



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Shah & O’Kubasu JJ A)

CRIMINAL APPEAL NO 1 OF 1994

STEPHEN MUNGAI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court at Nairobi (Mango J)

dated 16.11.93 in HCCrC No 76 of 1988)

JUDGMENT

The appellant, Stephen Mungai Macharia, was convicted of murder contrary to section 203 as read with section 204 of the Penal Code and consequent upon that conviction sentenced to suffer the ultimate penalty of death. The particulars of the offence stated that on the 30th day of

November, 1986 at Marurui Coffee Estate in Nairobi within Nairobi area the appellant murdered MN.

The evidence before the learned trial judge, the late Mango J, was to the effect that on 29th November, 1986 Hannah Njeri Njora (PW3) sent her daughter MN (the deceased) to Ngomongo where she was received by her sister Lucy Wanjiru Kimani (PW4) at about 4.30 pm. On the following day the deceased went to church but she was never seen alive again since her body was found lying in a coffee plantation in Marurui Estate. There was no direct evidence showing what caused the death of the deceased.

According to the postmortem examination conducted by Dr Mwaura (PW12) this girl was aged about 14 years and her death was due to manual strangulation. Dr Mwaura (PW12) was of further view that the deceased had been sexually assaulted and then killed. Sometime in August of the following year (1987) the appellant was arrested, interrogated and in the course of investigations he confessed to having been connected to the death of the deceased. In a long detailed charge and cautionary statement recorded by Senior Supt John Mutonyi (PW7) the appellant admitted having raped and murdered the deceased.

In that statement the appellant stated *inter alia*:

“After she passed, I started thinking about her. I do not know what happened to me because I woke up suddenly followed her and without saying anything, I caught her dress at the back and on the neck and pulled her into the coffee plantation. I ordered her to remove her underpants and she did so. I laid her and had carnal knowledge of her but I do not know what happened because I did not remit anything. I left her lying there and went away. When I was having carnal knowledge of her I was holding her throat so that she was dead when I left because it was early in the morning. I went straight to my aunt’s home. After

two weeks I returned to Kitale having failed to secure any employment.”

In yet another statement given to Supt Cornelius Ngugi (PW14) the appellant admitted having had sexual intercourse with the young girl only that she had consented. The two statements were admitted in evidence after two separate trials within the trial as the appellant repudiated having made these statements. He said that he had been tortured into signing the two statements.

The learned trial judge considered all the evidence before him and concluded that confession by the appellant had been corroborated by other circumstantial evidence and hence convicted the appellant on the charge of murder. The appellant was consequently sentenced to death as mandatorily provided by the law.

The appellant now comes to this Court appealing against that conviction. This being a first appeal to the Court, the appellant is entitled to expect that as a first appellate court we shall review the evidence given at the trial in compliance with the following well known dictum contained in the case of *Okeno v Republic* [1972] EA 32 at p36:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion

(*Shantilal M Ruwala v R* EA 570). It is not the function of the first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower court’s findings, and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In so doing it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses see *Peters v Sunday Post* [1958] EA 424.”

Having thus reminded ourselves of our duty on a first appeal we shall now proceed to examine and re-evaluate the whole evidence that was placed before the learned trial judge. From the evidence on record it cannot be denied that the deceased met her death in circumstances suggesting that she had been raped and then killed. The body of the deceased was found lying in a coffee plantation. When post-mortem examination was carried out it was Dr Mwaura’s opinion that the deceased had been raped and killed.

The appellant made long statement in which he admitted having been involved in the death of the deceased. The appellant then volunteered to lead the police to various places which included the scene where the body of the deceased had been found. As the appellant pointed out these places he was being video photographed. The two statements and the video recording were objected to and were only produced in evidence after trials within the trial. When put on his defence the appellant said that at the time the alleged crime was committed he was away in Eldoret and hence he could not have been involved in the commission of the offence with which he had been charged.

On our own evaluation of the recorded evidence we find that while the prosecution relied on circumstantial evidence and the confession by the appellant which confession was repudiated the appellant’s defence was an alibi. We would state here that when the appellant put forth an alibi as his defence it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial. In *Sekitoleko v Uganda* [1967] EA 531 p 533 Sir Udo Udoma CJ said:

“In *R v Johnson* [1961] 3 All ER 969 the general principle of law applicable to defence of an alibi was enunciated. It was laid down as a general rule of law that if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving his defence and that the burden of proving his guilt remains throughout on the prosecution.” Hence in this appeal although the appellant’s defence was an alibi it was upon the prosecution to demolish that defence and prove that the appellant was indeed at the scene of crime and that he committed it. In this appeal the appellant’s conviction was to a large extent based on his own confessions which he later repudiated during his trial. The law relating to retracted and repudiated confession was stated by the Court of Appeal for East Africa 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 or both retracted and repudiated with caution and must before founding a conviction on such confession be fully satisfied that 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”.

The learned trial judge was alive to the correct legal position when he stated in his judgment thus:-

“The law is that a confession can be used as a basis for conviction without more. It needs no corroboration in law. However, the practice is different. It is unsafe to convict on such confession alone without corroboration where such a confession has been repudiated or retracted as in this case. The evidence of confession in this case does not stand alone”.

From the foregoing, it is clear that the learned trial judge appreciated the fact that he was dealing with retracted confession. He directed himself correctly as to the law applicable.

In dealing with the defence of alibi by the appellant, the learned trial judge expressed himself thus:-

“I must state here that I have fully considered the prosecution’s case along with the defence of the accused. His alibi have (sic) been demolished. I have also considered that the accused did not have to prove his alibi or anything else for that matter. I see no escape for him for I find that he is the one who killed the deceased”.

We have, on our part, considered very carefully the evidence placed before the superior court and having given it a thorough re-examination we find ourselves in agreement with the conclusion reached by the learned trial judge. The appellant made two very detailed statements in which he admitted the offence. Although the appellant attempted to repudiate or retract these statements we are satisfied that they were properly admitted after trials within a trial and that the confession herein cannot but be true.

In his statement, the appellant had said that when defiling the young girl he was squeezing her throat to stifle her possible cry or cries for help. Postmortem examination on the body of the deceased indicated that strangulation marks were found on the neck. It was the evidence of the pathologist, Dr Mwaura (PW12) that the girl had been raped. The appellant’s retracted statement shows that he was in Kiambu on 29th November, 1986, the date when the deceased died. All these provided sufficient corroboration of the appellant’s statements.

The appellant having been convicted of murder was sentenced to suffer death, that being the only sentence prescribed by law.

We are satisfied, as was the learned trial judge, that the evidence adduced by the prosecution proved the charge against the appellant beyond any reasonable doubt. That being our view of the matter, this appeal must fail and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 3rd day of August, 2001

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR