



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Criminal Appeal 496, 510 & 511 of 2003

(From original conviction and sentence in criminal case No. 2001 of 2001 of the Chief Magistrate's Court at Nakuru – G. A. NDEDA [C.M.]

PETER KIMANI GICHUHI.....1ST APPELLANT

JOHN WAINAINA MWANGI.....2ND APPELLANT

ESTHER WANJIKU NDERITU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Peter Kimani Gichuhi (*hereinafter referred to as 1st appellant*), John Wainaina Mwangi (*hereinafter referred to as the 2nd appellant*) and Esther Wanjiku Nderitu (*hereinafter referred to as the 3rd appellant*) were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal code**. The particulars of the offence were that on the 5th of April 2001, at Menengai Forest in Nakuru District, jointly with others not before court and while armed with dangerous weapons namely knives, the appellants robbed Isaac Ndungu Ndimu of motor vehicle registration number KAC 822Q Toyota Corolla white in colour valued at Kshs 250,000/= and at or immediately before or immediately after such robbery used actual violence to the said Isaac Ndungu Ndimu and thereby fatally strangled the said Isaac Ndungu Ndimu (*hereinafter referred to as the deceased*). The appellants pleaded not guilty to the charge and after a full trial, were convicted as charged. They sentenced to death as is mandatorily provided by the law. They were aggrieved by their conviction and sentence and each filed a separate appeal to this court.

At the hearing of the appeal, the three separate appeals filed by the appellants were consolidated and heard as one. The appellants presented more or less similar grounds of appeal. They were aggrieved that the trial magistrate had not considered the totality of the evidence that was adduced before convicting them. They faulted the trial magistrate for convicting them based on insufficient evidence adduced by the prosecution witnesses. They faulted the trial magistrate for placing reliance on the statement made under inquiry by the 3rd appellant to convict them whereas the said statement was inconsistent and was not corroborated. They were aggrieved that the trial magistrate had not considered the fact that the prosecution had not called vital witnesses in its bid to establish the charge against them. They were finally aggrieved that the trial magistrate had not considered the defences offered by the appellants before convicting them.

At the hearing of the appeals, the 1st appellant made oral submissions urging this court to allow his appeal. The 2nd and the 3rd appellants, with leave of the court, presented written submissions in support of their appeal. They all urged this court to allow their appeals on the grounds that the prosecution had not proved the charge against them to the required standard of proof. Mr Koech, Learned State Counsel made submissions urging this court to uphold the conviction and the sentence imposed upon the appellants. He submitted that the prosecution had established to the required standard of proof that the appellants had participated in the robbery that led to the death of the deceased. He urged this court to dismiss the appeals. We shall revert to the submissions made after briefly setting out the facts of this case.

PW1 Stephen Irungu Mwangi and PW2 Esther Njeri Irungu were the owners of motor vehicle registration number KAC 822Q Toyota Corolla. At the material time, PW1 who is employed by the department of defence, was in Sierra Leone on official duties. The said motor vehicle was deployed as a taxi by PW2. PW2 had employed the deceased as his driver. The said motor vehicle used to operate as a taxi from Shik Park Hotel. PW2 recalled that on the 5th of April 2001, the deceased took the said motor vehicle at 9.00 a.m. from her residence at Racecourse Nakuru. PW2 knew that the deceased had taken the said motor vehicle so that he could deploy it as usual in the taxi business. According to PW2, it was usual for the deceased to return the motor vehicle after completing the day's work. On that day the deceased did not return the vehicle. On the following day, PW2 made inquiries from the wife of the deceased but was informed that the deceased had not returned home. She went to Shik Park Hotel and was informed by one Makori that the deceased had last been seen taking some people who had hired the taxi to the Milimani area of Nakuru.

PW2 and the wife of the deceased were worried by the disappearance of the deceased. They made a report to the police at Central Police Station. On the 9th of April 2001 they were informed by the police that a dead person had been found at a forest near the PC's residence. PW2 visited the scene and was able to identify the body to be that of the deceased. She saw that the deceased had been strangled using a belt. The hands of the deceased had been tied on his back. The body of the deceased was taken to the Nakuru Municipal Mortuary where a post-mortem was performed by PW6 Dr. Edward Vilembwa on the 14th of April 2001. He observed that there was an obvious strangulation of the neck which was visible. The 2nd and 3rd borne of the neck had been dislocated and the spinal cord was transected. He formed the opinion that the cause of death of the deceased was cardio pulmonary arrest due to strangulation.

The motor vehicle which the deceased was driving was not found when his body was recovered. PW3 PC Bernard Irumbi of the C.I.D. Flying Squad section Nakuru was assigned to investigate the case. He testified that he received information that there was a woman who had information regarding the robbery of the motor vehicle that the deceased was driving. He went to KANU street, Nakuru and was able to arrest the 3rd appellant. On the 8th of August 2001, the 3rd appellant led PW3 to Musoma in Tanzania where the motor vehicle which was robbed from the deceased was recovered. The 3rd appellant directed PW3 to the arrest of the 1st and 2nd appellant. The 1st appellant was arrested at Isebania on the Kenya – Tanzania Border whereas the 2nd appellant was arrested at Kabazi in Nakuru. PW1 testified that on the 27th of December 2001, he was accompanied by the police to Tarime in Tanzania where he was able to identify the motor vehicle that was stolen from the deceased. However the registration number had been changed to read TZA 2036. PW1 however produced the logbook of the motor vehicle and its duplicate keys which confirmed that the said motor vehicle was actually motor vehicle registration number KAC 822Q. The said motor vehicle was brought to Kenya and was produced in evidence in court. PW3 testified that the said motor vehicle was recovered from one Amos Kisonde a Tanzanian citizen. The said Amos Kisonde was however not arrested neither did he record any statement with the police.

PW5 Inspector Francis Njeru took a charge and cautionary statement from the 3rd appellant on the 6th of September 2001. In the said statement, the 3rd appellant confessed that she was involved in the robbery with the 1st and 2nd appellants which resulted in the death of the deceased. She stated that after the said robbery, they drove the said motor vehicle to Tanzania where they sold it. The 3rd appellant

implicated the 1st and 2nd appellants in the said robbery. Although the 3rd appellant retracted the said statement during trial, the same was admitted in evidence after a trial within a trial. PW4 Johana Nduhiu Ndimu testified that at the material time he used to operate a taxi registration number KZJ 011 Toyota Saloon based at Shik Park Hotel, Nakuru. This was the same stage that the deceased used to operate his taxi from. He recalled that at the material period, there was a man known as Gerald Makori who had offered to bring customers to him for a commission. He recalled that the said Gerald Makori introduced him to the appellants and he was able to ferry them to various destinations within Nakuru town. He later learnt that the said Gerald Makori had introduced some customers to the deceased. It is the said customers who later robbed the deceased and killed him. However the said Gerald Makori was not called by the prosecution to testify before the trial court.

After the close of the prosecution's case, the appellants were put on their defence. The 1st appellant denied that he was involved in the robbery. He testified that PW3, the investigating officer in this case, had a grudge with him over a woman who was known as Lilian. He testified that the charges were trumped up against him by the said police officer. He denied that he was involved in the said robbery as he was not in Nakuru at the material time. The 2nd appellant similarly denied that he was involved in the robbery. He gave an alibi defence. He testified that at the material time he was at his grandmother's house digging a well and was not at Nakuru town. He testified that he was arrested by the police over an issue which he had no knowledge of. Similarly, the 3rd appellant denied that she was involved in the robbery. She denied that she had voluntarily written the statement confessing to having committed the robbery.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See Njoroge –vs- Republic [1987] KLR 19*). Having carefully re-evaluated the evidence adduced and considered the submissions made before this court the issue for determination by this court is whether the prosecution proved its case on the charge of robbery against the appellants.

In the instant appeals, it is clear that the trial magistrate had relied on the evidence of the retracted confession to convict the appellants. The law as regards retracted confessions is well settled. As was held by the Court of Appeal in the case of *Tuwamoi –vs- Uganda [1967]EA 84* at page 89;

“The present rule then as applied in East Africa in regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true.”

In the present case, there was no direct or circumstantial evidence that connected the appellants in the robbery of the said motor vehicle from the deceased. PW4 testified that the deceased was hired by some people who later hijacked and killed him. They robbed him of the said motor vehicle. The said people were introduced to the deceased by one Gerald Makori. The said Gerald Makori was however not called as a witness in this case. It is trite law that where the prosecution does not call a crucial witness in a criminal case, the court is at liberty to presume that the said witness would have given testimony which would be prejudicial to the prosecution's case.

Further PW3 the investigating officer in this case referred to one Amos Kisonde, a Tanzanian citizen, from whom the motor vehicle which had been robbed from the deceased was recovered. No statement was taken from the said Amos Kisonde neither was he called to testify in this case. On re-evaluation of the evidence, this court is unable to connect the recovery of the said motor vehicle from the said Amos Kisonde to the appellants in this case. PW3 testified that the said Amos Kisonde on being interviewed denied that he knew the 1st appellant. There is therefore no evidence to connect the recovery of the said motor vehicle with the appellants. Furthermore when the said motor vehicle was recovered in Tanzania

on the 27th of December 2001, the appellants were already in custody. The evidence of the recovery of the motor vehicle could not therefore sustain the conviction of the appellant.

The trial magistrate relied on the retracted confession of the 3rd appellant to convict the appellants. Having carefully perused the said statement, it is clear that the same was written by PW5 about one month after the arrest of the 3rd appellant. During this entire period the 3rd appellant was in police custody. She had not been charged. The possibility that the 3rd appellant could have been induced to make the said confession cannot be ruled out. The said confession gives a generic narration of the events that allegedly took place. The said confession is not specific in details. Neither is it specific on dates. It is clear that the said confession was written after the police had received information which they put to the 3rd appellant and thereafter recorded her response. There is no corroboration of the said statement. The said statement was written over six months after the robbery in question. The said motor vehicle was recovered eight months after the said robbery. The information contained in the said confession does not therefore tally with the evidence which was adduced by the prosecution witnesses. We cannot therefore convict the appellants on the evidence of the said confession without corroboration.

Taking into account the totality of the evidence adduced, the alibi defences offered by the appellants could well be true. We therefore hold that the prosecution failed to prove its case on a charge of robbery against the appellants to the required standard of proof beyond reasonable doubt. The appeals filed by the appellants have merit. They are allowed. The appellants are acquitted of the charge of robbery with violence contrary to **Section 296(2) of the Penal Code**. They are ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 6th day of July 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE