Case Number:	Criminal Appeal 108 of 2002
Date Delivered:	29 Sep 2006
Case Class:	Criminal
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Philip Kiptoo Tunoi, Emmanuel Okello O'Kubasu, Erastus Mwaniki Githinji
Citation:	Charles Muthee Kariuki v Republic [2006] eKLR
Advocates:	Mr. Gekonga for the Appellant. Mr. Njogu, State Counsel, for the Republic.
Case Summary:	Criminal law - murder - criminal practice and procedure - assessors - one assessor failing to turn up in the course of trial - trial proceeding with only two assessors - appeal against conviction and sentence of death - whether there was evidence linking the appellant with the killing of the deceased - re-evaluation of the evidence by the first appellate court - appellant's conviction based on a confessionary statement and circumstantial evidence - whether the trial court had applied the proper test in dealing with the circumstantial evidence - whether the confessionary statement had been properly accepted - Penal Code sections 203, 204 - Criminal Procedure Code section 298(1)
Court Division:	-
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	H.C.CR.C. NO. 16 OF 2000
Case Outcome:	Appeal dismissed.
History County:	-

Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 108 of 2002

CHARLES MUTHEE KARIUKI ……………...………... APPELLANT

AND

REPUBLIC ……………………………………………...…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Justice D.M. Rimita)

dated 25th June, 2002

in

H.C.CR.C. NO. 16 OF 2000)

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JUDGMENT OF THE COURT

Charles Muthee Kariuki, the appellant herein, was charged before the superior court with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the charge/information stated as follows:-

"CHARLES MUTHEE KARIUKI

On the night of 9th-10th June, 1998, at Gatimu Village, Nyandarua District of Central Province murdered DAVID NJOROGE KARANJA."

The appellant pleaded *"Not Guilty"* to the charge and his trial commenced on *26th October, 2000* before the superior court (Rimita, J.). The learned Judge conducted the trial with the aid of three assessors but in the course of the trial one assessor failed to turn up so that the trial proceeded with the aid of the remaining two assessors. This must have been pursuant to the provision of ***section 298(1)*** of the Criminal Procedure Code which provides:

"If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance the trial shall proceed with the aid of the other assessors".

A total of sixteen witnesses were called by the prosecution. The evidence presented to the trial court by the prosecution may be briefly stated. The appellant was an employee of the deceased ***David Njoroge Karanja***. He (appellant) had been employed as a farm hand. The deceased was a Meat

Inspector within Nyandarua District and was married to ***Catherine Njeri Njoroge (PW2)*** a Livestock Technician with Ol Joro Orok Farmers Training Centre. The couple had a farm at Gatimu Village Nyandarua District. This was not a happy marriage and due to frequent misunderstandings, the wife ***(PW2)*** left the matrimonial home hence the deceased was left with the appellant in that home as from *May, 1998*. According to ***PW2*** the couple had been married for 16 years and had four children. In her evidence in chief ***PW2*** stated inter alia:-

"The deceased was my husband. We lived well with my husband. We had minor disagreements like other married couples. We were married for 16 years. We had 4 children. My husband was a drunkard. We would quarrel when he was drunk. We separated for a while. We quarreled on 20th May, 1998. I went away for a while. We had quarreled over a matter. This involved chicken feed. He used to be violent. This is what made me and children go away."

The appellant continued living with the deceased while the deceased's wife and children had left the matrimonial home at Gatimu Village. On the evening of *9th June, 1998* the deceased was seen by ***Joseph Wanjagi Wanjuki (PW6)*** and ***Leah Wangechi Munyaka (PW7)*** but after that day the deceased was never seen again. After the absence of one week the relatives and the neighbours of the deceased started looking for him. ***John Rimui Karanja (PW1)*** a brother of the deceased proceeded to the home of the deceased and found the appellant. On inquiring about the deceased, the appellant is said to have told ***PW1*** that the deceased had gone on a safari. This matter was reported to the police and as a result investigations commenced under the directions of ***Inspector Sarah Wanjiku Duncan (PW3)***. As a result of these investigations, the body of the deceased was recovered in a well within his home. The body was identified by his relatives and postmortem examination conducted on the recovered body. The postmortem report showed that the cause of death was brain damage due to severe head injury.

The appellant who had disappeared from the deceased's home was immediately suspected together with the wife of the deceased. The appellant was traced in Nyeri, arrested and charged. The appellant led the police to the recovery of several items which belonged to the deceased. While the appellant was in police custody, he made a detailed statement in which he confessed having killed the deceased. The appellant, however, repudiated the said statement, which was admitted in evidence after a trial within the trial had been conducted.

In the repudiated statement the appellant stated that on ***9th June, 1998*** he had invited ***Kahinga*** and ***Joseph Muchai*** to come and witness him demand money from the deceased. The appellant told the two friends that if the deceased refused to pay him the salary he *(appellant)* would kill him *(deceased)*. That evening the deceased came back home at 9:00 p.m. and appellant demanded his salary to which the deceased answered that he had no money. The appellant then took a hammer and hit the deceased twice on the head. The deceased fell down and never talked again. The appellant called his two friends who were waiting outside the house. The appellant had taken ***3,500/=*** from the deceased's pockets and gave ***Kahinga*** and ***Muchai*** *Shs.100/=* each. The three then put the deceased in a sack and polythene paper. They wrapped the deceased's body and tied him with ropes and carried him in a wheelbarrow. They threw the body into a well and threw stones into the well to prevent the body from floating. After this, the appellant took the deceased's brief case, camera, watch, radio, a hurricane lamp and a bicycle. The appellant washed the house, took the deceased's suits, shoes, two shirts and house keys and threw them into a pit latrine in an effort to cover up the offence. When the appellant was asked about the deceased, he said that the deceased had gone on a safari.

The learned Judge summed up the evidence and the law to the two remaining assessors who returned a unanimous verdict of guilty.

In convicting the appellant, the learned Judge stated as follows in concluding his judgment:-

"Both the hammer, and one of the accused's trousers were stained with human blood. This human blood was group "A". This was the deceased blood group. The accused person was found to be of blood group "B".

The accused also pointed out to the police the wheelbarrow that had been used to ferry the deceased to the well.

I admitted the accused statement after a trial within a trial. Since the same was repudiated it needs corroboration. As I have said above, there is plenty of corroboration, and I do not need to repeat myself. It can also be said that the recoveries of the articles alluded to show that the accused statement can be nothing but true.

I have carefully considered the evidence made available to me. I observed the demeanour of the witnesses. I believe the prosecution witnesses. P.W.2. was a victim of circumstances.

I do not believe the accused. He is the person who killed the deceased because he had not been paid his salary.

The two assessors who remained after the third one was dropped found the accused guilty of murder.

I agree with the assessors.

I find that the prosecution has proved its case on the required standard. I find the accused guilty of murder as charged and convict him accordingly."

The appellant was subsequently sentenced to death as mandatorily provided by the law. It is from that conviction and sentence that the appellant filed this appeal which was argued on his behalf by Mr. Gekonga on *25th September, 2006*.

In his submission, Mr. Gekonga advanced only one ground, in that there was no direct evidence linking the appellant with the murder of the deceased as the conviction was based on circumstantial evidence. Mr. Gekonga argued that the key to the deceased's house was found in the house of the neighbour and that this neighbour was not called to testify. Mr. Gekonga went on to submit that there was a possibility that the wife of the deceased was involved in this murder. As regards the items found in possession of the appellant, it was Mr. Gekonga's submission that the appellant had given an explanation to the effect that these items were planted on him by the police.

On the issue of confessionary statement, Mr. Gekonga submitted that it was the appellant's version that he was tortured while in police custody.

When put to his defence the appellant gave an unsworn statement in which he denied the charge and said that it was the wife of the deceased who had told him that the deceased had gone on a safari. The appellant went on to state that as his aunt was sick, he asked ***PW2*** to give him ***Shs.1,000/=*** so that he could go and see his sick aunt. The appellant denied having run away and insisted that he had obtained permission from ***PW2*** the wife of the deceased.

As regards his arrest, the appellant stated that he was arrested in *July 1998* and beaten by the

police who alleged that the recovered items were found in his possession.

The learned State Counsel, Mr. Njogu, in supporting both the conviction and sentence, pointed out that the appellant was convicted on circumstantial evidence and repudiated confession. He submitted that the appellant was found in posession of the items which belonged to the deceased. Mr. Njogu referred to the detailed statement by the appellant which was corroborated by circumstantial evidence.

Most of the facts of this case were simple and straightforward. But this being a first appeal it is our duty to re-evaluate the evidence, analyse it and come to our own conclusion but as we do so we must remember that we did not have the advantage of seeing or hearing the witnesses – See ***R. V. OKENO [1972] E.A. 32*** and ***NGUI V. R. [1984] KLR 725***.

The evidence before the trial court was that the appellant was a farm hand in the home of the deceased and that the deceased disappeared from his home during the night of ***9th June, 1998*** never to be seen again. The appellant's explanation as to whereabouts of the deceased was suspect. The appellant lived with the deceased but when the deceased disappeared, the appellant's explanation was that the deceased had gone on safari. When the appellant was arrested as a suspect in this murder he gave a long and detailed statement in which he confessed killing the deceased. He however repudiated that confession.

From the evidence on record, the appellant was convicted by the superior court essentially on the evidence of confessionary statement and circumstantial evidence. In our view, the learned Judge had the correct approach as he dealt with circumstantial evidence citing the well-known case of **KIPKERING ARAP KOSKE & ANOTHER V. REPUBLIC** ***(1949) 16 E.A.C.A. 135***. We have re-evaluated the entire evidence and are satisfied that the appellant's statement which he repudiated was properly admitted in evidence. In ***TUWAMOI V. UGANDA (1967) E.A. 84*** at ***p.91*** the predecessor of this Court stated as follows as regards conviction based on confessionary statement:-

"We would summarise 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 a confession be fully satisfied 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."

(Emphasis supplied)

In our view, the appellant's confession was too detailed and was therefore properly admitted, as it was only him who had the knowledge of all those details. The confession by itself was sufficient to sustain his conviction. But there was more. He was found in possession of items which belonged to the deceased. He led the police to the recovery of all these items.

On our evaluation of the evidence, we are satisfied that the appellant was convicted on very sound evidence. Consequently, we order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nakuru this 29th day of September, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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