REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

(CORAM: GICHERU, TUNOI & KEIWUA, JJ.A.)

CRIMINAL APPEAL NO. 15 OF 1996

BETWEEN

MIRIAM WAITHIEGENI KIRUNYU

EVANS RUHENI KIRUNYU ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Conviction and Sentence of the High Court of Kenya at Nyeri (Lady Justice Ang'awa) dated 1st December, 1995

in

H.C.CR.C. NO. 29 OF 1994)
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JUDGMENT OF THE COURT

The two appellants Miriam Waithiegeni Kirunyu and Evans Ruheni Kirunyu who are mother and son respectively were convicted of the murder of Eustace Kirunyu on the night of 21st and 22nd September, 1992 at Nanyuki Town in Nyeri District of the Central Province and sentenced to suffer death.

On the morning of 22nd September, 1992, the then Officer in Charge of Nanyuki Police Station, Chief Inspector Luka Muchai PW5, received an anonymous call that a body of an unidentified male had been seen in a thicket near Kwambuzi Estate of Nanyuki. He proceeded to the scene where he found a body lying on the back of a pick up Toyota Hilux registration number KYR 937. On a closer look he identified it as that of the deceased, a person whom he had known before. The hands were tied to the left leg at the knee. The mouth was covered with a cloth and there were several cut wounds on the forehead. At the scene Chief Inspector Muchai collected two empty cartridges.

As he knew the home of the deceased, Chief Inspector Muchai immediately drove there. He found the compound swept clean and he saw a newly washed pair of long trousers and a jacket hanging on the drying line. He detected that the clothes had blood stains. A new coat of green paint had been applied on the fencing posts near the kitchen yard. He remembered that some parts of the body of the deceased bore

that colour.

Naturally, the prime suspects were the two appellants, wife and son to the deceased respectively. They were immediately arrested.

A post-mortem conducted on the body of the deceased a week later by Doctor Gontier revealed two circular perforations on the frontal scalp which caused sub-dural haemorrhage and brain tissue lacerations. The cause of death was a head injury and cerebrovascular cuts due to a high velocity projectile consonant with a bullet fired from a gun. The two appellants and six others who were after trial convicted of conspiracy to murder and whose convictions are not the subject of this appeal were all arrested and jointly arraigned on a charge of the murder of the deceased.

Each of the two appellants recorded a statement under inquiry and a charge and caution statement. In those statements, the two appellants admitted having planned to kill the deceased because he had neglected to take care of his wife, the appellant Miriam and his children including the appellant Evans whose fees the deceased had refused to pay. The deceased spent all his money on concubines and was cruel to his family. He often tormented them. All attempts for reconciliation by the clan had failed. The deceased had long ceased to communicate with the appellant Miriam as a result of which she had contemplated committing suicide but was talked out of it by her children. She constantly lived in fear of being killed by the deceased. Because of all these problems the two appellants hatched a plot and hired a gang to kill the deceased. Two people of Somali origin agreed to do so on condition that they were paid a fee of Shs.100,000.00. The appellants made a deposit and pledged to pay the balance after selling a Honda water pump. The agreed date of the killing was fixed for the early morning hours of the 21st September, 1992. During that night, the gang arrived and positioned themselves in the compound and waited for the deceased to arrive. He did so at 2 a.m. He drove into the compound and it is now apparent that he was seized by the gang and driven into the thicket at Kwambuzi Estate where he was killed.

The two appellants promptly retracted their statements.

They recanted them on the ground that they had been forced to make them after having been tortured. But after holding a trial within a trial the statements were duly admitted. In convicting each appellant, the learned trial Judge, Ang'awa J., held that the statements were voluntary and amounted to a confession.

The main thrust of this appeal, as forcefully argued by Mr. Mahan for the two appellants, is that there was no corroboration of the confessions and therefore it was unsafe for a court to rely solely and act on them yet they had been retracted. In the circumstances, Mr. Mahan argued, it was incumbent upon the learned trial Judge to look for other credible independent evidence.

The learned State Counsel, Mr. Oluoch, was at pains to support the convictions but could not counter Mr. Mahan's second limb of submissions.

We have carefully and anxiously considered the points raised by Counsel, but, our task has been made very difficult by the record which has given us some disquiet. The guilt of the appellants require proof beyond all reasonable doubt and it was incumbent upon the learned Judge to make a fair and comprehensive finding on the issue.

What do we find here? The record is haphazard and the proceedings are inconceivably unintelligible. The approach to the issues in the trial is casual, confusing and without consideration. The language defies logic and comprehension. For example:-

> "The relationship between 7th and 8th accused is that they are brothers and presumably the 4th accused." "The evidence before the Court clearly shows that the accused No. 1 has serious marital problems - she conferred with her son accused No. 2 and as such a plot to murder her husband was made."
>
> and

"That the 1st and 2nd accused I find guilty of murder contrary to **section 203**..... and convict them accordingly."

The trial before the learned Judge was for murder in the High Court of Kenya. The resultant sentence was possibly death. The proceedings of the trial before the learned Judge are not fit for a Juvenile Court or the hawkers' trial in the City Council Court. The manner in which the learned Judge conducted the proceedings is deprecated. As we are allowing the appeal, we lament that 40 days of judicial time have been wasted and the appellants have been unnecessarily locked up in remand and prison for about eight years. Again, the Republic must have incurred enormous expense, all gone down the drain, thanks to the learned Judge's attitude and approach to work.

While the statements of the appellants were clearly a confession, the learned Judge did not warn herself and the assessors of the dangers of basing a convictions on a retracted or repudiated confession. It is trite law that a trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true - See **TUWAMOI V. UGANDA** [1967] E A 84.

There was no other material evidence against the appellants since witnesses who resided on the deceased's compound turned hostile during trial. Moreover, a blunder was committed while taking exhibits to the Government Analyst. These were mixed up and no conclusive opinion on the matching of blood-stains could be reached.

Mr. Mahan complained that the learned trial Judge failed to sum up the case to the assessors before obtaining their opinions, which were that the appellants were guilty of murder. This contention is correct as the record bearfvs him right. While the omission is fundamental, however, the failure to sum up a case for murder to the assessors is not necessarily fatal nor is it mandatorily required by law, since **section 322(1)** of the Criminal Procedure Code provides only that "the judge may sum up the evidence" to them; but it is desirable to do so in all but the simplest cases and it ought to have been done in the present case - See **WASHINGTON S/O ODINDO V. R. 21 EACA 392**.

After full consideration, we are of the view that it is unsafe to allow the convictions of the appellants to stand. Their appeals must succeed and the same are allowed. We quash their convictions and set aside the sentences. The appellants are set at liberty

forthwith unless they are otherwise lawfully held.

Dated and delivered at Nairobi this 26th day of May, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR