



IN THE COURT OF APPEAL

AT NAKURU

(CORAM:CHUNGA CJ,LAKHA & KEIWUA J.J.A)

CRIMINAL APPEAL NO. 105 OF 1999

BETWEEN

FANUEL HESIWAS MODAKAA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from convictions and sentence of the High Court of Kenya at Eldoret (Lady Justice Nambuye) dated 25th May, 1998

in

HCCRC No 4 of 1996)

JUDGMENT OF THE COURT

The appellant was charged in the High Court Eldoret, on 3 counts of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars in each count read as follows:-

“1. During the night of 18th December, 1994 at Tuloi village, Nandi district of the Rift Valley province murdered Daniel Kipkiyeny Ngososei. 2. During the night of 18th December, 1994 at Tuloi village, Nandi district of the Rift Valley province murdered Nyamumbo Angweny. 3. During the night of 18th December, 1994 at Tuloi village Nandi district of the Rift Valley province murdered Mogen Musuthi.”

It is noted at once, that, in each count, the appellant was not named in the particulars thereof although on the heading of the information his name appears in full as Fanuel Hesiwas Madokaa. The better practice in framing a criminal charge is to set out the name of the accused in full in the particulars of the charge. This was not done in the present case but, we are satisfied that the omission occasioned no injustice.

On 23rd May 1996, the appellant appeared before the learned judge for plea. The state counsel, Mr Omwenga, is recorded as saying:

“I apply to substitute the charge sheet on the ground that there was an error in the way the old charge sheet was drawn, I have a new one”.

The nature of the error was not specified by the state counsel but, eventually, it appears to us, that his application was allowed and a new information was substituted on the basis of which the appellant's plea was entered and the trial proceeded.

We draw attention to section 275 (2) of the Criminal Procedure Code Cap 75, Laws of Kenya which is in the following terms:

“Where, before a trial upon information or at any stage of the trial, it appears to the Court that the information is defective, the Court shall make an order for the amendment of the information as the Court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice; and any amendments shall be made upon such terms as the Court shall seem just”.

The trial of the appellant was in the High Court and was upon information. Substitution of a new information amounted to amendment. But, as the section clearly says, amendment of an information will take place upon and order of the Court only where there is a defect in the information. Here as we have said, the error mentioned by Mr Omwenga was not specified and we do not, therefore, know, whether there was a defect within section 275(2) of the Criminal Procedure Code. We would assume however, that the error which prompted substitution of the new information was the omission to set out the name of the appellant in full in the particulars of each of the three counts as we mentioned earlier.

Before the appellant's plea was taken, the learned trial judge made an order, upon application by defence lawyer, for medical examination of the appellant to ascertain his mental status. After a number of mentions, a psychiatrist's report was produced in Court on 7th August 1996, indicating that the appellant had no mental illness. Accordingly, the appellant pleaded not guilty to all the three charges.

The psychiatrist in his report did, however, express a desire to interview the appellant's relatives for the sake of completeness of the report. Several attempts having been made unsuccessfully to trace his relatives, a location chief eventually informed the Court the appellant's parents had passed away and his brothers and sisters were not available and could not be traced.

Thus, a full trial subsequently followed after the above events as a result of which, the learned trial judge convicted the appellant on the 1st and 3rd counts while acquitting him on the 2nd count.

The three assessors did express themselves in general terms that the appellant was guilty of murder. They were not asked and did not specify whether he was guilty of murder on each of the three counts or in some of them only.

Where there is a trial on murder charge on more than one count, and the trial proceeds with the assessors as required by law, we are of the opinion that the assessors should be asked to express their opinions on each count for the sake of clarity and for the avoidance of doubt. In the present case we would assume that the assessors found the appellant guilty of murder on all the three counts.

At the close of the prosecution case the appellant was put on his defence and the record reads as follows;

“Section 211 complied with”.

Section 211 appears in part VI of the Criminal Procedure Code headed “Procedure in trials before subordinate courts”. This was not a trial before a subordinate court and we think that the section complied with by the learned trial judge at the close of the prosecution case was inapplicable.

The trial was in the High Court and, accordingly, fell under part IX of Criminal Procedure Code headed “Procedure in trials before the High Court”. Thus, the correct section under this part with which the learned trial judge should have complied with at the close of the prosecution case was section 306(2) Criminal Procedure Code.

Having made the preceding observations, we, nevertheless think that the procedural errors we have mentioned did not result in any injustice or prejudice to the appellant and we shall now proceed to consider the rest of the case and the submissions ably made before us in this appeal by both counsel. We think however that absolute care is necessary in conducting criminal trials so that laid down procedures are followed to avoid any possibility of prejudice.

We shall now state very briefly the facts as found by the trial court for both sides. On the night of 18th and 19th three people namely Sakera Wandam Nkintei (PW 2), Daniel Kipkiyeny Ngososei (deceased 1st count) and Josephat Gacheru Kamau (PW 14) were walking together on a public road towards a place called Danger, having come from their employer's home. They were walking in a line and Daniel was the last one. According to PW 2 and PW 14, there was moon-light and, presently, Daniel alerted them that somebody was following them. PW 2 and PW 14 looked back and saw a man walking hurriedly towards them. On nearing them, the two witnesses heard the man say words to the effect "*leo niko na nyinyi*". According to PW 14, the three of them started to run away but as they did so, Daniel was heard saying that he was being killed.

PW 2 and PW 14 reached Daniel's home, woke up his relatives, and informed them of what had happened. The two witnesses and some relatives of Daniel returned to the scene where they found he had been fatally attacked and his head severed from the body. The head was lying four to five metres from the body. Nobody else was found at the scene.

The two witnesses and Daniel's relatives went to Danger market whereupon a person appeared armed with two *pangas* and cut a dog and threw its head towards the gathered crowd. The crowd ran away and the two witnesses concluded their evidence by saying they did not know who had killed Daniel.

In the meantime and in the same night, Jenifer Mogeni (PW 7) was in her house with her husband. They heard screams outside and peeped out through the window of their house. They saw a man driving away their cattle a short distance away from the house. The husband came out and followed the man, while PW 7 remained in the house. She waited but her husband did not come back. At about 5 am she also came out and was joined by others in search of her husband and the cattle. They found him dead in the nearby bush, the head having been severed from the body. This evidence is confirmed by the evidence of PW 8 the deceased's son. The dead man was the subject of the third count in the information.

In the second count, the deceased is named as Nyamumbo Angweny. The only evidence on him is the post mortem examination and report by Dr Innocent Makaya Denge (PW 1) who said that the body was identified to him by three people namely, Keya Angweny and Protus Nyabone in the presence of PC Caleb Limo. Of these three, only PC Limo gave evidence as PW 12 but his evidence only confirmed identification of the dead body of Nyamumbo Angweny to the pathologist.

There is absolutely no evidence to explain where and when the deceased in the 2nd count Nyamumbo Angweny was recovered and taken to the mortuary for post mortem examination. There is nothing therefore to show that he too was killed on the same night of 18/19 December 1994 like the deceased persons in the first and third counts.

The most important evidence in the prosecution case was the extra judicial statement under charge and caution made by the appellant to Inspector Aphaxard Mugo (PW 16). This statement amounted to a confession by the appellant of the killing of the three persons the subject of the three charges against him. It is not surprising therefore that, when the statement was tendered in evidence by the prosecution, the defence objected to its admission, and a trial within trial was then conducted by the learned trial judge in the absence of the assessors.

In the trial within trial, objection was on the basis that the extra judicial statement was not obtained voluntarily. The prosecution called Insp Mugo who testified that he recorded the statement in accordance with the Judges' Rules, and that he used no force or inducement to obtain the statement from the appellant. On his part the appellant contended that he did not make the statement and, in any event, he was sick when he appeared before IP Mugo.

The judge, in a short ruling, found that the statement was made voluntarily by the appellant and admitted it in evidence. The judge found that IP Mugo had not used force or undue influence to obtain the statement. She also found that the Inspector did not notice and was not aware of any injuries on the appellant.

On the above evidence the appellant was put on his defence and he denied the offence. He said that when he was arrested he had a *panga* because he was going to his *shamba* to cut trees. He was taken to the police station and asked about the murder which he denied. He concluded that he did not know the offence for which he had been arrested in connection with as he had a bad sore on the body.

The appellant called no witness in his defence and submissions were then made by the prosecution and the defence.

On 18th January, 1997 the learned trial judge summed up the case to the assessors and, dealt with four aspects of the case. First, she explained the nature of the offence to the assessors. Second, she dealt with the nature of circumstantial evidence. Third, she dealt with the appellant's extra-judicial statement. Fourth, she dealt with the defence case.

When dealing with the appellant's extra judicial statement this is what the learned trial judge said to the assessors:

“The 3rd aspect of the case is the evidence of the statement under inquiry. It was retracted but admitted after a trial within a trial. The general law is that where such statement has been denied it can be accepted if there is corroboration on some other evidence to support it. Where there is no evidence to support it, then it can only be acted upon if it is so detailed that it can only be a true account of what transpired.”

We must say that the direction which the trial judge gave to the assessors on the extra judicial statement was beyond reproach. It is settled in law that retracted or repudiated confessions require corroboration as a rule of practice. However, where there is no corroboration, the Court may still convict if the Court is satisfied that the confession is too detailed to be untrue, subject of course, to the Court warning itself and the assessors of the danger of doing so.

After the summing up, the assessors returned their findings in the manner we have already indicated in this judgment.

On 4th May, 1998 the learned trial judge delivered a judgment in which, as we indicated earlier, she convicted the appellant on count one and three while she acquitted him on count two.

From the decision of the learned trial judge, the appellant has brought an appeal against conviction to this Court on fourteen grounds filed by his advocate Mr Kamonjo Kiburi.

Before us the appellant was represented by Mr Kiburi while the Republic was represented by Mr Onderi.

Mr Kiburi based his submissions on three main headings:

- (a) The appellant's extra judicial statement and requirements for corroboration.
- (b) That the learned trial judge erred in acting on evidence not adduced in the trial which Mr Kiburi referred to as extraneous matters.
- (c) That the learned trial judge erred in failing to make an inquiry as to the appellant's mental status and to find that the appellant was not mentally sound.

On extra judicial statement, Mr Kiburi strongly submitted that IP Mugo (PW 16) who recorded it was not a truthful witness. According to Mr Kiburi the Inspector said in evidence that he only learned of the

offences from the press reports whereas the truth is that he was well aware of the case and had recorded statements from two people during the course of investigations. Mr Kiburi submitted that IP Mugo was therefore an investigating officer and ought not to have recorded the extra judicial statement from the appellant.

Mr Kiburi referred us to the appellant's P3 form which, according to him, showed that the appellant had several bodily injuries when he was examined on 22nd December, 1994. This, according to Mr Kiburi, showed that the appellant was beaten or otherwise ill-treated to extract the confession from him. Mr Kiburi also criticized the learned trial judge's ruling in the trial within trial which, according to Mr Kiburi, did not take into account the untruthfulness of IP Mugo and the injuries seen on the appellant according to the P3 form.

In responding to Mr Kiburi's submission Mr Onderi said that the extra judicial statement was properly recorded according to the Judge's Rules. He pointed out that the injuries were found to be about one week old at the time the appellant was medically examined on 22nd December, 1994. He further pointed out that the appellant was arrested on 19th December, 1994 and, if this is so, he must have sustained the injuries before arrest.

We have given anxious consideration to the points by Mr Kiburi on the appellant's extra judicial statement. We must emphasize that in all criminal trials, the burden of proof is on the prosecution to show that an extra judicial statement taken from a suspect was made voluntarily. If there is any injury or sign of ill treatment on a suspect while in police custody, the burden is on the prosecution to explain the injury or the signs of ill treatment.

In this case the P3 form clearly shows that on 22nd December, 1994 when the appellant was medically examined the doctor found a number of injuries on him. These injuries were consistent with a sharp weapon and were estimated to be about one week old at the time of examination.

We would have taken very strong view of the point taken by Mr Kiburi on the injuries, more particularly, in the absence of any mention of the same by the learned trial judge in her ruling admitting the extra judicial statement in evidence. However, there is evidence that the appellant was arrested on 19th of December, 1994. At the time of his examination by the doctor on 22nd December, 2000 he had been in police custody for three days only. Since the injuries were about one week old at the time of examination, we are satisfied that these injuries, were not occasioned to the appellant at the time of arrest or when he was in police custody. Accordingly, we arrive at the conclusion that the injuries did not affect the recording of the extra judicial statement from the appellant by IP Mugo.

It is true that IP Mugo in his evidence in the trial within a trial said that he learnt of the offence only through the press reports. Mr Kiburi drew our attention to two statements at pages 61 and 72 respectively. These are statements recorded from witnesses. One of them, Jenifer Mukeni gave evidence as PW 7. The other one namely Zakaria Wandaru Nkinki does not appear to have been called as a witness though we suspect that he was PW 2, Sakera Wandam Nkintei.

We observe that there was no suggestion put to IP Mugo that he recorded statements from the two persons. We also observed, that there is no evidence from PW 7 or PW 2 for that matter, that their statements were recorded by IP Mugo. For these reasons, we are reluctant to draw the inference which Mr Kiburi asked us to draw namely that the two statements were recorded by PW 16 simply by the appearance of the name Mugo as the recording officer on the two statements.

We must, however, point out, that the position is very clear in law that an investigating officer or any officer who has participated in the investigations, should not record an extra judicial statement from a suspect. The reason for this is obvious, because such officer will have acquired some information about the case which may, willingly or otherwise, find itself in the suspect's extra-judicial statement. The rule however is a rule of practice only. And although it has been emphasized and repeated in many decisions of this Court in the past, it has not acquired the status of a rule of law. It is, nevertheless, a useful rule of practice which should be strictly observed and followed in criminal investigations for the benefit of

fairness in the administration of criminal justice.

Having considered everything urged before us, we conclude, that the appellant's extra judicial statement was properly admitted in evidence by the learned trial judge. We are satisfied that the trial within trial was properly conducted and the learned trial judge was right in her finding that the extra judicial statement was made voluntarily by the appellant.

Mr Kiburi also complained to us about evidentiary weight which the learned trial judge attached to the extra judicial statement. It was, as we have already stated, a retracted statement and, Mr Kiburi, properly submitted that it required corroboration as a rule of practice in order to support conviction. Mr Kiburi further complained that the statement could not have been truthful because of various aspects of it which do not tally with the rest of the evidence on record. Finally, Mr Kiburi complained that there was no acceptable independent corroboration on record to support the retracted confession.

In reply to Mr Kiburi's submission, Mr Onderi referred to various witnesses. He referred to PW 14 and particularly what PW 14 said about the appellant. He referred also to PW 4 and the manner in which the witness described the appellant. He also referred to PW 11 who was the officer who, among others, arrested the appellant. He emphasized PW 11's evidence on the conduct and reaction of the appellant at the time of arrest. Mr Onderi concluded that all this was circumstantial evidence capable of corroborating the appellant's retracted confession.

We were referred by Mr Kiburi to the well known case of *Tuwamoi v Uganda* [1967] EA 84. This case most exhaustively discussed the evidentiary weight to be attached to retracted or repudiated confession. We may summarise the position like this: The Court must accept the confession with caution and must be satisfied that it is true. If it is not true, that marks the end of the statement, and no reliance can be placed on it. On the other hand if the statement is true then the Court must go further to consider whether it requires corroboration or otherwise. Corroboration must be independent evidence which tend to implicate the accused with the offence in material particulars. If the statement requires corroboration the Court must find that corroboration in the evidence tendered.

If however, the Court finds that the statement does not require corroboration then the Court must further satisfy itself that the statement cannot be a truthful account of the events of the commission of the offence. A statement which is long and detailed will readily lend assurance as to its truthfulness. On the other hand, a short and unimpressive statement will normally throw doubt about its truthfulness.

In the present case, the learned trial judge had this to say about the appellant's extra-judicial statement;

“the prosecution case in fact hinges on the charge and cautionary statement Exh 6. It was produced in evidence after a trial within a trial. The general principle to be borne in mind when considering such a statement can only be acted upon if it is corroborated in material particulars, or, alternatively, if there is no corroboration, then it must be detailed in such a way to as to be nothing but a true account of the event which took place.”

We had earlier quoted the direction which the learned trial judge gave to the assessors on the appellant's confession. Substantially it is the same direction we find in the judgment. We are satisfied, in the circumstances, that the learned trial judge correctly directed herself and the assessors on the principles to be applied on the retracted or repudiated confession.

Having set out the correct principles the learned trial judge concluded thus;

“When the foregoing principles are applied to the charge and cautionary statement given by the accused person herein I find that there is corroboration of the fact that the victims had their heads severed off and one of them was chased, caught up with, and then his head chopped off. There is no corroboration as to the person who murdered the deceased person. However, the details given therein could only have been given by a participant and they are therefore true”.

We understand the learned trial judge to be saying this. She found no corroboration as to who murdered the deceased person on the counts on which she convicted the appellant. However, the details given in the appellant's confession was such that they could only be given by a participant in the crime. Accordingly, we understand the learned trial judge to base the conviction on the appellant's confession because she was satisfied that it was too detailed to be untrue.

We must however, make one observation. We do not find, either in the summing up to the assessors or in the judgment, any indication that the judge warned herself and the assessors of the danger of basing a conviction upon a retracted confession without corroboration. It is a trite of rule of practice enunciated in the *Tuwamoi* case to which we have made reference earlier in this judgment. Nevertheless, as a rule of practice only, its absence, though unfortunate, cannot vitiate the conviction in the particular circumstances of this case.

We have ourselves independently examined the appellant's confession. Though it is not a long statement, it deals with the most vital details of the circumstances of the commission of the offences charged. It deals also with events following the commission of the offences. Like the trial judge, we too are satisfied that these details could only have come from the appellant himself as the participant in the crime charged. His confession, in our view, was too detailed to be untrue.

The 2nd main heading on which Mr Kiburi addressed us was what he called extraneous matters on which, according to him, the learned trial judge relied. He referred us to various passages in the judgment and in the proceedings to support his submission on this point. We have given the matter the most anxious consideration but we are not satisfied that the learned trial judge relied on extraneous matters. Most of the passages referred to us by Mr Kiburi in the judgment were in fact contained in the evidence of various prosecution witnesses. The only difference we detected was that, in some instances, the learned trial judge did not produce verbatim account of what the witnesses said. She phrased them and dealt with them in summary form in the judgment. This, we are satisfied, she was entitled to do and we do not find any merit on this ground which must inevitably fail.

Finally, Mr Kiburi complained about the appellant's mental status. According to him the learned trial judge erred in not ordering an inquiry into the appellant's mental status as required by section 162(1) of the Criminal Procedure Code Cap 75 Laws of Kenya.

We do not agree with Mr Kiburi's submission. As pointed out by Mr Onderi and as we observed at the beginning of this judgment, the learned trial judge adjourned the case on more than one occasion to enable the appellant to be referred to the psychiatrist for treatment. Eventually, a report was obtained from the psychiatrist which showed that the appellant had no mental illness. The psychiatrist's report was produced in the proceedings in the presence of the appellant's counsel who said that he had seen it and he raised no objection or question on it. Throughout the proceedings, the appellant did not show any unusual conduct and he was able to put up his defence in the trial within a trial and also after the close of the prosecution case.

Mr Kiburi stressed that the appellant was wearing dreadlocks, was shabbily dressed and was generally unkempt. All these matters do not show and did not show that the appellant was mentally unstable.

As Mr Onderi rightly submitted, there is no presumption of insanity. What there is, is the presumption of sanity under section 11 of the Penal Code Cap 63 Laws of Kenya. Every person is presumed to be of sound mind and to have been sound mind at any time which comes into question until the contrary is proved.

What was before the learned trial judge did not, in our opinion, disprove in any way the presumption of sanity under this section. Mr Kiburi particularly dealt with a paragraph in the judgment of the learned trial judge which read as follows:

“However in Court at the time of trial the accused wore dreadlocks, was shabbily dressed and when he was given the chance to defend himself he talked irrelevancies. He however did not say plainly

that he was putting up a defence of insanity if that is what he was putting forward, then still the onus is on him to prove that he was insane at the time of commission of the offences. The defence of insanity is however though not offered is displaced by the fact that the assailant fled from the scene, there is no evidence of it when the accused was examined twice and there is no history of it”.

We do not find any misdirection in the passage criticized by Mr Kiburi. We agree with the learned trial judge that the offence of insanity was not specifically put forward by the defence. Had he done so the burden was on him to prove that he was insane at time of offence even though it was a much lighter burden on a balance of probabilities. We also agree with the learned trial judge that the evidence on record overwhelmingly proved that the appellant was not mentally insane, either at the time of the offence, or at the time of the trial.

As we mentioned earlier, the three assessors returned their opinions which implied that they found the appellant guilty of murder on all the three counts. Similarly, as we mentioned earlier, the learned trial judge, on her part found the appellant guilty and convicted him only on two counts namely the first and third counts. She acquitted him on the second count.

What it means, in our view, is that the judge disagreed with the assessors on the second count. This, she was entitled to do because the findings or opinions of assessors do not bind the trial judge. However, it is an established practice that where the trial judge disagrees with the assessors’ findings or opinions, the judge should assign reasons for doing so. That did not happen in this case in respect of the 2nd count where the assessors appear to have convicted the appellant while the trial judge acquitted him. The submission by the trial judge to give reason for this is a mere irregularity which, in our opinion, did not occasion any injustice to the appellant.

Another issue that we find of significance still relates to the acquittal by the trial judge of the appellant on the 2nd count. The judge relied on the appellant’s confession in which the appellant admitted killing all the 3 people the subject of the three counts. In view of the learned trial judge’s finding that the statement was too detailed to be untrue, it becomes difficult to understand the acquittal of the appellant on the 2nd count.

Nevertheless, this is a first appeal and we have, ourselves, given the entire evidence independent and exhaustive examination. In doing so, we find as we observed earlier, that there is absolutely no evidence to show, when, where, and by whom the body of the deceased in the 2nd count, Nyamumbo Angweny was found. Accordingly, there was nothing to connect his death with the events of 18th and 19th December, 1994 when the deceased person, in count 1 and 3 were killed. On this basis therefore, we are satisfied that the learned trial judge properly acquitted the appellant on the second count while convicted him on the first and third counts.

For all the reasons in this judgment we arrive at the conclusion that the appellant was properly convicted on the said two counts and all the grounds advanced before us by Mr Kiburi must fail. We order the appeal to be and is hereby dismissed in its entirety.

Dated and Delivered at Nakuru this 27th day of September 2000.

B.CHUNGA

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CHIEF JUSTICE

A.A.LAKHA

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JUDGE OF APPEAL

M.M.OLE KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR