



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI**

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1097 OF 2002

(From original conviction and sentence in Criminal Case No. 725 of 2002 of the Chief Magistrate's Court at Nairobi: El Kindy Esq.)

JAMES MWAURA NJOKI ALIAS TOTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant JAMES MWAURA NJOKI alias TOTO and one JOSEPH NDUNGU WAMBUI alias SOLOBO Cr. A.1097 were jointly charged with two counts of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code while in Counts 3 and 4 each was separately charged with having suspected stolen property contrary to Section 323 of the Penal Code. The appellant pleaded not guilty to the charges.

This appeal is confined to the first two counts of Robbery with violence contrary to Section 296(2) of the Penal Code where the particulars are as follows:-

Count 1

That on 21/1/02 at Kenya Co-operative Creameries Dandora Depot Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely pistols robbed RICHARD KIPRONO TUWEI of cash kshs.1,782,322/05 a mobile phone make Nokia and at or immediately before or immediately after the time of such robbery used personal violence on the said RICHARD KIPRONO TUWEI.

Count 2

That on 21/1/02 at Kenya Co-operative Creameries Dandora Depot within Nairobi area jointly with others not before court while armed with pistols robbed JONATHAN BIRECH of a wrist watch make Rado and a cell phone make Erricsson RIO both valued at 20,000/- and immediately before or immediately after the time of the such robbery used personal violence to the said JONATHAN BIRECH.

The prosecution case is briefly that P.W. 1, the Manager KCC Dandora Branch, at about 10a.m. on the material date, some one walked into his office, and P.W. 1 offered him a seat but instead of sitting the person pulled out a pistol. The man asked P.W. 1 to co-operate and open the strong room. P.W. 1 told the thug that he did not have the keys as the same were with the accountant upon which the man ordered P.W. 1 to take him to the accountant warning him not to alert anyone. As they entered the accountant's office, P.W. 1 found other officers lying down on the floor. There were other persons inside holding of

pistols at the officers.

Two men then ordered the accountant to get up and they took him to the strong room where P.W. 1 opened the combination and the accountant opened with the keys. The accountant was the complainant in Count 2. P.W. 1 and P.W. 2 were pushed inside. One more thug came in and removed a sack ordering P.W. 1 and P.W. 2 to stash in all the money, which was about Kshs.1.8million. After they had finished they ordered P.W.1 and P.W. 2 to lie down and went away.

On the date in question, P.W. 2 was informed by his secretary that he had visitors. He, P.W. 2 was at the Manager's office and upon getting back to his office two men walked in with him, drew pistols and ordered him to hand over the keys to the strong room. He had the keys but could not open so one of the men went for the manager, who alone knew the combination and he opened the strong room.

P.W. 3 who was present at the said office and time walked into the accountant's office when he was confronted by a huge gun wielding man; was ordered to lie down along with other members of the staff while the gang stole from the strong room.

P.W. 4 who was in the Secretary's office and while there she saw P.W. 1 leave his office with a man. They passed through the secretary's office towards the accountant's office, and moments later a man wielding a pistol informed them that they were staging a robbery and warned them not to do anything silly. The thug ordered P.W. 4 and the rest in that room into the accountant's office where they were. They were further ordered to lay on the floor. P.W. 4 later heard footsteps leave the office and got up. The thugs had made away with about 2 million shillings.

P.W. 5 testified on the same lines as P.W. 4. P.W. 6 said about 9a.m. he saw a Pajero Vehicle, with GK numbers drive into the Dandora K.C.C. Depot, through his office window, with five people, and four men alighted leaving the fifth in the car. The four headed towards the boss's office. The vehicle left 15 minutes later, and P.W. 6 learnt of the robbery later.

On 4/3/02 P.W. 7 along with other colleagues, were on mobile duties when they received information of a suspect who had staged a robbery at the Dandora K.C.C. Depot. The suspect had been cited at the city center. P.W. 7 and his colleagues went to Luthuli Avenue and Tom Mboya Street junction, and into a bar and entered. They had been given the description of the suspect and name as Mwaura alias Toto. The suspect they had been told wore a black and white stripped sweater and he limped while he walked. P.W. 7 and his colleagues arrested him, and took him to his house at Mwimuto (Kiambu) where they searched the house and recovered a Panasonic radio cassette, one radio game which the officers reasonably suspected to be stolen or unlawfully obtained. The appellant could not explain how he came into the possession of the said items. The officers took the appellant and the recovered items to Makongeni Police Station where they held him for further investigations.

P.W. 8 was instructed by D.C.I.O., Buruburu, to go and conduct search at Ndungu Wambui's (alias Solobo) residence at Komarock. The suspect was then at Buruburu Police Cells. The officers had information that the suspect was involved in the Dandora K.C.C. robbery. The suspect led the officers to his house in Komarock No. 170 where the search led to recovery of Panasonic T.V. Set, a video desk and a compact armada 1120 T laptop. The suspect could not account for the items. They also recovered from the bedroom 14,000/- from underneath the bed. The officers took the items to Buruburu Police Station and the items were produced in evidence by P.W. 9.

P.W. 10 and P.W. 11 only testified about seeing a Pajero vehicle on the date of the robbery at Dandora K.C.C. Depot. None could identify the five men they saw in the Pajero alight and enter the office.

P.W. 12 produced the statement under inquiry, of the appellant. The appellant denied the above allegations and said he was arrested on 4/3/02 at around 2p.m. while leaving a bar. He was asked by the officers whether he was alias Toto which he denied but was taken straight to his house where search did not lead to recovery of what they wanted to recover. They took away the items they produced in evidence claiming they were stolen property. Appellant vehemently denied the charges and stated that he never

recorded the statement produced in evidence against him.

The second accused stated that he worked at his mother's butchery as manager of the slaughter house at Kayole. He said he had no relationship with the appellant. He said he was once questioned by the Flying Squad about a motor vehicle which they alleged had been stolen; and that the charges were mere fabrications. The 2nd accused stated that the 14,000/- were proceeds from sales from the slaughter house. He denied committing the alleged offences.

We now turn to the evidence on record from the lower court. The learned trial magistrate concluded that whereas there had been robbery at the Dandora K.C.C. Depot, none of the prosecution witnesses was able to identify any of the attackers and therefore could not link the accused persons to the alleged robbery. Even on the allegedly recovered items, P.W. 2 did not in his testimony mention whether he had in possession at the time of the robbery the said items and whether they were unlawfully robbed of him. All he said was that he was accosted by a gun wielding man who took him to his office and ordered him to open the strong room.

At J 8 the lower court acquitted the 2nd accused – Joseph Ndungu Wambui alias Solobo, for the prosecution failed to show that he was “Solobo” and hence failed to link him to the offence in Count 1.

We now turn to the crucial basis for the conviction of the appellant herein which was based on a confession by the appellant before P.W. 12, which statement the appellant retracted arguing that he was beaten and tortured before he made the alleged statement. He also stated in his amended grounds of appeal, that the alleged statement was in Swahili yet what was produced in court was in English.

In light of the retraction of the statement by the appellant, which statement is the only linkage between the appellant and the robbery herein, it became necessary to have a trial within a trial to establish the authenticity of the alleged reasons for such retraction – these were the alleged torture and the language used by P.W. 12 during the alleged statement which was Kiswahili while the statement produced in the Trial Court was in English.

From the record, there is no doubt that the statement is incriminating to the appellant, and directly links him to the robbery herein.

The question we have to deal with is the status of an alleged or real confession which has been retracted.

The law on retracted or repudiated confession requires corroboration as a rule of practice. However a court may, nevertheless convict, even without corroboration, if the court is satisfied that the confession cannot but be true, subject to the court warning itself of the danger of doing so. This was the holding in **ODHIAMBO V. REPUBLIC**, [2002] 1 KLR, 241 AT 248, QUOTING FROM **Tuwamoi V. Uganda [1967] E.A. 84**

Applying the above authority to the current appeal we note that from the lower court's record and holding, there was neither identification of the appellant or any of the alleged robbers, nor recovery of any of the alleged items, in terms of the authority of **PETER KAMARU MAINA V. REPUBLIC**, Cr. Appeal No. 111 of 2003. Further, there was literally no evidence upon which to convict or link the appellant [accused persons], other than the retracted and repudiated confession by the appellant. Hence there is no way the confession could be corroborated because there was no other evidence.

Can the lower court still safely convict on the last leg of the law on retracted confessions, that **“the confession cannot but be true.”**

We have re-evaluated the evidence in the lower court's record, especially at J7 and J8 and have difficulty in agreeing with the Learned Trial Magistrate on this point. We find no evidence or circumstance to make the appellants retracted confession **but be true**. Yes, he told of how he was recruited by one “Agu” and his involvement in the plot. Despite this there is no evidence on how he was involved other than in the planning/plotting the robbery. He was stopped by “Agu” from participating in the robbery as he had

wounds which had not yet healed.

The question we asked ourselves is the incentive for the appellant to make such an incriminating confession. Only 60,000/-out of a total of Kshs.1.8million. We are not sure that such a sum was reasonable price for the magnitude of the consequences of the appellants confession. We have also found no evidence that the lower court cautioned itself on the dangers of convicting on an uncorroborated retracted confession.

We thus hold that in the absence of corroboration, there was no evidence, on the record, upon which the lower court could convict on the said retracted confession.

On this crucial point, which was the only basis of the conviction of the appellant, our re-evaluation of the evidence does not, and cannot, support the conviction under the circumstances herein.

Accordingly we quash the conviction and set aside the sentence. The appellant is set free unless he is otherwise lawfully held.

DATED and delivered in Nairobi this 27th day of April, 2005.

O.K. MUTUNGI

JUDGE

F.A.OCHIENG

JUDGE