contrary to section 204 as read with section 203 of the Penal Code cap 63 Laws of Kenya (to be referred to as the appellant). The particulars of the charge averred as follows:-

"Chaol Rotil Angela: On the 30th day of May, 1992, at Sigomere sub-location Siaya district of the Nyanza province Kenya, jointly with others not before the Court, murdered Benedetta Consolata Oketch".

The appellant, pleaded not guilty to the charge and his trial eventually followed and there is a background history thereof, which we do not find necessary to go into for purposes of the appeal before us. Suffice it to say that, after the background history, Wambilyangah J on 26th January, 1996 ordered the hearing to start afresh (*de novo*) before himself. The hearing did duly start and ended in the appellant's conviction and sentence as already stated. We shall, accordingly, in this judgment, confine ourselves to proceedings before Wambilyangah J.

The basic facts found by the learned trial judge may be set out as follows:- The deceased Benedetta Consolata Oketch was a widow whose husband died either in 1988 or 1989 (hereinafter referred as the deceased). After the death of her husband, the deceased remained and continued to live at their rural family home in Sigomere sub location, Uholo location of Siaya district in the Nyanza province.

According to the evidence, the deceased had substantial properties left to her by her late husband. These included a commercial property at the nearby Sigomere market, a lorry, a parcel of land at Mumias, and livestock like goats and cows.

Apart from herself, the deceased lived in the family home together with her son one John Odhiambo

Oketch who gave evidence in the trial as prosecution witness number 1 (to be referred to as PW1). He was a single man, having not taken a wife for himself despite, according to evidence,some prompting and encouragement from his mother the deceased. He had his own house within the family home.

The appellant was a domestic servant employed by the deceased in 1990 (to be referred to as the appellant.) His main work was to tend the home and look after the livestock. He was provided with and staying in the servant quarters within the deceased's homestead.

At the commercial property at the market place, there was evidence that the deceased had employed another servant whose name was given as Edwong. He was staying in a room behind the shop but disappeared after the deceased's murder.

On 30th May, 1992, PW1 left home at about 5.00 pm for Sigomere market. He remained at the market until 10.00 pm when he returned home. He found the two gates to the home locked, and he jumped over and entered the home. All the electricity lights at the gates and within the home were on.

Immediately PW1 entered the home, the appellant called him and told him that one of the big he-goats had died. The appellant, by this time, was at the cowshed where PW1 was able to see him clearly under the security lights. The appellant asked PW1 to go and see the dead goat at the goatpen. PW1 then walked up to the cowshed where the appellant was. He asked the appellant to show him the dead goat, whereupon, the appellant suddenly struck him twice with an object on the right shoulder. A struggle ensued between them in the course of which PW1 freed himself and took flight towards the deceased's house. As he did so, he saw the appellant take flight towards the gates.

On reaching the main house, PW1 found the lights on. He pressed the alarm bell but, did not see or receive any response from the deceased. Suspecting that something serious may have happened in the home, PW1 fled to the nearby home of his uncle one Zachary Okongo who gave evidence in the trial as PW5 (to be refered to as PW5).

PW1 found PW5 present. He told PW5 what had happened and the two of them proceeded to the nearby Sigomere Police Post to make a report. Accompanied by one police officer from the police post, PW1 and PW5 returned to the deceased's home. They found the two gates to the home were still locked. PW1 and the police officer jumped over the gates and entered the home. PW5 remained at the outer gate because he was unable to jump over the gates.

The police officer who accompanied PW1 and PW5 to the deceased home that night, gave evidence at the trial as PW2 (he will be referred to accordingly). He was the first police officer to arrive at and examine the scene. He previously knew PW1. He also, previously knew the appellant because the appellant used to deliver milk to him and other police officers at the police post. In fact, he gave evidence that he had, earlier that evening, seen the appellant though he was not asked to explain where he saw the appellant.

Having entered the home with PW1, PW2 examined the scene and described what he saw in his evidence at the trial. In the appellant's quarters, where he was led by PW1, they found some items which PW1 said were his properties. The appellant was not in his quarters and was not anywhere in the homestead.

From the appellant's quarters, the witnesses proceeded to the deceased's house where they looked for her in all the rooms and eventually found her lying dead in a pool of blood near one of the outer doors. PW2 observed a cut wound at the back of her neck which was nearly severed. PW1, PW2 and PW5 returned to the police post. PW2 then telephoned Ukwala Police Station to inform the OCS what had happened. Eventually, transport was organized and PW1, PW2 and PW5 proceeded to Ukwala Police Station to collect the OCS. However they found the Deputy OCS Inspector Abdullah who gave evidence at the trial as PW6 (to be referred as the Deputy OCS.)

The witnesses collected the Deputy OCS and with other police officers they returned to the deceased's home at or about 4.30 am. The two gates were still locked. The police officers broke the two gates and all entered the home.

The Deputy OCS observed the scene and gave evidence of his observations at the trial. His observations were substantially, the same as PW2s observations of the scene. He drew a sketch plan of the scene and carried the deceased's body to Siaya District Hospital Mortuary.

On 31st May, 1992 the Deputy OCS received further information from Sigomere Police Post. As a result of this, he made another visit to the deceased's home on that day. He found another dead body of a female adult in the home. The body was identified to him as that of Cecilia Wandu Muruka. It was in one of the unoccupied houses in the homestead. It had several stab wounds and the right hand was almosts severed. The Deputy OCS drew another sketch plan and transported the body to Siaya District Hospital Mortuary. It was in evidence that throughout the visits to the deceased's home, the appellant was not there.

Subsequently, post-mortem examination was done on the body of the deceased by one Dr FO Ramolo at the Siaya District Hospital. At the trial, the doctor was not immediately available to give evidence and, therefore, the post-mortem examination report was produced by the then OCS Ukwala Police Station PW8. It was marked exhibit 3 and showed that the deceased suffered several cut wounds on various parts of the body including the right arm and the neck which, according to the report, was a complete decapitation.

As a result of these serious cut wounds, the doctor concluded that cause of death was:-

" Cardiopuliminory arrest due to severed cervical spine caused by cut with sharp object."

On 19th November, 1991, the appellant was arrested at Mumias by Police Constable Stephen Sigilai accompanied by another officer. The two officers were based at Sigomere Police Post and, had known the appellant previously because he used to supply them with milk from the deceased's livestock.

The appellant was escorted to Ukwala Police Station and placed in police custody. At about 4.00 pm the same day, the OCS Ukwala Police Station (PW8), recorded an extra-judicial statement under charge and caution from the appellant. This statement was in respect of the deceased Beneditta Consolata Atieno Oketch only, the mother of PW1. When the statement was tendered in evidence by the prosecution through PW8, the appellant through his advocate, objected to its admissibility.

Because of the objection to the statement, the learned trial judge held a trial within a trial in which the prosecution called two witnesses namely, the OCS who recorded the statement from the appellant, and a Police Corporal one Augostine Mwakio who escorted the appellant from the cells to the office of the OCS and back to the cells.

The appellant gave a sworn statement and called no witnesses. His main contention was that he was slapped and kicked as he was being put in the cells at about 4.00 pm. After 30 minutes in the cells, he was taken to the office of the OCS where he was forced to thumb print on a document without knowing the contents thereof.

Another extra-judicial statement was tendered in evidence by the prosecution. It was recorded from the appellant by one David Wafula Situma, a retired Police Inspector, who, at the time of the statement was attached to Ukwala CID at Ukwala Police Station. He gave evidence at the trial as PW7 and will be referred to accordingly in this judgment.

On the 1st of December, 1992, PW7 was in his office at the police station. He received a message as a result of which the appellant was escorted to his office. On talking to the appellant, he realized that the appellant was desirous of making a further statement to clarify the earlier statement he had made to the OCS Chief Inspector Ndiema (PW8). Accordingly, PW7 not only cautioned the appellant afresh, but also, reminded the appellant of the earlier caution administered by Chief Inspector Ndiema (PW8) on 19th November, 1992 when the appellant made the first extra-judicial statement.

Having been so cautioned, the appellant proceeded to make a statement which PW7 headed thus: -

" Further statement of accused – Athumani Chaol Rotil Angela."

When the prosecution, through PW7, tendered the further statement in evidence at the trial, objection was taken to its admissibility by the appellant's advocate.

Another trial-within-trial was held in which the prosecution called one witness only namely, PW7. The appellant made a sworn statement in which, once again, he alleged having been beaten by kicks and slaps when he was being placed in the cells on the day of arrest 19th November, 1992. Later he was taken to an officer who threatened to kill him if he did not make a statement. The officer said his name was Inspector Wafula. The appellant claimed he was beaten for three hours and threatened with death. Inspector Wafula then forced him to thumb print a document.

After examining the evidence led before him by both sides carefully, the trial judge rejected the appellant's allegations of beating. He found the OCS (PW8), Inspector Wafula (PW7) and Corporal Mwakio truthful witnesses and he also found that the two statements were made by the appellant voluntarily. Accordingly, he admitted the statements in evidence.

Thus, there were two extra-judicial statements produced at the trial against the appellant. At the beginning of the hearing of this appeal before us, there was some dispute between counsel for the Republic and for the appellant as to the number of statements produced in evidence. We have examined the record carefully and we can find no more than two statements. They were recorded by the OCS Ukwala Police Station (PW 8) on 19th November, 1992 and by retired Inspector Wafula (PW7) on 1st December 1992 respectively. We find no evidence of any other statement having been made or produced at the trial. Indeed, both counsel, at the end of their submissions, seemed agreed that there were only two statements.

There was also some dispute as to the nature of the second statement made by the appellant to Inspector Wafula. Counsel for the appellant, referred to it as an inquiry statement. Counsel for the Republic, was of the same view.

The statement of the appellant to the OCS (PW8) was not an inquiry statement. It was a "charge and caution" statement. When therefore, the appellant was recording a further statement, it could only be a further statement to the said charge and caution statement. Indeed, in the body of the second statement itself, there is no reference whatsoever to an inquiry statement. The two statements were, in our opinion, charge and caution statements. Even the trial judge in his judgment treated them as such when he said:

"It is in this regard that I find that the two charge and caution statements made by the accused to the policemen where he fully admitted his participation in the crimes committed against the two women to be true."

At the conclusion of the prosecution case the appellant was placed on his defence. He elected to and did give a sworn statement in which, he denied the commission of the offence. He claimed that he was employed in Siaya district in Ukwala division, Uholo location in July 1988 by the deceased. He further claimed that he worked until mid 1991. He claimed that at the time he was leaving, he had been paid all his money. After leaving, he went to his home at a place called Lokiriama which, we understand, is in Turkana district. In 1992, the appellant further claimed, he went to Mumias to see a sick cousin of his. He stayed with the cousin for a while and, on a certain Thursday, when at a local posho mill within Mumias, some four police officers came and arrested him. He was escorted to Ukwala Police Station where he was slapped and kicked as he was placed in the cells. He concluded his statement by repeating his allegations, in the two trialswithin- trial to the effect that he was beaten by police officers.

On 25th November, 1999, the learned trial judge summed up the case to the assessors. He set out, in the fullest possible details, all the evidence for both sides. He directed the assessors on the law pertaining to the offence charged. Thereafter, the assessors retired to consider their opinions. After due consideration of the summing up and the evidence tendered before them, the assessors returned a unanimous opinion that the appellant was not guilty of the charge. They gave their reasons which showed that they believed the appellant's *alibi* defence.

The learned trial judge reserved his judgment which, he eventually gave on 25th July, 2000. He did set out in the judgment, in full, the evidence given by both sides. He concluded that the appellant was guilty as charged. He disagreed with the opinions of the assessors.

When the appeal came before us for hearing Mr Ongele for the appellant, argued it on the grounds filed by the appellant himself. Additionally, at the hearing of the appeal, the appellant handed to us, his own handwritten notes to form part of the appeal. We have perused the notes and we are satisfied that they are based on seven grounds of appeal which he filed while in prison.

Mr Ongele argued the appeal on four main headings. These were:-

(a) Reliance which the learned trial judge placed on the evidence of PW1 to whom Mr Ongele referred to as a single witness.

(b) Admissibility in evidence of the appellant's extrajudicial statements.

(c) Production in evidence of the post-mortem examination report by the investigating officer under section 33(b) of the Evidence Act Cap 80 Laws of Kenya.

(d) The learned trial judge's failure to give reasons for disagreeing with the opinions of the assessors.

Mr Ongele expounded his first point by taking us through the evidence of PW1 and said that PW1 could very well have been the murderer himself. This, according to Mr Ongele, was because PW1 had a previous misunderstanding with his mother the deceased. The misunderstanding was because the deceased wanted him to get married which he was not prepared to do immediately. According to Mr Ongele, there was further misunderstanding between PW1 and the deceased over the sale of the lorry with which PW1 did not agree. For these reasons, Mr Ongele submitted PW1 himself had motive enough to make him kill the deceased.

His conduct, according to Mr Ongele, on the fateful night, tended to confirm that he was himself the killer. In this regard, Mr Ongele referred to PW1's failure to raise any alarm or call the neighbours immediately he reached home and the incident occurred. Instead, Mr Ongele pointed out, PW1 quietly ran to the uncle's home, and from the uncle's home, to the police station, returning to the deceased's home late in the night without anybody in the neighbourhood, noticing what had happened to the deceased.

Mr Ongele did also refer to what he called a dispute over the deceased's husband's parcel of land at Mumias. According to Mr Ongele, the manager of this parcel of land, was in dispute with the deceased over the management of the land. This being so, he too could have had motive to kill the deceased.

Finally, on the possible killers of the deceased, Mr Ongele referred to PW5. According to Mr Ongele, he too had a previous dispute with the deceased. He was not happy when the deceased sold the lorry. When a relative died in the recent past, he and others in the village, forced the deceased to contribute towards the funeral expenses. Because of this misunderstanding, PW5, according to Mr Ongele, could also possibly have been the killer of the deceased.

Mr Gacivih, on the other hand, did not agree with Mr Ongele's submissions. He pointed out that there was a second lady who was also brutally killed in the deceased's home on the fateful night. If these other people had the motive to kill the deceased, Mr Gacivih submitted, there was no reason why they would want to kill the second lady. According to Mr Gacivih, the appellant had explained the reasons and motive for killing the deceased in his second statement to Inspector Wafula and that excluded all the other possible killers mentioned by Mr Ongele. Furthermore, Mr Gacivih pointed out that PW1, who Mr Ongele said could have been the killer, was himself violently attacked by the appellant.

We have given careful consideration to what Mr Ongele has submitted to us on the possible killers of the deceased. These issues really hinge on facts and evidence led at the trial. They were fully considered by the trial judge and he found, as a fact, that the appellant was one of the killers of the deceased. We find no

reason and there is no misdirection drawn to our attention on the part of the learned trial judge, to make us disturb his findings in that regard. We may only add that PW1 was himself the victim of attack by the appellant when PW1 returned home on the fateful night at 10.00 pm. We also observe, as Mr Gacivih submitted, that the second lady, was not involved in any dispute with any of the persons mentioned by Mr Ongele as the possible killers. That being so, we agree with Mr Gacivih's submissions that there would have been no reason to kill the second lady. Indeed the appellant, himself, gave reasons for killing the deceased in his second extra-judicial statement to Inspector Wafula. We now turn to Mr Ongele's submissions on the admissibility of the appellant's extra-judicial statements. We shall take the statements in the chronological order in which they were made. First to be made, was recorded by the OCS (PW8) Ukwala Police Station, on 19th November, 1992. Mr Ongele emphasized that the OCS appeared to be confused when recording this statement particularly in regard to the language used. According to the OCS, the statement was made to him by the appellant in Kiswahili language. Yet, according to Mr Ongele, in the middle of the statement, the OCS inserted a sentence in the English language which he immediately crossed out on realizing his mistake. This, Mr Ongele, submitted, showed that the OCS might himself have manufactured or authored the statement and not the appellant. Mr Ongele also referred to the appellant's evidence at the trial-within-trial where the appellant alleged that he was kicked, slapped and beaten at the time he made the statement.

The second statement to be made was on 1st December, 1992. It was made to the retired Inspector of Police Wafula (PW7). Mr Ongele submitted that the Inspector investigated the case and therefore should not have recorded the statement. By doing so, he violated the Judges' Rules, Mr Ongele said. Mr Ongele referred us to Inspector Wafula's evidence in the trial-within-trial, particularly where he admitted to have taken part in the investigations. He also admitted to having seen the first statement which the appellant had recorded to the OCS. Lastly, Mr Ongele referred to the appellant's evidence at the trial-within-trial in which he alleged that he was beaten or otherwise mistreated when he recorded the second extrajudicial statement.

Mr Gacivih did not agree with Mr Ongele's submissions on the two extrajudicial statements. He submitted that the learned trial judge fully complied with the rules governing admissibility of extra-judicial statements. Two trials-within-trial were held and the facts surrounding the recording of the statements, were fully probed by the learned trial judge and he only admitted the statements in evidence when he was satisfied that they were voluntarily made. Mr Gacivih pointed out that the allegations of beating of the appellant by police officers were fully considered but rejected by the learned trial judge. On the question of investigating officer, Mr Gacivih submitted that there was nothing in law or practice to prevent an investigating officer from recording an inquiry statement. According to him, an inquiry statement, could be recorded by an investigating officer at any stage of the investigations.

It is indeed, an undesirable practice for an investigating officer, or an officer who has taken active part in the investigations, to charge a suspect and record his caution statement. The former Court of Appeal for Eastern Africa, dealing with a similar situation in the case of *Njuguna son of Kimani and others vs R* (1954), 21 EACA 316 at page 322 said this:

"This Court has more than once said that it is inadvisable, if not improper, for the police officer who was conducting the investigations of a case to charge a suspect and record his cautioned statement." And, in the subsequent case of *Israeli Kamukolse and others vs R* (1956), 23 EACA 521 the same Court said as follows:

"We have already mentioned that most of the impugned statements were recorded by the investigating officer.

The Court has more than once said that this practice is inadvisable, if not improper. See *Njuguna and others*. CA 549-552 of 1954 (unreported). By ignoring this opinion the investigating officer in the present case has exposed himself to grave allegations of misconduct made both by the appellant and by their advocates."

We fully accept what the Court of Appeal for Eastern Africa said in the two cases we have quoted above.

It is most undesirable and inadvisable, for an investigating officer, or an officer who has taken part actively in the investigations, to charge and record a caution statement from a suspect. In appropriate circumstances, this Court has held, more than once, that it may very well lead to exclusion of such a statement from evidence. Nevertheless, the rule is one of practice only. It does not automatically follow that, where an investigating officer has recorded a statement from a suspect, such a statement must be excluded from the evidence. Each case and each statement must turn on their own facts and circumstances. It still remains for the trial court to examine the surrounding circumstances under which the statement was recorded and to find whether it was made voluntarily or otherwise. We take for guidance, what the Court of Appeal for Eastern Africa said in this regard in the case of *Pyaralal Melaram Basam and Wathobia s/o Kiambu vs R* [1961] EA 521 at page 533 as follows:-

"We certainly do not think that the Court in *Njuguna's* case (5), 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 *Israeli's* case (6), 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."

We have examined the particular circumstances of this case and those under which the extra-judicial statements were recorded. We have considered, carefully, the evidence of the OCS (PW8) in regard to the statement he recorded on 19th November, 1992. We have also considered the evidence of Inspector Wafula (PW7) in regard to the further statement he recorded on 1st December, 1992. We have also considered the evidence of the appellant in the two trials-within-trial and the submissions of his counsel before us. In particular, we have taken note of the fact that Inspector Wafula appears to have played some part in the investigations and to have seen the previous statement made by the appellant to the OCS.

We have also considered, as we must, the two rulings by the trial judge admitting the extra-judicial statements in evidence. As was stated in the *Bassam & Wathobia* case (*supra*) the matter was in his discretion. He considered all the evidence and all the submissions made by the prosecution and the defence. He arrived at the conclusion that the two statements were made voluntarily and admitted them in evidence. There being no misdirection brought to our attention, we decline to disturb his discretion and findings. We are, equally, satisfied that the two statements were properly admitted in evidence as voluntary and relevant statements.

We will now deal with the third ground of Mr Ongele's address to us.

This was in regard to the manner in which the postmortem examination report was produced in evidence at the trial. As we said earlier, it was produced by the then OCS Ukwala Police Station. The prosecution made application for its production in that manner under section 33(b) of the Evidence Act Cap 80, Laws of Kenya. The advocate for the appellant had no objection and the learned trial judge allowed the application and admitted the report in evidence without the doctor being called to give evidence.

Before us, Mr Ongele complained that section 33(b) of the Evidence Act had no application and therefore, should not have been used. According to him, the section deals with what he called "commercial documents." In view of this, Mr Ongele submitted, a postmortem examination report is not a commercial document and was not covered by the said section. For clarity, we set out in full herein below, the provisions of section 33(b) of the Evidence Act Cap 80 Laws of Kenya:-

"That the statement was made by such person in the ordinary course of business, and in particular that it consists of an entry or memorandum made by him in business or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other documents usually dated, written or signed by him."

While it is true, as Mr Ongele, says, that most of the documents mentioned in the section appear to be business, commercial, or property transaction documents, there is, at the same time, in the section,

express reference to documents made in the "discharge of professional duty". A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is, undoubtedly, performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that, subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by section 33(b) of the Evidence Act.

But before section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h) may not be applied. Once again, for the sake of convenience and clarity, we set out below the requirements of the first part of the section. They are these:

"Statements, written or oral, on admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves admissible in the following cases."

In making his application for the production of the postmortem examination report, the prosecuting state counsel, on 24th March 1999 informed the Court as follows:

"I apply to the Court to allow the witness to produce the postmortem report under section 33(b) of the Evidence Act. The maker cannot be produced without undue delay and expense. The statement was in the discharge of professional duty."

PW8 on recall to produce the postmortem report said:-

"I was involved in the investigating of this case. I received documents which are related to this case. One of them is the postmortem report by Dr F O Ramolo. He has since become untraceable. We have done all we could but failed to trace him."

We have examined the record very carefully and note that the case was adjourned several times on account of the absence of the doctor. Coupled with what PW8 and the prosecuting counsel said, we are satisfied that the doctor was a witness whose attendance could not be enforced without an amount of delay which was unreasonable. Accordingly, we are, equally, satisfied that this was a proper case in which to invoke section 33(b) CPC and therefore the leaned trial judge rightly allowed prosecution application in this respect.

Although not raised before us by either side, there is also section 77 of the Evidence Act Cap 80 Laws of Kenya as amended by Act Number 14 of 1991 and which reads as follows:

"In criminal proceedings any documents purporting to be a report under the hand of a government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."

In the peculiar circumstances of this case, and for reasons we have already given, we are satisfied that the postmortem examination report could also still have been produced legitimately under the aforementioned section of the Evidence Act. It was a document, purporting to be a report under the hand of a medical practitioner namely the doctor or pathologist who performed postmortem examination on the body of the deceased. It was tendered by the prosecution in criminal proceedings and in the light of the delay in procuring the attendance of the doctor as a witness, section 77 of the Evidence Act, would also come in handy for use to prevent unnecessary further adjournments of the case.

We must however, sound a word of caution against the use of expert reports and opinions either under section 33 or under section 77 of the Evidence Act without procuring the attendance of the experts concerned to give evidence and to be cross-examined on their reports and opinions. It is desirable that an

expert should attend Court and explain to the Court his expert opinion and the grounds upon which that opinion is based. This is more particularly so in a case, such as here, of a trial with aid of assessors who might have difficulty in understanding the expert opinion or report without full explanation by the expert. In short therefore, the two sections of the Evidence Act must be used only in the most exceptional circumstances and where the best possible interests of justice permit their use.

Before we leave the post-mortem examination report in this case, we must mention one other aspect on which Mr Ongele based his submissions. He complained that there was no proof that the report was in the handwriting of its purported author. According to Mr Ongele, the OCS who produced the report, was not asked and did not say that he was familiar either with the handwriting or with the signature of the doctor who completed and signed the report. Under these circumstances, Mr Ongele submitted strongly that there was no evidence to show the authorship of the report and it should not have been relied upon.

We observe, once again, that the appellant's advocate had no objection to the production of the report without calling the doctor. This issue was therefore, not raised before the learned trial judge. Nevertheless, we have considered it carefully and we are satisfied that it occasioned no injustice whatsoever to the appellant. We say so because the report was produced by the OCS purely on the basis of a document in his custody. He was the OCS of Ukwala Police Station under which the crime committed was being investigated. It was his duty therefore, as he said in his evidence, to receive and keep exhibits, including medical reports, recovered by police officers in the course of investigations. The post-mortem examination report in this case, was one of the exhibits that he had kept in his custody and he produced it at the trial on that basis. He laid a foundation for this by stating that he received it from the doctor who performed post-mortem examination and prepared the report.

We now move to the last point argued before us by Mr Ongele namely that the learned trial judge disagreed with the opinions of the assessors without assigning reasons thereto. Mr Ongele referred us to two decisions of this Court on the point. Both of them emphasize the important role played by assessors in murder trials.

We have no doubt that assessors in murder trials in the High Court have an important role to play in advising the judge on issues of facts. However, in this case, we have examined the record carefully and this is what the learned trial judge said on the opinions of the assessors:-

"In all these circumstances, I am satisfied that the accused committed the offence of murder against the two (2) women. I am quite conscious that my findings differ from the opinions given to me by the assessors who said that the accused could not have killed the two women as he had already left the employment of Benedetta Consolata Oketch.

But in my view the assessors either misunderstood the whole evidence or completely misinterpreted it. Their opinions were certainly flawed and faulty.

Accordingly, I reject the opinions of the assessors and I find the accused guilty as charged in this case. I convict him accordingly."

The position is manifestly clear. The learned trial judge was mindful of his duty to give reasons for rejecting the opinions of the assessors. He did so fully in the paragraph we have quoted above. We are satisfied in the circumstances, that this ground raised by Mr Ongele, cannot but fail. Before leaving the issue of assessors, there is one other matter which, though not raised by either counsel before us, has caused us some concern and we must comment upon it for the avoidance of doubt. This was a murder trial and therefore was conducted with the aid of assessors. The relevant provisions are found under sections 262 and 263 of the Criminal Procedure Code Cap 75 Laws of Kenya both of which are as follows:-

"262. All trials before the High Court shall be with the aid of assessors.

263. When the trial is to be held with the aid of assessors, the number of assessors shall be three."

We note the use of the word “shall” in the two sections. As this Court has held on previous occasions, the sections are mandatory. All criminal trials before the High Court must be with the aid of assessors and, where this is so, the number of assessors must be three. A criminal trial without the required number of assessors in the High Court, cannot by law be a valid trial.

Indeed, in this case the trial started and proceeded for quite some length of time with the aid of three assessors. However, towards the end of the trial, one assessor absented himself. Although his absence is noted in the record, there is nothing to show what had happened to him and the trial proceeded with the remaining two assessors up to the end.

The Court of Appeal for Eastern Africa in the case of *Cherere Gikuli vs Reginum* (1954) Vol XX1 EACA at page 304 said as follows when dealing with a similar situation:-

“Held (1) a trial which has begun with the prescribed number of assessors and continues with less than that number is unlawful unless the case can be brought precisely within section 294 CPC. (2) in section 294 aforesaid, one of two conditions must be satisfied, *viz*, either that the absent assessor is from any sufficient cause prevented from attending throughout the trial or that he absents himself and it is not practicable immediately to enforce his attendance.” The *Cherere Gikuli* case, clearly confirms what we have stated in the preceding paragraphs. Indeed, in several subsequent cases this Court hasrestated the position in the same way.

Put briefly, the position can be summarized like this. A murder trial in the High Court must start and proceed with the aid of three assessors as required by sections 262 and 263 of the Criminal Procedure Code Cap 75 Laws of Kenya. Unless this happens, the trial cannot be said to be a valid trial. Nevertheless, there is an exception or qualification to the generalrule which is in our present day section 298(1) of the Criminal Procedure Code Cap 75 Laws of Kenya. The section which is the equivalent of section 294 (1) quoted in the *Cherere Gikuli* case, is in the following words:-

“298 (1) in the course of trial with the aid of assessors, at anytime before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other two assessors.” And in the case of *Muthemba s/o Gombe vs Reginum* (1954) Vol XXI EACA page 234 the Court of Appeal for Eastern Africa said:-

“Held (1) Criminal Procedure Code, section 294(1) casts on the trial court a duty to inquire as to the whereabouts of an absent assessor. If he is not found in the precincts of the Court and his exact whereabouts are not known, the Court cannot immediately enforce his attendance and the trial may proceed.”

As we see it therefore, a trial court is under a duty, where an assessor absents himself, to show on record, that section 298 (1) CPC applies and therefore the trial may proceed notwithstanding the absence of one assessor.

The record before us in this appeal does not show that the Court discharged the duty on it as envisaged by the *Muthemba s/o Ngombe* case. We have, however, on our own, exhaustively gone through the record to find out what happened.

The absent assessor was one Joseph Aboge. He was in the trial till the trial reached very advanced stage when PW8, the last prosecution witness, was giving evidence. After PW8, this assessor did not attend Court despite several adjournments on account of his absence.

We think that it should have been desirable for the learned trial judge, not merely to record the absence of the assessor, but also to make an inquiry as to his whereabouts. If he was not within precincts of the Court, then his presence would not be immediately enforced and the learned trial judge would have been entitled to proceed with the remaining two assessors. On the other hand though the record shows that the absent assessor had fallen into the habit of not coming to Court on several occasions. We aresatisfied that

he was not merely sitting within the precincts of the Court on each occasion that his absence was recorded and the case was adjourned on that basis. His long absence, the repeated adjournments, and his failure to turn up whatsoever or send any explanation to the Court must mean, in our judgment, that his presence could not be immediately enforced. For the preceding reasons, we think that although the learned trial judge did not make and record an inquiry to that effect, the circumstances clearly indicate that the absent assessor could not immediately attend Court. The case, therefore, was clearly within the provisions of section 298(1) CPC which we quoted earlier in this judgment. Under the circumstances, we are satisfied, that failure by the learned trial judge merely to make and record an inquiry and to bring the case formally under the aforementioned section, did not occasion any injustice to the appellant. We stress however the desirability of express compliance with section 298(1) CPC for the avoidance of doubt.

One other thing which was not specifically raised and argued before us by either side is in regard to the appellant's *alibi* defence. As we indicated earlier, it was his contention that he was not in the deceased's home on the fateful night. We have set out the *alibi* in full in the earlier parts of this judgment.

This is how the learned trial judge dealt with it in his judgment:-

"In his defence the accused said that he was never in the home of the deceased Benedetta Consolata Oketch on the date that she was killed. He said that he had ceased to work for her in 1991 and had returned to his home Lokiriama in Turkana district. Thus, he raised an *alibi*. But the evidence of John Odhiambo Oketch is that on the night that his mother was killed the accused met him at the gate and lured him to the cowshed where he set up upon him and assaulted him." After considering all the evidence led by both sides, the learned trial judge came to the following conclusion on the *alibi*;-

"For these reasons, I find that the impression created by the accused that he was far away from the home of the deceased at the time that she was killed to be a lie which is for rejecting."

There is no similar direction to the assessors on the *alibi*. However this omission occasioned no injustice in the circumstances of this case in view of the conclusion the assessors eventually reached as we have indicated. We add, further, that apart from PW1, there was also evidence of PW2, the police officer at Sigomere Police Post, that he saw the appellant on the evening of the fateful night. We are satisfied that the learned trial judge adequately considered the *alibi* and rightly rejected it in his judgment.

Before concluding this judgment, we must return to the appellant's two extra-judicial statements. It seems to us that the conviction was based largely on the two statements which were, in fact, and indeed, confessions. This is what the learned judge said:-

"It is in this regard that I find that the two charge and caution statements made by the accused to the policemen where he fully admitted his participation in the crimes committed against the two women to be true. In the statements, he supplied minor details of the episode and those statements could not at all have been concocted by policemen as alleged in the unsworn statement before me. So, I find and accept the prosecution's assertion that the accused is one of the people who killed the deceased."

Clearly, conviction flowed from the appellant's confessions. Without them, the rest of the evidence was only circumstantial.

The two confessions were, when tendered in evidence, retracted and repudiated by the appellant. The learned trial judge properly conducted two trials at the end of which, he was satisfied that both statements were voluntarily made and therefore he admitted them in evidence. Nevertheless, the task of the Court does not end merely with admission in evidence of a retracted and repudiated extra-judicial statement. In the summing up to the assessors and in the judgment, the Court must consider the weight of such a statement. The Court must give proper direction to the assessors and duly warn itself on the weight of such a statement. The Court must indicate whether corroboration is necessary in the circumstances of the case and if so, whether corroboration is or is not available in evidence. Where corroboration is available, the Court must identify it and refer to it specifically. On the other hand, where the Court is satisfied that the statement cannot but to be true, and the Court is prepared to convict on it without corroboration, the

Court must say so expressly and duly warn itself and the assessors of the danger of doing so. Dealing with a similar situation, the Court of Appeal for Eastern Africa in the case of *Tuwamoi vs Uganda* [1967] EA at page 89 said the following:-

"The present rule then as applied in Eastern Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular but, that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."

And at page 91 of the same report, the Court said as follows:-

"If the Court is satisfied that the statement is properly admissible and so admits it, then when the Court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession the main consideration at this stage will be, is it true?

We would summarise the position thus- a trial court should accept any confession which has been retracted

or repudiated or both retracted and 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 material points and surrounding circumstances that the confession cannot but be true."

The law on retracted and repudiated confessions remains the same today as it was stated in the *Tuwamoi* case. The case confirms what we have already stated in this judgement. A proper and clear direction on corroboration is necessary when a trial court is dealing with retracted or repudiated confessions. In the present appeal, we find absolutely no direction by the learned trial judge to the assessors or in his judgment, in the manner, enunciated in the *Tuwamoi* case. We have earlier quoted, a passage from the judgment of the learned trial judge and, that appears to be all that he said on the confessions.

Having said the above however, we note two things. First, we note that the learned trial judge found that the confessions were truthful. Despite this, he should have gone further to state, whether he was prepared to convict upon them without corroboration. If that is so, he should have warned himself and the assessors of the danger of doing so. On the other hand, if he felt corroboration was required, he should have looked for it, and if he found it in evidence, he should have expressly mentioned it. This being a first appeal, we have, ourselves, examined the evidence on record exhaustively. We uphold the finding of the learned trial judge that the confessions were truthful. In arriving at that conclusion, we have taken into account, the details in the two confessions as well as the evidence and circumstances of the case. The statements were too detailed to be untrue.

Additionally, we find also, that from the evidence of PW1, whom the trial judge believed, there was sufficient circumstantial evidence, not only to dislodge the appellant's *alibi's* defence, but also to provide adequate corroboration to the two confessions. PW1 described how he was attacked by the appellant and, indeed, all this is in the appellant's confessions, particularly, the one he made to the OCS (PW8) on 19th November, 1992.

In many respects, this statement conforms to what PW1 said he saw as he arrived home at 10.00 pm on the fateful night. We are satisfied that even on a proper and full direction, the learned trial judge would still have come to the same conclusion.

We have given careful consideration whether the two confessions are contradictory or otherwise. Indeed, if they are contradictory, they cannot be true and cannot be relied upon. We find however no serious

contradiction between the two confessions. In the one the appellant made to the OCS on 19th November 1991, he claimed that he acted together with Edwong and six other people. In the one he made to Inspector Wafula on 1st December, 1992, he claimed that he acted only with Edwong and no other people were involved. The rest of the details in the two statements are essentially the same and the slight variation as to the number of people involved in the crime, does not affect the truthfulness of the statements.

Finally, we observe that, both in the summing up and in the judgment the learned trial judge was under a misapprehension that the appellant was on two counts of murder. This is not so in accordance with the information sheet in the file. Both counsel before us were agreed on this point and we do not think it occasioned injustice to the appellant.

This was a long murder trial, which, clearly, gave rise to many legal issues. We have dealt with all of them exhaustively and we are satisfied that the appellant was properly charged, tried and convicted. Accordingly, we order this appeal dismissed in its entirety.

Orders accordingly.

Dated and delivered at Kisumu this 9th day of July, 2001

B. CHUNGA

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CHIEF JUSTICE

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL