IN THE COURT OF APPEAL
AT NAIROBI
CORAM: CHUNGA C.J., TUNOI & SHAH, JJ.A
CRIMINAL APPEAL NO. 45 OF 2000
BETWEEN

MICHAEL WAITHAKA KARUGA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Appeal from a conviction, judgment, and order of the High Court of Kenya at Nairobi (Mr. Justice J.M. Khamoni) dated
21st December, 1994
in
H.C.CR.A NO. 41 OF 1993)
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JUDGMENT OF THE COURT

The appellant, Michael Waithaka Karuga, was found guilty and convicted by the High Court of Kenya at Nairobi upon an information which charged him with the murder of H W N (the deceased) during the period 31st day of October, 1990 to 2nd day of November, 1990, at ***[particulars withheld]*** village in the Kiambu District of Kenya and was duly sentenced to death. All the three assessors had unanimously supported the learned Judge's finding.

The deceased who was attending a nursery school left her home on the morning of 30th October, 1990 to go to the school and did not return home at the expected time of 3.30 p.m. She was about six years of age. Her body was found at ***[particulars withheld]*** village in a farmstead (shamba) by one R W. When she left home the deceased was dressed in her school uniform, a brown and white spotted dress. She carried with a her yellow food container with a white lid. She was dressed in a jacket, in addition to the school uniform.

When the deceased's body was found on 2nd October, 1990 the dress was on the body. Her underpants were not there. Her body was lying on her jacket. She had an injury mark on the head above her right ear and appeared to have been severely sexually molested. A portion of her nose on the right side was cut. According to the police pathologist who carried out the postmortem the deceased's clothing was soaked in blood; she had a wound on the left side of the nose and bruises on the right thigh and left knee joint. Internally she had a torn liver and spleen. There was bleeding in the abdominal cavity. She also had a tear of the wall of her private part and also of the anus. Other injuries suffered by her were a linear fracture of the temporal bone on the right as well as of right pareatal region. She had intracranial haemorrhage. We will revert to the nature of her injuries later during the course of this judgment.

One of the policemen who inquired into the murder was P.C. Michael Waitiki Ritho (PW.13). He went to the appellant's house on 16th November, 1990 accompanied by the Kiambu D.C.I.O. Mr. Mwania, Inspector Kathuki, Inspector Jenifer and other police officers. Constable Ritho stated that their intention was to look for and recover the underpants and food container of the deceased as well as any other exhibits they could find. The appellant was with the inspection party.

P.C. Ritho told the court below that the appellant had led the search party to his home. No exhibits were found there. The appellant then led the party to his pit latrine within the compound where the appellant's mother's and brother's houses were. He informed the search party that the underpants and the food container were in the pit latrine. The pit latrine's wall was knocked off and the top cover thereof was removed. The search of the pit latrine led to the recovery of the food container which was identified by the deceased's mother as belonging to the deceased. The search did not lead to recovery of the underpants. Instead underpants belonging to a man were recovered which the appellant identified as his.

From there the appellant led the search party to a bore hole saying that there was a nylon sack (bag) in there. The sack was retrieved therefrom. By then it was becoming rather late in the day and a further search was postponed until the next morning, that is, the 7th November, 1990. That further search led to the recovery of the deceased's underpants duly identified by her mother.

The evidence of P.C. Ritho was in material parts corroborated by that of P.C. Herman Muriuki (P.W.14) attached to Divisional C.I.D. Kiambu. The evidence of Inspector John Kariuki also tallied with that of P.C. Ritho. Inspector John Kariuki had interrogated the appellant before proceeding with the two searches.

The pit latrine that featured in the searches made on 6th and 7th days of November, 1990 belonged to the appellant's brother, Samuel Kamau Karuga. This fact was confirmed by Samuel Kamau Karuga (P.W.2) who also confirmed that the appellant had a pit latrine not yet in use. It was still being built and that it was in the same compound where his and his mother's pit latrines were.

The evidence so far unearthed pointed an accusing finger at the appellant. We now turn to consider other aspects of the evidence. The appellant was in custody from 5th October, 1990 and was charged and cautioned by Inspector Samuel Githenji Mwaniki (P.W.20 - P.W. 1 in the trial within the trial) on 7th October, 1990 at 3.00 p.m. The appellant retracted and/or repudiated the charge and caution statement on the grounds that he had been ordered to sign an already recorded statement after being whipped, kept in a pool of cold water and having been taken into a forest where he was threatened to be killed. The appellant, during the course of the trial within the trial which was held to determine the admissibility of the statement, stated that prior to his being charged he was beaten up - he had a scar on his nose as noted by the learned Judge - by Inspector Githenji who used the finger print inkstand to hit his nose with. He stated also that other policemen had beaten him seeking to know from him the reason on his part for killing the deceased. Later he was beaten up by a club and a leather whip. The appellant gave a detailed version of how he was beaten up on 5th October, 1990 as well as on 7th October, 1990. He narrated how he came to sign the charge and caution statement. He said he was told by Inspector Githenji that all facts regarding the killing were known and that there was sufficient information recorded. He was taken to a "dark room" and was told that that was his last moment. His hands were tied with a manila paper to a window.

He was beaten on the buttocks by an electric wire. After being grilled in the "dark room" he was taken to a forest on the boundary of Kiambu and Nairobi and was tied up with a manila string upside down. His penis and testicles were tied and pulled. His hanging head was hit by an electric wire for about 30 minutes by Corporal Mwangi. He was thereafter taken back to Kiambu Police Station where he was beaten up again. His testicles were squeezed and he finally yielded up and signed the already prepared statement.

The reason why we have set out at length the appellant's version of the factors leading upto the signing of the statement is that when the appellant was examined by Dr. Zephania Mwangi Kamau (P.W. 15) on 8th November, 1990 there were no injuries found on him. That doctor made the observation that he found no injuries on the appellant. Yet, the doctor was not asked a single question on that score in his cross-examination. Whilst not putting any burden or onus of proof on the appellant we wish, simply, to point out that if the appellant's version of how he was forced into signing the charge and caution statement was correct some injuries would have been clearly apparent the very next day when he was examined and that the appellant would most likely have bitterly complained to the doctor. The p3 form signed by Dr. Kamau shows that the appellant's physical examination showed "no abnormalities detected". This factor leads us to conclude that the learned Judge rightly rejected the appellant's version

during the trial within the trial and properly admitted the statement. Obviously the learned Judge was not satisfied that the appellant was beaten up as he had alleged.

Apart from that factor the learned Judge was impressed by the fact that the charge and caution statement was elaborate, detailed and factual. He also held that it was not possible that the same was prepared in advance simply for the appellant to sign. The learned Judge, in our view, properly points out in the judgment as follows:-

> "In any case, I do not see how the ingenuity of George Njoroge or any body else, including Inspector Githenji and Inspector Kariuki, could have enabled them to know all the details found in the charge and cautionary statement, more specifically that the deceased ate two bananas first and one banana later; and that after the accused person had discharged sperms in the anus of the deceased, the said sperms spilled over and some stool came out of the anus and that the stool mixed with sperms spilled over on the private part of the accused person; and that the accused person used the child's underpants to wipe himself off the spillage; and that thereafter the accused person strongly hit the deceased with his fist on her chest on the right hand side making the deceased unconscious; that the accused person removed the deceased from his bed and placed her in a baby cot and covered her with a small mattress; that thereafter the accused person went outside his house to check if there had been anybody around hearing what had been going on inside the house; that the accused locked his house and went to Ndumberi village shops, bought 10 cigarettes and two rolls of bhang and went to the home of Waithira Muthee; that the accused having later returned to his house heard one Gatirangu call him from outside the house asking for chang'aa to buy and the accused sold him three glasses of chang'aa including one for the accused; that the two later went and ate some food in Mr. Gatirangu's house; that back to his house that night the accused found the deceased still breathing but unconscious with a lot of foam coming from her mouth; that he removed her from the baby cot, placed her on the floor and strongly stepped on her twice using his gum boots; that from there the deceased stopped breathing; that he put her body in a gunny bag before hitting the head with a club and taking the body to his table room."

We agree with the learned Judge that such a detailed and comprehensive statement could not have been invented by the police inspector or for that matter any one else. This observation is pertinent to this case, particularly in regard to the circumstances in which the deceased met her death. We do not say that detailed statements could not be manufactured. It can happen; but the peculiar manner in which the deceased was murdered lends credence to the statement being voluntarily made.

Whilst still on the aspect of voluntariness of the statement we revert to the nature of injuries suffered by the deceased which injuries we have set out earlier in this judgment. Those injuries clearly are of the type or nature that could result on account of the appellant finding it impossible to penetrate his penis into the deceased's vagina and then forcibly attempting to penetrate the same into the deceased's anus. The fact of injury to the deceased's right side of the chest confirms the fact that the appellant hit her savagely there. Other injuries suffered by the deceased point to the appellant stepping on to her heavily, twice with his gum boots on. The factual correctness of the nature of assaults by the appellant upon the person of the deceased stands out glaringly obvious through his charge and caution statement. Such a statement could not have been conceived in the mind of the person taking the same.

If the policemen, namely Inspector Kariuki and P.C. Muriuki, subjected the appellant to such torture as the appellant alleged, they would have been questioned thereon, we think, rather strenuously; but they were not questioned in that regard at all. It is quite obvious that having made an inculpatory statement the appellant was at pains to extricate himself therefrom. His efforts did not bear fruit as the learned Judge carefully analysed all aspects of the factual correctness and voluntariness of the statement.

In the first of his grounds of appeal the appellant complains that the learned Judge erred in law and in fact in relying on the confession statement and basing the conviction thereon without appreciating that it was repudiated and proved not to have been 'truthful' on account of the vaginal and rectal swabs and the underpants of the deceased having had no seminal stains. This ground of appeal is a double-barreled one. He complains that he did not make such a statement and that in any event it was proved to be incorrect by

the absence of vaginal and rectal swabs and also by the absence of seminal stains on the deceased's underpants.

We have already stated why we believe the statement to be true and a voluntarily one. We now come to the Government Analyst's report. The vaginal and rectal swabs as well as the underpants of the deceased had no seminal stains according to that report. It must be remembered that the underpants had been removed prior to the brutal attack on the deceased. There is evidence, however, that the deceased's dress had some faecal matter at the front.

There is also evidence that the blue underpants of the appellant had seminal stains of a group O secretor with a few degenerated spermatozoa. These underpants being found where the same were found corroborate the sexual assault by the appellant. We note however that the learned Judge did not place any reliance on the Government Analyst's report saying that that was probably because the examination was done too late. That was so but what we have just pointed out in regard to the appellant's underpants lends credence to the brutal sexual assault resulting in the discharge of semen on the appellant's underpants.

In his second ground of appeal the appellant states that before being led to the places where requisite exhibits were recovered he ought to have been cautioned. If information given by an accused person leads to discovery of articles which connect the accused person with the crime, nonadministration of caution is inconsequential. Section 31 of the Evidence Act caters for this eventuality. It reads:

> "31. Notwithstanding the provision of sections 26, 28 and 29, when any fact is desposed to as discovered in consequence of information received from a person accused of any offence, so much such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered, may be proved."

We have already pointed out that the information given by the appellant led to the discovery of the deceased's underpants, her food box, the appellant's underpants etc. Such evidence was properly accepted by the learned Judge despite there having been no caution administered. Such evidence is good evidence and in fact points to the strength of the prosecution case. The second ground of appeal therefore fails.

The third ground of appeal advanced by the appellant is as follows:-

> "That the trial Judge erred in law by finding the statement in question corroborated by evidence which also required corroboration"

The counsel for the appellant argued that it was wrong on the part of the trial court to find corroboration for the retracted and repudiated confession on account of discovery of the incriminating items discovered. As we understood counsel, his complaint was that the discovery of the said items having arisen prior to the time when the statement was taken, such discovery could not corroborate the statement. The two searches, that is on 5th October, 1990 and 7th October, 1990 were carried out prior to the time when PW 20 took the appellant's statement, but the gap in regard to the timings was so minimal that no one could say that the statement was 'manufactured' to tally with what was recovered. The learned Judge addressed the issue of the timings of the searches and the recording of the statement adequately. He said:

> "Secondly I should point out that on the 7th November, 1990 when the charge and cautionary statement was taken, evidence is that the accused person and the police team had gone to the home of the accused at about 1.00 p.m. to search for the underpants of the deceased. Inspector Githenji started recording the statement at 3.00 pm. after the accused person had been returned to the Police Station. What the accused person alleges was done to him after he had been taken to Inspector Githenji's office for the statement could not all have been done within that space of time. I do not find good evidence to persuade me that that statement was recorded some other time later."

The third ground of appeal also fails The last ground of appeal advanced by the appellant is that his defence of alibi was not checked or investigated as the law requires. It must be born in mind that during

the course of the committal proceedings in the Magistrate's court the appellant reserved his defence. When asked about an alibi defence which he was obliged to disclose under section 235(b) of the Criminal Procedure Code he reserved the same. This section mandates the magistrate, after the committal for trial, to give to the accused person an alibi warning in words which are clearly set out therein. When the accused person discloses a defence of alibi the prosecution gets the opportunity of checking on that alibi. This is a necessary course of events as the onus is always on the prosecution to prove or disprove the defence of alibi. When an accused person does not disclose his defence of alibi at that relevant time and discloses the same after the close of the prosecution case he gives no opportunity to the prosecution to inquire into the defence of alibi.

This issue was dealt with by this Court in the case of Karanja vs. Republic (1982-88) I K.A.R. 355. The court said at page 357:

> "There was, of course, a distinction between Ssentale's case and the present because as the learned Chief Justice said, the appellant had raised the alibi at the first available opportunity, so that the police had an opportunity, of which they did not take advantage, to check and test it. But Mr. Chunga, the Assistant Deputy Public Prosecutor (as he then was), on behalf of the Republic, submitted that no alibi had been advanced in the instant case, either by way of crossexamination of the material witnesses, to whose evidence regarding the events of February he drew our attention, or by the appellant's police statement, or by his unworn statement in court."

At the time the appellant raised the defence of alibi in somewhat obscure manner it was too late for the police to reopen the case to inquire into that defence. However, that defence was not such as to raise a complete defence of alibi as the appellant did say that he was around in the vicinity of the area where the deceased was murdered. The fourth ground of appeal also fails.

When Mr. Ndege rose to argue the appellant's appeal he took a point which was not raised in the petition of appeal. He argued that the evidence taken during the course of the trial within a trial was not read over to the assessors after they were recalled and that that non-action vitiated the conviction. That is how we understood his point. When asked to substantiate the arguments with some authority he produced the case of Ndagizimana & Another vs. Uganda [1967] E.A. 35. It was held in that case that the evidence taken during a trial within a trial should have been given again before the assessors to show that the statements were admissible. It is of course necessary that once a judge decides to admit a confession statement the assessors have to be recalled and the disputed evidence is led again as if there had never been a trial within a trial. In the instant case the record bears out that after the assessors were recalled PW.20 continued with his evidence and stated that he administered the requisite caution before calling upon the appellant to make a statement after charging him and that the appellant opted to make a statement which he recorded. He then proceeded to complete the remaining formalities as regards taking of such a statement. An issue arose as regards the language in which the statement was recorded. PW. 20 stated that he recorded the statement first in Kikuyu language and translated the same into English language. We have not seen what was recorded in Kikuyu language. However, that lacuna by itself does not vitiate the conviction. It was probable that the appellant who is a Kikuyu was talking in Kikuyu and PW.20, who is also a Kikuyu, was recording it in Kikuyu. It ran to 24 pages according to PW.20. The prosecution in normal circumstances ought to produce the statement as originally recorded. Whether it was so done is not clear from the file of the superior court but we have no reason to doubt that the learned Judge was properly made aware of the manner in which the statement was recorded.

We must note that the learned judge admirably summed up the prosecution and the defence case to the assessors. All the assessors had no hesitation in finding the appellant guilty as charged. The learned Judge was properly satisfied of the appellant's guilt beyond all reasonable doubt. We consider that the conviction was just and safe in all the circumstances, and we accordingly dismiss the appeal against the conviction of murder, and the mandatory sentence of death which followed.

Dated and delivered at Nairobi this 13th day of October, 2000.

B. CHUNGA

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CHIEF JUSTICE

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.