



Case Number:	Criminal Case 54 of 1988
Date Delivered:	28 May 1990
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Fidulhussein Esmailji Abdullah
Citation:	Republic v Hussen [1990] eKLR
Advocates:	Mr Ghalia for the Defendant.
Case Summary:	<p style="text-align: center;">Republic v Hussen</p> <p style="text-align: center;">High Court, at Nairobi May 28, 1990</p> <p style="text-align: center;">Abdullah J</p> <p style="text-align: center;">Criminal Case No 54 of 1988</p> <p><i>Criminal Practice and Procedure</i> - evidence – sufficiency of evidence – what constitutes sufficient evidence.</p> <p><i>Criminal Practice and Procedure</i> - confession – oral confession – oral confession to be received with great caution – rationale for receiving the confession in such a manner - discretion of the Court to exclude a confession.</p> <p><i>Criminal Practice and Procedure</i> – charge – when to charge a suspect – where the investigation and gathering of evidence is continuing – whether a suspect should be charged at the first sight of sufficient of evidence.</p> <p>The accused person was arrested and detained upon suspicion of murder of his wife. The accused later told the investigating officer that he had a confidential request to make. He started</p>

confessing to the murder of his wife and stated that certain evidence was in a store he owned. The investigating officer cautioned the accused who continued to plead with the officer and offered to bribe him.

They went to the store and the accused pointed out various places and items used in connection with the murder. He made oral statements amounting to confessions in respect of the murder.

The accused was not charged immediately. The defence argued that the police were unfair in not charging the accused the moment they had sufficient evidence to charge him. Further the investigating officer did not respond to the offer to bribe immediately hence his silence could amount to tacit inducement to obtain a confession.

The accused denied making a confession all together. To support this contention, the accused suggested that the failure by the investigating officer to mention the confessions to his superior officer who visited the scene was so incredible and indicated that the confessions were never made.

Held:

1. Sufficiency of evidence must be looked from the subjective view of the investigating officer. Sufficient evidence must be such that in the opinion of such police officer, the evidence may result in conviction.

2. Only where an investigating officer has patently overwhelming evidence in his possession and deliberately refrains from charging the accused person with a view to extracting a confession by unfair methods may the court criticize the conduct of such police officer and exercise its discretion to exclude the confession if the voluntary nature of the confession is tainted.

3. It is only after all the evidence is obtained and properly collected that a police officer may decide to charge the accused person.

4. When the police officer in the instant case had adequate evidence the investigation and gathering of evidence was continuing and could not be

expected to pause at the first sight of sufficiency of evidence to charge the accused.

5. Evidence of oral confession of guilt ought to be received with great caution. Considerable danger of mistake arises from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning and the infirmity of memory.

6. Evidence of oral confession of guilt should be received with caution also due to the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof.

7. The character of the witnesses, who are sometimes necessarily called in cases of secret and atrocious crime tends to impair the value of evidence of oral confession of guilt. This sometimes leads to its rejection, where, in all civil actions.

8. The police officer in this case testified as to what the accused said and his (the officer's) integrity and honesty was not impeached.

Accused convicted.

Cases

Rex v Kaperere s/o Mwaya (1948) 15 EACA 56

Texts

Taylor, JP (1920) *A Treatise on the Law of Evidence* London: Sweet &

Maxwell 11th Edn p582

Statutes

1. Penal Code (cap 63) section 204

2. Evidence Act (cap 80) section 77

Advocates

	<i>Mr Ghalia</i> for the Defendant.
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Accused convicted.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL CASE NO 54 OF 1988

REPUBLIC.....PROSECUTOR

VERSUS

MOHAMMED SHIRAZ HUSSENACCUSED

JUDGMENT

The accused, Mohammed Shiraz Hussen, is charged with murder contrary to section 204 of the Penal Code, in that on 5th December, 1987, at Pangani, Nairobi, murdered his wife Zainab Essah Shiraz.

The accused and the deceased were apparently happily married and they had two children of the marriage. The elder child, about 4 years old lived with the couple at Pangani whilst the younger one lived with relatives in Mombasa.

The accused according to evidence is well behaved and sober young man of about 27 years whilst the deceased was about 26 years old. The accused had a painful childhood in that his parents were divorced when he was an infant and was brought up by grandfather or uncles under difficult circumstances, most of them including the father of the accused were chronic alcoholics. Moreover, 2 or 3 uncles may have committed suicide.

The accused was employed by a motor spares dealer and he had rented a private store along Baridi Road, Pangani where he stored motor vehicle spare parts. He lived in a house adjacent to that store until about June, 1987 when he shifted to the present house, also at Pangani but he retained the store for which he paid monthly rent of shs 900/=. The deceased was a nursery school teacher at the time of her death. The accused a Hanafic Muslim could have easily divorced his wife by pronouncing three times, "I divorce you". In the afternoon of Saturday, 5th December, 1987 at about 3 to 3.30 pm, the accused reported whilst sobbing, to his cousin Mohamed Hanif (PW 8), that his wife had disappeared since lunch time that day when she went to buy vegetables at Pangani shopping centre. Some day, upon advice of another cousin or friend, Omar Hussein (PW 10, 12 and 15), who live at Eastleigh section III about his missing wife. After waiting for her that night, without result, the accused in company of a neighbour (PW 9) and relatives reported to Pangani Police Station, the following morning, namely Sunday, 6th December, 1987.

In the afternoon of Monday, 7th December, 1987, police from Embakasi discovered a body wrapped in black "*bui bui*" on a link road before reaching flyover bridge on Mombasa/Nairobi Road, which was subsequently identified as that of the deceased, Zainab. The '*bui bui*' was tied with strings and so were the hands and feet. It was dressed in yellow dress and trousers. Blood was seen on trousers but no injuries on the legs. Clotted blood was observed on the right side of the head and blood was oozing out of mouth. Moreover, both the breasts were dismembered. The neck had constriction marks on both sides. The scene and the body were photographed. Post mortem was carried out on 9th December, 1987, by Dr Mwaura (PW 1) who also took blood sample and vagine swab which was submitted to Government Chemist for examination.

According to Dr Mwaura, it was a body of female Asian, 26 years old, with both breasts cut off, transverse ligature marks on the neck, and bruises on the forehead with and brain swollen. He formed the opinion that cause of death was asphyxia due to manual strangulation with a ligature around the neck.

After confirmation on 8th December that the body was that of the deceased, the house of the accused was searched by CI Mboshe (PW 17) of Kasarani CID Division, who took over the investigation from Embakasi Police, upon instructions of PCIO, Nairobi, Mr Mutungi (PW 18), an Assistant Commissioner of Police.

He found a wedding ring and a wrist watch (Ex 11 and 12) allegedly belonging to the deceased in a built in wardrobe, in the bedroom of the accused, as also dress material(Ex 9), allegedly purchased on 5th December, 1987 from the shop of the Rainbow Fabrics, Ngara. In the adjoining bedroom in a basket, he found a T-shirt(Ex 13) allegedly worn by the accused on the material day and a pair of black boots (Ex 14).

The accused was arrested on 11th December, 1987 as a suspect and detained at Kasarani Police Station, where he made a statement under inquiry, same night.

In a lengthy statement, (Ex 15), the accused denied all involvement in the murder of his wife, whom he alleged he loved so much and he had no reason to kill her. They lived happily except for minor arguments, occasionally.

He alleged that his wife, who was a nursery school teacher and who 2 weeks before her death, used to take their child to and collect from another nursery school, had complained to him that a man appeared to be half cast or of Arab origin used to follow her every morning in a dark blue Datsun. He tried to monitor and find out who this man was but without success.

In this statement, he gave details of movements on that Saturday. That day he woke up at 10.30 am and after ten, attended to a puncture of his pickup car. He returned to the house at 11.30 am as they were to do shopping at Ngara. After dropping the child at his in laws they went to Ngara where the deceased bought dress material for which he gave her shs 360/= to pay.

After a ride, he dropped his wife home at around 12.30 pm. and went to collect his child at his in laws. He returned to his house, which he found locked and his wife was not in. He waited until 3.00 pm, when he went to Pangani shopping centre where he found Mohamed Hanif, his cousin and informed him that his wife had gone out without permission and had not returned. After reporting to another cousin, they went to his in laws and reported. They all came back to his house and waited for her up to about 11.00 pm without any result.

Following day, after unsuccessful inquiries, he reported to police upon advice of Krishan, his neighbour.

They continued to search for her until 8th December,1987, when he learnt that the body was at the City Mortuary.

He insisted in his denial and asserted that he had belief and trust in her. Moreover, his religion allows four wives. In this statement, the accused has made a revelation which may be noted.

He says that he always used to find his wife home when he returned home from work at 6.00 pm. but two days before 5th December, 1987, namely Thursday, 3rd December,1987, when he returned home

from work at 7.30 pm. he found his wife absent and his child locked inside the house watching video. She returned home at 10.00 pm and when he questioned her she did not tell him where she had been. He neither became angry nor quarrelled with her, but according to the evidence, he apparently was frantic on the afternoon of that Saturday, 5th December, 1987, when his wife who had gone shopping was missing for 2 hours. The accused continued to remain in custody.

During the course of his investigation, CI Mboshe received a tip off that the accused owned a private store along Baridi Road in Pangani and on 17th December, 1987, at about 10.30 am he collected the accused from cells and questioned him about the keys of the store. The accused told him that these were with someone at River Road. They proceeded to River Road. On the way, the accused said to the CI that he had a confidential request to make.

At this stage a trial within trial was held on the issue of law as to admissibility of statements made by the accused to CI Mboshe, there being no suggestions of torture or threat. The issues were breaches of fundamental constitutional rights of the accused and abuse of procedure particularly the right of the accused to be brought before a court within 24 hours of his arrest.

I gave a detailed ruling and held that whatever the accused said to the CI after caution and with regard to the information from the accused leading to the discovery of facts, was admissible. When the accused mentioned that he had a confidential request to make, CI directed his driver to return to Kasarani Police Station, where after attending certain matters, he called the accused to his office and asked him what the confidential request was and the accused started confessing whereupon the CI cautioned the accused, who continued to beg for assistance and offered to CI shs 200,000/=, which was in the store.

They, then proceeded to a house in Pangani, which the accused said was his cousins and from behind one of the bedroom door, where a knitted nylon bag was hanging, the accused removed keys (Ex 18-a bunch of 5 keys.).

They then drove to the store, which was opened by the accused, using those keys.

Inside the store, the accused showed CI blood on the floor and said "This is the place where I killed my wife". This blood had spread out from under a plywood board (Ex 19), which the accused lifted and some more blood was seen on the floor, which at some places were thick and dried out.

This dried blood was scrapped off the floor by Scenes of Crime and Government Chemists personnel, who handled various exhibits discovered in the store, which were analyzed and the report of the Government Chemist who is abroad and may not return until the end of the year, was produced under s 77 of the Evidence Act, upon Mr Ghalia for the accused indicating that he did not object to production of such exhibits.

However, Mr Ghalia has challenged the findings on the grounds that the several exhibits which were received on different dates, are not specifically indicated as to when each was received and that the exhibits may have come in contact with each other. There is evidence that the exhibits were handled mostly by the trained and experienced personnel of Scenes of Crime as well as Government Chemist. There is no suggestion from evidence, that any of the exhibits may have come in contact with the other after it was recovered. Be that as it may, in the absence of the Government Chemist who could not be adequately questioned, the report may not be treated as conclusive evidence, where such evidence needs to be closely examined.

According to the report of the Government Chemist the blood sample of the deceased was of blood

group O and phosphoglucomitase 1+ and the blood sample of the accused was blood group O and phosphoglucomitase 2+1+

The blood scrapped from the floor of the store was of human blood group O ph 1+.

Some hairs picked up from the floor of the store were found to be similar to hennaed hair found on the clothes which the deceased was found wearing when her body was discovered.

Underneath the plywood board at the further end was a knife (Ex 8) which the accused picked up and said that that was the knife which he had used to cut off the breast. Upon examination CI Mboshe, saw lot of fat on the blade.

It may here be mentioned that this knife was identified by Khairumisa,(PW 12), sister of the deceased as the knife from the kitchen of the deceased, which she used to see in that kitchen and which she (PW 12) had been using whenever she went to assist her sister on occasions when she had guests. Mr Ghalia closely questioned Khairumisa about this common knife which has no particular distinguishing marks but she insisted that that was the knife. She denied a suggestion that the police prompted her to identify the knife.

The accused then showed two small knives (Ex 20) and some sisal strings (Ex 21), which were close to each other on the shelf of the store. The accused said that he used the knives to cut the strings in order to tie legs and hands of the deceased to keep in position and also to tie the body with *bui bui* cloth.

The accused also showed the CI a blanket (Ex 22) on the floor, near the plywood board. It appeared slightly bloodstained and covered with dry grass. The accused explained that he had used the blanket to cover the body over *bui bui* when transferring the body from the store to Embakasi. He also said that he put the body on the pickup and covered the body with the plywood board on the pickup.

According to the Government Chemist's report the blanket was moderately stained with human blood group O and ph 1+. The dry grass on the blanket was identified to those found at the scene at Embakasi. It may be noted that Insp Kariuki who discovered the body at the scene and later collected grass sample at the scene at conceded in his cross-examination that such similar grass grows in extensive area in Embakasi and other areas of Nairobi. In the absence of the Government Chemist, such evidence of the report may not be treated as conclusive evidence.

The accused then showed him a *rungu* (Ex 23) on the floor, near the plywood board. It was slightly bloodstained. The accused said that he had used the *rungu* to hit the deceased first.

The Government Chemist's report reveals that the *rungu* was stained with human blood group 'O' but was insufficient in quantity for grouping in 'phospho system'.

Near the *rungu*, the accused showed the CI a scarf (Ex 24). It was bloodstained. The accused told him that he had used this scarf to strangle the deceased, tightening the grip with his hands.

The Government Chemist's report reveals that the scarf was stained with blood group O and ph 1+.

At the door on the left was a blue faded jeans (Ex 25) in an open carton. It was slightly bloodstained at the crotch.

The accused explained to the CI that he was wearing these jeans when transferring the body to

Embakasi and it got stained. When returning from Embakasi, he passed through Kariakor, bought new jeans, changed it at the store and abandoned the faded jeans (Ex 25) in the store.

According to Government Chemist's report, such jeans were stained with human blood group O and ph 1+.

Next to the carton containing jeans was a smaller one in which there was money. The accused offered the monies to the CI and requested if the CI could give him time to clean up the place and at the same time pointing to a water tap in the store. These monies in 4 plastic bags amounted to shs 213,500/= (Ex 26). The CI rejected the offer and summoned the PCIO, Mr. Mutungi and the Scenes of Crime through the pocket phone.

They came to the store and so did later Mr Patrick Shaw.

The search continued. The PCIO summoned the Government Chemist, whose personnel came. The PCIO left a short while later, immediately followed by Mr Shaw.

As the PCIO was about to leave, the accused requested the CI that he (accused) wanted to talk to the PCIO, who upon being so informed directed that the accused be sent over to his office at Nairobi Area Hqr.

After the PCIO left, the accused was sent to his office whilst the CI and others were handling exhibits. The CI remembered the breasts and recalled the accused. When the accused came back, he was asked about breasts.

The accused showed a place on a shelf behind a carton from which he pulled a black polythene bag. Inside, he showed him breasts with teats still showing and the bag stinking.

The accused also showed him on the other side of shelf a pair of sandals (Ex 31) which he said his wife was wearing on 5th December, 1987.

The Government Chemists report shows that the sandals were stained with human blood group O which was insufficient for Ph system. The accused was then sent to the office of PCIO. The scene at the store at various places was photographed.

On 21st December, 1987, the accused took the Chief Inspector to his house where a bucket containing red green checked shirt and light green trousers (Ex 34) in three quarter full water was shown in a bathroom.

According to the Government Chemist's report the sisal strings with which hands and feet of deceased were tied as also the sisal strings with which the *bui bui* was tied are similar to one of the bundles of string found in the store.

CI Mboshe was thoroughly questioned by the defence counsel. It is true that the CI did not respond to offer of bribe immediately when accused offered same in his (witness) office. His silence did not in my view amount to tacit inducement to obtain a confession. From the circumstances, it does not appear that the CI by his conduct induced the accused to make the incriminating statements in the store.

The defence has complained that the police were unfair in not charging the accused the moment they had sufficient evidence to charge him. It is true that the phrase "I decided to charge the prisoner " by a

police officer may be read in the content of the investigating officer having sufficient evidence to charge. However, this cannot be decided by objective approach of such officer. Sufficiency of evidence must be looked at from the subjective view of the investigating officer. Sufficient evidence must be such that in the opinion of such police officer such evidence may result in conviction. It is only where an investigating officer in the face of patently overwhelming evidence in his possession deliberately refrains from charging the accused person with a view to extract a confession by unfair methods that court may properly criticize the conduct of such police officer; and may where the court is of the view that the voluntary nature of the confession is tainted thereby exercise its discretion to exclude the confession. In the instance case, the CI did not have any adequate evidence until he entered the store with the accused and it is not reasonable that he ought to have charged the accused the moment blood on floor was pointed out and the accused said "This is where I killed my wife". At that moment, the investigation and gathering of evidence was continuing and the CI cannot be expected to pause at the first sight of sufficiency of evidence to charge the accused. It is only after all the evidence is obtained and properly collected that the police officer may decide to charge the accused person. The CI says that the he decided to charge the accused after he collected the accused from Mr Mutungi's office at 7.00 pm. on 17th December, 1987.

The CI has readily conceded that in his police statement self recorded by him on 13th January, 1988, he omitted to mention the confessions of the accused accompanying the discovery of *rungu* and scarf, and that the mention of these two items in his statements is so placed as to suggest that these were discovered after the PCIO and Mr Shaw left the store. He ascribes both these to human error and the defence has suggested that this is so because the accused never made any incriminating utterances to the CI. The accused also says in his statutory statement that he never made such incriminating statements to the CI.

In this regard, I am not unmindful of the passage in *Taylor on Evidence* (11th Ed) p 582 which was cited in *R vs Kaperere s/o Mwaya* (1948) 15 EACA 56.

"... the evidence of oral confession of guilt ought to be received with great caution. For not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory; but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof-together with the character of the witnesses, who are sometimes necessarily called in cases of secret and atrocious crime-all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in all civil actions, it would have been received."

Here is a police officer whose integrity and honesty is not impeached and who gave evidence as to various facts which were discovered in the store and which facts have not been challenged. This police officer has testified as to what the accused said in respect of various items which he pointed or showed to the Chief Inspector. Can it be said that there is mistake from misapprehension or malice; can it be ascribed to infirmity of memory; or is it zeal to detect murder in this case-Has his testimony been magnified to turn suspicion into sufficient proof" All these have been very carefully considered.

It is also suggested that the failure of the CI to mention those confessions to his superior officer, the PCIO Mr Mutungi who came to the scene is so incredible, if such confessions were made, that such conduct of the CI indicates that such confessions were never made. This must be considered in the light of all the evidence. There is evidence that there was a crowd outside the store after the police started arriving. The store where these items were discovered appear from the photographs to be narrow with not much space. The accused was in the store, so was the escort, as well as Mr Shaw and the Scenes

of Crime officers as well as personnel of the Government Chemist. Mr Mutungi said in his evidence that he did not consider it proper to discuss the case in the presence of the accused. Defence says that such discussions would, more so be proper as it would have given opportunity to the accused to refute the incriminating statements or keep quiet. This acts both ways. If so discussed, the defence could properly object to admissibility of such evidences as the conduct of police officers may be tainted of improper conduct.

At the office of the PCIO, Mr Mutungi, the accused made a cautionary statement (Ex 43) to Mr Mutungi. This was on 17th December, 1987 at about 4.00 pm. There is evidence that CI Mboshe sent him to the office of PCIO after the breasts and sandals were discovered. There is evidence that he was so sent at the request of the accused.

However, the admissibility of the said cautionary statement was challenged on the grounds that it was obtained as a result of threats of death proceeding from late Mr Shaw to the accused. A trial within trial was held and the statement was admitted.

It was alleged that when Mr Shaw with his huge body and terrifying reputation came to the store, he was shown the polythene bag which contained the breasts and he put his hands inside, withdrew them immediately and screamed, "Jesus, this man must be crazy. Arrest him and push him in the car".

Let us pause here for a moment. There is evidence that the bag was stinking. If Mr. Shaw was shown the bag containing breasts, surely, he being and sane and reasonable person would not put his hands in the bag knowing it contained breasts.

Be that as it may, there is evidence that Mr Shaw left the store more or less at the same time after the PCIO left. By then the breasts had not been discovered. The accused was dispatched to Mr Mutungi's office after Mr Shaw and Mr Mutungi left. The accused was then recalled when CI Mboshe remembered breasts. There is no suggestion that Mr Shaw returned to the store after the accused was recalled. Surely, Mr Shaw could not have put his hands in the polythene bag containing breasts because these were not discovered whilst Mr Shaw was in the store.

However, defence claim that Mr Shaw interrogated the accused inside and outside the office of Mr Mutungi when he was taken there on 17th around 4 to 5 pm and threatened to shoot him unless the accused made a statement with regard to the discovery in the store. Mr Mutungi has strenuously denied this suggestion because he says he was alone with the accused in his office recording the cautionary statement of the accused during this material period. Mr Mutungi is challenged on this piece of evidence that he recorded the statement of the accused on 17th December, 1987. It was suggested to him that he in fact recorded the statement on 18th December, 1987. This is so, because the cautionary statement (Ex 43) and his deposition (Ex A) were originally dated 19th and have been altered to read 17th. Mr Mutungi admits that he made a mistake when he put 18th on the cautionary statement and continued to make the same mistake in his deposition because he put the date on the same after obtaining it from the cautionary statement. When he realized that it was a mistake, he altered both. He cannot recall when he did so and did not seek to alter the committal documents as they were already in court. He thought it proper to explain the mistake in court. There is evidence that the CI Mboshe collected the accused from the office of Mr Mutungi at around 7.00 pm on 17th December, 1987 and took him to Langata Police Station, where he was detained until he was taken to court. It was alleged that the accused was removed from Langata Police Station in the afternoon of 18th December to the office of Mr Mutungi. The prosecution had opportunity to produce the OB of Langata PS to show otherwise. It is unfortunate that it was not so done.

It is unfortunate also that various allegations have been made by the accused against Mr Shaw, who is no more. He cannot refute these allegations.

It is also put to Mr Mutungi that it was wrong to record the statement of the accused without charging him because by 4.00 pm on 17th December, police had sufficient evidence. Mr Mutungi says that he was not personally aware of the evidence which was against the accused though he was summoned to the store. Such assertion may be taken with a pinch of salt. However, the police were in the process of collecting the evidence in the store and the accused had expressed a desire to speak to Mr Mutungi. The accused has suggested that he wished to accompany Mr Mutungi who appeared gentle and more civilized than others, and to be away from the terrifying presence of Mr Shaw. It is to be noted that Mr Shaw was leaving the store at the same time as Mr Mutungi did. So, there could not be need to make a distance from the terrifying presence. Be that as it may, the accused was brought back to store in connection with breasts. By then, Mr Shaw was not there.

To me it appears that after all the incriminating pieces of evidence were discovered with regard to which the accused made utterances, the accused made a request to speak to Mr Mutungi in order to make a clear breast and to explain why he did what he did.

I therefore admitted the statement in evidence which I found to have been voluntarily made by the accused and in accordance with the rules. In this cautionary statement the accused relates history of his unhappy marriage with the deceased because of her domineering, insulting and quarrelsome ways. Her behavior compelled him to leave his mother and sister and move with his wife to another house, and from there to yet another house. Her behaviour grew worse and she mistreated him and their child, to an extent that he could take it no more. When he threatened her with divorce, she retorted that as an educated person she can support and take care of herself and the child. This reminded him of his unhappy childhood due to his parent's divorce; which he did not want his child to undergo. He loved the child so dearly, that he came to conclusion, after some thought that he could not without a wife than a son. It occurred to him that he would rather kill her than let her go with the child, upon divorce.

The accused then continues to say in this statement that as days continued she made his life worse and it reached a point when he decided to kill her as soon as possible. He thought of convenient place to kill her. He ruled out their house because the screams she may make would attract the neighbours. He thought of his store as the best place and examined it. He saw a *rungu* in the store which he decided to use.

On Saturday, 5th December, 1987, he woke up at 10.30 am and decided that he would kill her that day. He attended to pressure of the tyres of his pick-up which he wanted to use.

At his wife's request, he took her to Ngara where she bought material from Rainbow Fabric for shs 360/=. Before doing so, they left their child at her parents house in Eastleigh at his urging.

After buying the dress material he suggested to his wife that they pass through the store where he wanted to show her something, and they did so. After getting inside the store, he locked the door from inside and told his wife to look around whilst he was looking for things which he wanted to show her.

At this stage his heart was beating very fast as he thought this was the only chance he had and if he loses it, he would never get it again.

He brought her to a position where he had kept the *rungu*. He pushed her very hard. She fell. He picked up the *rungu* and hit her on the head and the back to make her unconscious. She screamed a bit in a

low voice. He then strangled her neck with her head scarf which she was wearing around her neck, until she was breathless and he was sure that she was dead. He locked the store and returned to change his bloodstained clothings, namely light green trousers and green and red spotted shirt as well as black boots. He put these clothes in a bucket of water.

He then went to his in law's house to pick up his son and had lunch at Exotica. At around 3.30 pm he saw his cousin Mohamed Hanif and told him that his wife had left without telling him where she had gone.

Later, they went to report to Omar Hussein and at the latter's suggestion, they reported to his in law. They all then went to his house to wait for his wife so that she may be questioned when she came back. They dispersed after 11.00 pm to return to their respective houses.

He did not get sleep the whole night. Following morning at 8.00 am, he collected a blanket, a piece of black cloth and a knife and put them in a bag. He went to his store, where he found the body of his wife as he had left it. He left the blanket, the piece of cloth and knife in the store. He then went to Krishan Lal's house and on his advice, they all including his cousin and brother in law, subsequently reported to Pangani Police Station and after which he had lunch with Krishan Lal.

That evening, after checking with his in laws and cousins, he returned to the store where he found the body of his wife still there. He cut the two breasts of his wife with a knife, put them in a polythene bag on a shelf. He did so to direct the suspicion from him when the police started investigation because he had been hearing of people found with breasts and private parts cut off.

He then checked with his cousin, at Pangani Police Station as well as his parents in law. He spent that night with his cousin, Mohamed Hanif. On Monday, 7th December, 1987, he reported at his place of work at 8.30 am but was allowed off by his employer in order to look for his wife. He returned to his house to change his car for the pick up, and went to the store where he reversed the same close to the door. He closed the door of the store from inside. He found the body in the same way as he had left it. He added that on the day he killed her, he tied her hands with a string in order to keep the body straight. He then tied the legs with strings and wrapped the body with black cloth and covered it with the blanket to avoid bloodstains on his car. He lifted the body and put it on his pick-up, which he covered with a slab of plywood, the size of the back of the pickup.

He drove up to junction of Mombasa Road where he threw the body near the road and returned with the blanket and the slab to the store. On his way back, he bought a pair of new jeans from Kariokor open market because his jeans got bloodstained. He changed them at the store. He locked the store and went to change his pick-up. He rested at Mohamed Hanif's house.

Following day he was told that the body of his wife was found. Police came to his house and questioned him until evening.

The body was released and buried after the post mortem was carried out on 9th December, 1987.

The police arrested him on Friday, 11th December, 1987. A remarkable confession of such thorough details that it cannot but be handwork of the person who has made it.

In his statutory statement, the accused denied that he killed his wife. He insisted that he had no reason to kill his wife, whom he loved so much and who was the mother of his children, whom she loved.

He said that he had been doing business of motor vehicle spares which he operated from his store at Pangani. His cousin (he named this cousin as Omar Hussein during trial within trial with regard to oral confessions in the store) who was also a partner had the keys to the store and so did his wife.

Having regard to all the evidence in court, this claim of the accused of his cousin and wife having the keys of the store appears to be a patent afterthought. Such claim cannot stand reasonable scrutiny. If the accused implies that his cousin lured his wife to the store where the said the cousin killed her and then disposed of the body, then it may seem that his wife had some liason with the cousin, who may have decided to do away with her. There is no evidence before the court to raise any such apprehension. It may be noted that Omar Hussein was a witness in the Court and the accused had the benefit of a very able and experienced court. The other implication may be that his wife who had keys to the store took someone to the store and that someone did her away in the store and then disposed of the body. It cannot be so, having regard to all the evidence.

The accused contends further that the statements he made to CI Mboshe on 11th December, 1987 was a true statement. I have given careful consideration to the same in the light of all evidence. In my view, it cannot be true with regard to denial by the accused of his complicity in his wife' death.

In his statutory statement, the accused has denied that he tried to offer bribe to CI Mboshe or that he made any confessions to Mr Mboshe. I have considered all the evidence before the court, particularly of the events from the time the CI collected the accused from cells at Pangani

Police Station in the morning of 17th December, 1987 until the accused left the store to go to Mr Mutungi's office, after he pointed out the breasts in the polythene bag and the sandals on the shelf. In doing so, I have not ignored the comments in *Taylor on Evidence (supra)*. I am satisfied and I find that the accused not only pointed out various exhibits in the store in connection with the killing of his wife but also made incriminating statements to CI Mboshe with regard to these exhibits as well as offered bribe to the Chief Inspector.

In this statutory statement, the accused has asserted that he was forced to record the statement before Mr Mutungi, which he did in the afternoon of 18th, after both Mr Shaw persistently threatened him with death, in the store as well as in the office of Mr Mutungi, that afternoon and evening of 17th December, 1987.

Upon consideration of all the evidence, I reiterate my earlier finding, that the accused made the statement under caution to Mr Mutungi in the late afternoon of 17th December, 1987 and he did so voluntarily without threat, inducement or promise. I also find, having regard to all the evidence before the court that such statement made to Mr Mutungi cannot be true. All three assessors have unanimously expressed an opinion that the accused is guilty of murder.

Upon my own assessment and evaluation of all the evidence before the court, I make the following findings.

- a) The death of the deceased was caused by manual strangulation with ligature around the neck.
- b) Such death was caused by the accused in his store along Baridi Road, Pangani on or about 5th day of December, 1987 and the same was thrown by the accused along Embakasi area after the breasts of the deceased were cut off.
- c) The accused who had planned the murder of his wife over a period of time, did so cause death with

malice aforethought.

In the circumstances, I find the accused guilty as charged and convict him of murder contra s 204 of the Penal Code.

Dated and Delivered at Nairobi this 28th Day of May, 1990

F.E. ABDULLAH

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JUDGE



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