



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**(Coram: Potter, Kneller and Hancox, JJ.A)**

**CRIMINAL APPEAL NO 61 OF 1981**

**BETWEEN**

**1. ERNEST IMBINDI.....APPELLANTS**

**2. ADRIANO ACHESA)**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Trevelyan & Chesoni,  
JJ.A) dated 2nd February, 1981**

**in**

**Kisumu High Court Criminal Appeal Nos 194 & 195 of 1980)**

**JUDGMENT OF THE COURT**

The appellants Ernest Imbindi and Adriano Achesa were convicted by the Senior Resident Magistrate sitting at Kisumu of the offence of robbery, contrary to Section 296(1) of the Penal Code and sentenced to seven years' imprisonment and twelve strokes of corporal punishment, with five years compulsory police supervision to follow their release. Three other co-accused were also convicted and awarded the same sentence as the appellants. On appeal to the High Court (Trevelyn and Chesoni JJ) the consolidated appeals of the five convicted men were dismissed.

On the night of June 29, 1979, Robert Franks and his wife Ingeborg were in the kitchen of their house at Sirere Village in the Kakamega District when an armed gang broke in and beat the husband and the wife so severely that the couple had to be flown to Nairobi Hospital for treatment. The goods listed in the charge sheet were stolen.

The first appellant Ernest was not identified by Mr Franks or his wife. The case against him rests on his own confessions.

In his defence Ernest said that he was arrested by the assistant chief and taken to an office station. He said he knew nothing about the robbery. "I was asked to sign a statement and I signed it like a feel."

On July 24, 1979 Assistant Chief Imbowa went to Ernest's house on information. He was asked about the

robbery but made no reply. Later he admitted that he had taken some items. Ernest did not challenge this evidence in court. Ernest was arrested and handed over to the police. The same day he gave a statement under enquiry to a police inspector, which was a full confession to participation in the robbery, and in which he said he was armed with an axe. Ernest repudiated and retracted that statement. A week later on July 31, Ernest made a charge and caution statement to another police inspector, in which he said "I admit the charge." This statement he also repudiated. The enquiry statement and the charge and caution statement were admitted after a trial within a trial. They were corroborated by the evidence of the Assistant Chief Imbowa and also by the references to Ernest in the enquiry statements of his co-accused Adriano and of each of the other three co-accused. (The magistrate did not rely on these statements.

We would refer with approval to the following passage in the judgment of the High Court:

"As for the confessions of co-accused amounting to corroboration, there are many cases in the books on the topic, and it is clear that provided that the statements are confessions and sufficient to justify the markers" convictions they may be taken into account against coaccused being tried for the same offence even if they are retracted and repudiated: Anyumba s/o Omolo and Another v R [1953] 20 E A C A 218. Tuwamoi v Uganda [1967] EA 84. Of course, other evidence against the co-accused named but, as we said earlier, corroboration is no more than something tending to confirm other evidence."

Ernest has not attended this appeal at his own wish. This is a second appeal confined to points of law. The High Court has confirmed the rightness of the conviction on its own assessment of the evidence. Ernest's grounds of appeal disclose no grounds of law. This court has no jurisdiction to review a sentence on second appeal on the grounds of severity. In fact Ernest was fortunate not to have been convicted of the offence with which he was charged, which would have resulted in his being sentenced to death. Ernest's appeal against conviction and sentence are dismissed.

The second appellant Adriano was identified as one of the robbers by Robert Frank at an identification parade.

On July 24, 1979 Assistant Chief Imbowa went to Adriano's house on information and questioned him about the robbery. He told Imbowa that he had taken part in the robbery and was sorry about it. This evidence was not challenged by Adriano at the trial. All that he said in his defence was that the assistant chief checked his house for stolen goods but found nothing. He denied knowledge of the robbery of the other accused.

On the day of his arrest Adriano made an enquiry statement to a police inspector which was a full confession. On July 31, he made a charge and caution statement to a chief inspector, which was also a full confession. In both statements he said that members of the gang and caution were armed with pangas and rungas. Adriano impugned both statements, but they were admitted after a trial within a trial and as the High Court held, they were corroborated by the evidence of identification by Robert Frank, by the confession to the chief and by the references to Adriano in the enquiry statements of Ernest and the other three co-accused.

Adriano also did not wish to attend his appeal. His grounds of appeal disclose no points of law. We have no jurisdiction to review the sentence. Adriano's appeal are also dismissed. The High Court made two criticisms of the trial with which we fully agree. Firstly, the appellants and their co-accused were charged with the capital offence of robbery with violence contrary to Section 296(2) of the Penal Code. We agree with the High Court that that charge was proved as laid against all the accused. The complainants were wounded and the accused were armed with offensive weapons. The senior resident magistrate said that he reduced the charge to simple robbery with reluctance, but it is not clear why he did so. We agree fully with the High court that the senior resident magistrate should not have done so in the circumstances of this case.

Secondly, one trial within a trial was held for four of the accused in respect of statements made by them on three different dates. The magistrate did so because all the statements were recorded by the one

prosecution witness. We fully agree with the High Court when it said in its judgment:

"This was wrong. A separate trial within a trial should be held for each impugned statement. Each challenge is entitled to its individual consideration."

Delivered at Nairobi this 4th day of May, 1983.

K D POTTER

JUDGE OF APPEAL

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL