



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

Criminal Appeal 103 of 2003

(From Original Conviction and Sentence in Criminal Case No. 2264 of 2001 of the Chief Magistrate's Court at Nakuru – N. O. ATEYA - S.P.M)

NORMAN KURIA MBURU APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT OF THE COURT

The appellant, Norman Kuria Mburu was charged with the offence of robbery with violence contrary to Section 296(2) of the **Penal Code**.

The particulars of the charge stated that on 23rd day of October 2001 at Tipis Forest in Nakuru District of the Rift Valley Province with others not before the court being armed with dangerous or offensive weapons namely; Somali swords robbed **Beatrice Nyatich Ogega** of cash 17,500/- and one wrist watch make Seiko all totaling to Kshs.17,800/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **Beatrice Nyatich Ogega**.

The appellant also faced another charge of **robbery with violence** contrary to **Section 296(2) of the Penal Code**.

The particulars stated that on 23rd of October 2001 at Tipis Forest in Nakuru District of the Rift Valley Province jointly with others not before the court, being armed with dangerous of offensive weapon namely; Somali swords robbed **Shadrack Kyalo** of one wrist watch valued Kshs.300/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **Shadrack Kyalo**.

The appellant was tried by the learned Senior Principal Magistrate at Nakuru and was convicted of the two counts of robbery with violence. The appellant was sentenced to the mandatory death sentence and both sentences were ordered to run concurrently.

The appellant was dissatisfied with the conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has challenged the quality of evidence that was admitted by the trial court. The appellant faulted the admission of the statement made under inquiry which was repudiated. He criticized the conviction that was based on evidence of the two witnesses and for ignoring

the defence by the appellant especially the fact that the appellant was too a victim of attack by the same people who robbed **PW 1** and **PW 2**.

The appellant also blamed the trial court for finding that he was the one who planned the robbery without any cogent evidence.

During the hearing of this appeal, the appellant who was unrepresented sought to introduce further grounds of appeal and written submissions in addition to the oral presentation which were duly admitted.

The matters raised in the supplementary grounds of appeal are cross-cutting on the above grounds of appeal and thus need not be restated. The evidence that lead to the conviction and sentence of the appellant was given by a total of five (5) witnesses.

Briefly stated, it was the prosecution's case that the appellant lured the complainants and masterminded their attack and robbery. The robbery took place on 23rd October 2001 at Tipis Forest in Nakuru.

According to the prosecution's witnesses, the appellant had offered to take the complainants to a forest where **Beatrice Nyatich Ogega, PW 1** could buy charcoal. The appellant was well known to the complainant and on the material day she withdrew Kshs.20,000/- from the bank in the presence of the accused. They bought sixty (60) sacks for Kshs.900/- and then set out on the journey to the forest in the company of a brother-in-law of the **PW 1, Shadrack Kyalo (PW 3)**. When they reached the forest they were confronted by four people who beat them up tied them on a tree and robbed **PW 1** Kshs.17,300 and **PW 3** Kshs.300/- and a wrist watch.

After sometime, the appellant was able to free himself and also untied **PW 1** and **PW 3**, they decided to escape from the forest and sought help from a driver of a passing motor vehicle who dropped them at Njoro Police station. The incident was reported at Njoro Police station but the police decided the matter ought to have been reported at Likia Police Station from where investigations were carried out by **P.C Antony Mwangi, PW 2** and Inspector of Police **Dalmas Ongere, PW 5** who recorded a statement under inquiry from the appellant.

The statement under inquiry was admitted in evidence and it is the basis upon which the appellant was convicted with the offences which he was charged with. **Mr Koech**, the learned Senior State Counsel supported both the conviction and sentence. He submitted that the conviction which was based on the evidence of recognition and a confession by the appellant was safe and should be upheld.

In considering this appeal, this court has a duty to re-evaluate the entire evidence and subject it to independent scrutiny and arrive at an independent decision on whether to uphold the conviction. (See case of **Okeno Vs Republic [1972] E.A.A 32**).

Having considered the evidence that lead to the conviction and sentence of the appellant and we have identified one principle issue that is whether the conviction that was based on a confession that was retracted should be sustained.

There is no evidence that the appellant took part in the attack and robbery against the complainants, and the only reason why he was convicted was because of the evidence contained in the statement under inquiry that was admitted in evidence. The appellant retracted the confession during trial, however the trial magistrate admitted the same confession after a trial within a trial. The appellant contends that the trial magistrate erred in law by failing to consider the element of threats, physical assault and coercion that he was subjected to before signing the statement under inquiry.

Although the appellant states that the admission of the said confession is irregular, it is important to note that the **Criminal Law (Amendment) Act of 2003 (Act No. 6 of 2003)** came into effect on 25th July 2003 long after this trial.

Although the admission of the confession was lawful, the law governing the admission of retracted

confessions is well settled. The Court of Appeal held in the case of **Tuwamoi Vs Uganda [1967] E.A 84** at page 89 as follows:

“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, the trial court did not direct itself to the dangers of conviction the appellant on the basis of a retracted confession and there was no material corroboration of the confession.

Taking into totality the evidence that was adduced by the appellant in his defence, there are clear doubts in our minds as to whether the appellant indeed was the one who masterminded the robbery against the complainants.

In the circumstances, we are of the view that the defence by the appellant raised reasonable doubts and thus the appeal should be allowed.

The upshot of the above is that we allow the appeal, the conviction by the trial magistrate is hereby quashed. The appellant is acquitted of the charge of robbery with violence. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Dated at Nakuru this 17th day of November 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE