Case Number:	Criminal Appeal 23 of 1992
Date Delivered:	15 Dec 1994
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Philip Kiptoo Tunoi, Abdul Majid Cockar
Citation:	Janet Muviti Kathuku v Republic [1994] eKLR
Advocates:	Mr Mbuthia for the Appellant Miss Ndirangu for the State/Respondent
Case Summary:	**Muviti *v* Republic** Court of Appeal, at Nairobi December 15, 1994 Cockar, Omolo & Tunoi JJ A Criminal Appeal No 23 of 1992 (Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Mr Justice Mango) dated 20th December, 1991 in HCCC No 13 of 1988) ***Criminal Practice and Procedure*** *– charge and caution statement – investigating officer recording a statement from an accused person – whether statement admissible in evidence.* ***Criminal Practice and Procedure*** *– extra-judicial statement – accused making a statement admitting the offence after long period in police custody – trial judge admitting statement without seeking explanation about the long period in custody – whether admission was procedural.* The appellant was tried and convicted by the High

Court of the offence of murder and sentenced to death.

On appeal it was argued on her behalf that the learned trial judge misdirected himself by admitting an extra judicial statement by the appellant in which she admitted killing the deceased without seeking explanation from the prosecution over her long period in custody before making her statement.

It was further argued that it was improper for the investigating officer to be the same person to record her statement.

Held:

1. The fact that a statement had been recorded by an investigation officer in the case was, no doubt, a matter for the trial judge to consider in deciding whether or not to admit the statement in evidence, but the fact, in itself, does not automatically result in the exclusion of the statement from the evidence.

2. Where at the time of taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused, or there has been inordinate delay in bringing the accused to Court from the date of arrest etc; then an explanation of the circumstances, must form an intergral part of the facts to be stated by the prosecution to the Court.

3. If the statement was taken sixteen or seventeen days after arrest, as happened in this case, then in seeking to prove the voluntary nature of the statement, the prosecution must prove that the length of the period for which the accused was in their custody had no effect on his making the statement.

4. The prosecution offered no explanation at all as to why they kept this appellant in their custody for so long before taking the two statements from her. On that basis, the judge ought to have excluded the statements.

Appeal allowed.

	Cases 1. *Bassan & Wathobia s/o Kiambu v R* [1961] EA 521 2. *Ndede v Republic* [1991] KLR 567 **Statutes** Penal Code (cap 63) section 203 **Advocates** *Mr Mbuthia* for the Appellant *Miss Ndirangu* for the State/Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	HCCRC No 13 of 1988)
Case Outcome:	Appeal Allowed.
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Omolo & Tunoi JJ A)

CRIMINAL APPEAL NO. 23 OF 1992

BETWEEN

JANET MUVITI KATHUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Mr Justice Mango) dated 20th December, 1991

in

HCCC No 13 of 1988)

****

JUDGMENT

Janet Muviti Kathuku, the appellant herein,and a man called Daniel Kapepa were jointly tried before the late Mango, J sitting with assessors on a charge of murder contrary to section 203 of the Penal Code. The particulars of the charge against the two had alleged that on the 31st March, 1987 at Embakasi village in Nairobi area, the two of them jointly murdered one Tabitha Kavuu Musyoki, Tabitha hereinafter. At the end of their protracted trial, the learned judge and the assessors unanimously found Daniel Kapepa not guilty of the murder and he was accordingly acquitted. The judge and the assessors, however, found the appellant guilty as charged. She was accordingly convicted and sentenced to death. This appeal is against that conviction and sentence.

We are grateful to the very lucid and precise submissions of Mr Mwangi Mbuthia, learned counsel for the appellant, who has thus made our task in this appeal that much easier than it would have otherwise been. Having listened to Mr Mbuthia, and Miss Ndirangu for the Republic, we think the judge and the assessors were wrong in finding this appellant guilty of the offence laid to her charge.

The Republic’s case against the appellant was based almost exclusively on two extra-judicial statements said to have been made by the appellant when she was in police custody. The first statement was one under inquiry and was alleged to have been made by the appellant to Inspector Paul Wambua Mbithi (PW20) on 21st April, 1987. The second statement was one under charge and caution and was alleged to have been made by the appellant to Inspector Tom Mutati Mutisya (PW24), on 22nd April,

1987. Both these statements were repudiated and retracted by the appellant during the trial and they were only admitted in evidence after lengthy trials within the main trial. Mr Mbuthia submitted to us that these statements ought not to have been admitted in evidence in the first place, but that even if they were admitted as the learned judge did, they ought not to have been relied on because the evidence of the prosecution itself showed that the statements could not possibly be true. We must first deal with the admission of the statements in evidence. Inspector Muteti (PW24) who produced the charge and caution statement was himself a full participant in the investigation of the case. No explanation at all was offered by the prosecution as to why they had found it necessary to depart from the established practice of an investigating officer not taking a charge and caution statement from an accused person. While there is really nothing illegal in an investigating officer taking a charge and caution statement from an accused person, we would here repeat, what the then Court of Appeal for Eastern Africa said in the case of *Bassan and Wathioba s/o Kiambu – vs – R* [1961] EA 521 at page 535 letters F – G:-

"..... it is obviously a matter of prudence for an investigating officer, if he can, to avoid himself charging a suspect and recording his statement. The dangers of doing so are stressed in the passage from *Israeli's* case, set out above. The fact that a statement, whether on charge and caution or otherwise, has been recorded by an investigation officer in the case is, no doubt, a matter for the trial judge to consider in deciding whether or not to admit the statement in evidence, but the fact, in itself, does not automatically result in the exclusion of the statement from the evidence".

With respect, we agree.

The more serious issue was the voluntariness of the two statements alleged to have been made by the appellant. The learned judge found and held that the appellant had not been beaten by the police officers in whose custody she was when she made the statements. Having concluded that the appellant had not been assaulted while in police custody, the learned judge

seems to have thought that was the end of the matter and her statements were accordingly voluntary. We are satisfied the learned judge was wrong in this. The appellant was arrested on the 5th April, 1987. The inquiry statement, as we have said, was recorded on the 21st April, some sixteen days after the arrest. The charge and caution statement was recorded on the 22nd April, some seventeen days after the arrest. The prosecution offered absolutely no explanation as to why they kept the appellant in custody for that long period and what they had been doing with her. In *David Mbewa Ndede v Republic* Criminal Appeal No 1 of 1989 (unreported) this Court said and we quote:-

"We would add that, where as happened in this case at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused, or there has been inordinate delay in bringing the accused to Court from the date of arrest etc, then an explanation of the circumstance must form an integral part of the facts to be stated by the prosecution to the Court. The Court should then put that explanation to the accused and inquire of him if it affects his plea".

True, this statement was made in connection with the taking of pleas but we think it applies with equal force to the issue of the voluntariness or otherwise of a charge and caution statement or a statement taken under inquiry. If the statement is taken sixteen or seventeen days after arrest, as happened in this case, then in seeking to prove the voluntary nature of the statement – and the burden to prove this is always invariably on the prosecution – they ie the prosecution, must prove that the length of the period for which the accused was in their custody had no effect on his making the statement. We have said that the prosecution offered no explanation at all as to why they kept this appellant in their custody for so long before taking the two statements from her. On that basis, the judge ought to have excluded the statements.

Again the appellant repeatedly told the judge that she had made a statement on the 16th April, 1987, but that the statement had been torn and thrown away by some police officer. The prosecution did not seek to rebut that contention by the appellant and taking the entire circumstances of the case into account, we think the judge ought to have excluded the two statements from the evidence. We must now do so.

Miss Ndirangu conceded that if the statements are excluded from the evidence, then the prosecution would be left with no basis for their case.

That is obviously correct, but we would go further and point out, as Mr Mbuthia also pointed out to us, that even the medical evidence brought by the prosecution did not support their general theory that Tabitha died from strangulation. We ourselves strongly suspect that Tabitha must have died as a result of strangulation by a rope around her neck. When her body was found, it had a rope tied around the neck. But Dr George Kungu Mwaura (PW19) who did the post-mortem examination on the body of Tabitha was emphatic in his evidence as to what the cause of death was. In the examination – in – chief he said and we quote him:-

“As a result of my examination, my opinion was that cause of death was blood over the brain left side due to a blunt head injury.....”

When cross-examined, he said and we again quote:

“I saw no evidence of possible strangulation. I ruled strangulation out.”

There was no evidence at all, even in the statements allegedly made by the appellant that she had hit Tabitha on the head and thus caused her death. In his judgment or even in his summing-up to the assessors the learned judge did not at all refer to this serious gap as to the cause of death. For all these reasons, we allow the appellant’s appeal, quash the conviction recorded against her, set aside the sentence of death and order that she be released from prison forthwith unless she is held for some other lawful cause. Those shall be the orders of the court in this appeal.

Dated and Delivered at Nairobi this 15th day of December 1994.

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

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