IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller JA, Chesoni & Platt Ag JJA)

CRIMINAL APPEAL NO. 84 OF 1983

BETWEEN

1.BAKARI OMAR

2. JOHN MARTHA KOMORA.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants, Bakari Omar and John Martha Komora were convicted of robbery with violence contrary to section 296 (2) of the Penal Code (cap 63) and were sentenced to death. Their first appeal was dismissed by the High Court (Todd and Porter JJ). Bakari has appealed to this Court on one ground namely, “the appellant’s defence was not given adequate and due consideration and this occasioned a miscarriage of justice.” John has put forward two grounds of appeal and these are:

1. The appellant’s defence of alibi was not given adequate and due consideration and this occasioned a failure of justice.

2. It was a fatal error to rely on the retracted confession of the appellant without considering its weight critically.

The two appeals have been considered and as they are second appeals they can be only on points of law (section 361) of the Criminal Procedure Code (cap 75).

The case against the appellants was that in the very early hours of August 10, 1981 at about 2.30 am when the complainant Mercy Wambui Karani was sitting on the bed feeding her baby, she was attacked by robbers of whom she saw two. She had a pressure lamp burning in the room and also a torch. Mercy is a businesswoman and has a shop attached to her room at Kisumu Ndogo in Malindi Town of the Coast Province. At the material time that night she heard some noise in her shop and when she flashed her torch towards the door of the shop she saw a man going towards her running. The man did not talk to her but stabbed her with a knife on the left side of the neck. She got hold of the knife blade and as she struggled with him he stabbed her on the left armpit with a different knife. Mercy asked the man why he wanted to kill her and what he was after and he told her that he wanted money. She directed him to the drawer where the money was. As the first man went to take the money from the drawer, Mercy tried to escape with the baby, but she found a second man standing by the door her back into the room. She went back to her bed and she was by that time bleeding profusely. The men opened the front door (this would appear to

mean the main door to the shop) and instructed Mercy to close the door to her room and she did so halfway so that she could escape when a chance arose. She said that she saw the men taking away the "*lessos*" from her shop. Mercy shouted for help but she was ordered to keep quiet and close the door completely and she did so. When the robbers left she called for and got help and was, after fainting, taken to hospital where she stayed for two days. The robbers had stolen Kshs 5,400, twenty "*lessos*" worth Kshs 1,400 and a wristwatch valued at Kshs 800.

The complainant later on October 24 and November 12, 1981, identified John and Bakari at separate identification parades, and in this appeal there is no complaint about the conduct of those identifications.

Bakari made an unsworn statement in court in his defence. After telling the Senior Resident Magistrate that on November 22, 1981 he was serving a six months' imprisonment at Kilifi when he was visited by some people at the prison he said:

"At noon there came another two people who I did not know. There were more than five people. They came in civilian clothes and identified themselves as policemen. The gate was opened to them and they sat at the duty office. When I was called to see these people I also saw the woman who had at first come to see me. I was taken inside the duty office and interrogated about the incident at Kisumu Ndogo. I was asked by another askari whether I remembered August 10, 1981 at Kisumu Ndogo. I told him it was a long time since I last went there. Then he told me there was a person outside who was alleging that she had been robbed of her property.

One askari told me he wanted to place me in a line with others so the woman could come and pick me. When she was called inside I found it was the same woman who had come to see me that morning. Then she was asked to pick the person who had come to her house. She did not go anywhere else but came straight to me and touched me and then she left. I kept quiet. That is all."

His defence was therefore by inference that he was not at the complainant's house on August 10, 1981 and it was a long time since he was at Kisumu Ndogo. The Senior Resident Magistrate in his judgment repeated what Bakari told the court and said, referring to Bakari:

"He was interrogated by the police and then placed in a line. The woman (presumably the accused was referring to the complainant) then picked him out straight away."

After saying this the trial magistrate also considered the fact that as part of his defence Bakari denied the offence to the police. The case had to be considered under the general presumption of innocence of an accused till he is proved guilty beyond reasonable doubt and his denial that he was at the scene of the crime. However, the record shows that the trial magistrate carefully considered Bakari's defence before he found this appellant guilty as charged and convicted him. Indeed it is worth noting that the ground of appeal before us was not one of the grounds put forward by Bakari in his first appeal, but still the High Court considered Bakari's defence in the form of the denial to the police that he did not commit the offence he was charged with. Mr Odero's submission was that this appellant's defence was not adequately considered by both courts below but in fact it was rejected and so we cannot hold that there was any miscarriage of justice in his trial.

John's defence in court was an alibi for in his unsworn statement he said:

"On August 10, 1981 I was at Busia. I arrived there on August 4, 1981. I left on August 28, 1981. I did not stay at Malindi, I stayed at Mombasa."

About John's alibi the trial magistrate said:

"Accused 1 elected to give unsworn evidence … He said he was in Busia between the 4th August and the 28th August, 1981."

The magistrate after considering John's positive identification by Mercy and the statement he made to the

police under charge and caution had the following to add:

"Against accused No 1 (John was accused No 1 at the trial) positive identification by the complainant and an admission under charge and caution. Against that evidence I have his unsworn statement that he was in Busia. I am aware of the dangers of convicting on the identification of one witness only, but taking the evidence in its totality including that of the accused No 1 there is no doubt in my mind that he was involved in this incident and was the man with the axe who entered her room after the first man had entered it and injured her."

Thus the trial magistrate after considering all the evidence before him reached the conclusion that John was not in Busia on August 10, 1981 as he had alleged. He rejected the alibi after considering it together with the whole evidence. The magistrate was bound to reach the conclusion he reached because he had admitted John's confessionary statement in which John said *inter alia*:

"It is true I robbed the lady Mercy Karani Kshs 5,400 and twenty *lessos*. Also I cut her with a knife."

He could not have done so on August 10, 1981 at Malindi if he was in Busia. Although inadequate consideration of the defence of alibi was not raised by John at his first appeal the High Court nevertheless considered it and reached a concurrent conclusion with the trial court for the learned judges said:

"Making our own assessment of the recorded evidence we believe and accept the evidence of Mercy Karani as we do also the other prosecution evidence that it was indeed the two appellants who broke into Mercy Karani's premises at Kisumu Ndogo during the night of August 10, 1981 and there jointly robbed her of cash Kshs 5,400, twenty *lessos* valued at Kshs 1,400 and her wrist watch and that during the time of such robbery they both with common intent wounded Mercy Karani as testified."

Again the records of the two lower courts show that John's defence of alibi was fully and carefully considered together with the whole evidence and found to be untrue. There was therefore no failure of justice which Mr Odero for the appellant has urged us to find.

John made a charge and caution statement to Chief Inspector Cornelius Ngugi in which he admitted robbing Mercy, but at the trial he retracted his statement to the police, although the trial magistrate admitted it in evidence after holding a trial within a trial. The magistrate found that the injuries which John had were inflicted on him by members of the public who arrested and took him to the police and there was the independent evidence of Hamisi Iddi who was present at John's arrest to support the magistrate's findings. The magistrate was satisfied and found that the statement was given voluntarily. In his judgment the magistrate said what we have already quoted. He took into account John's confession in arriving at his decision and when John appealed to the High Court he did not complain about the trial magistrate's reliance on his (John's) retracted confession. The learned judges however considered the point and said:

"The learned trial magistrate after considering all the evidence given and the unsworn statement of this second appellant (John was the second appellant in the High Court) given at the trial within trial was of the view as we are also of the view that the statement of the second appellant John Martha Komora given to Chief Inspector Cornelius Ngugi was voluntarily given. It follows we find that it was in the learned trial magistrate's mind that what the second appellant said in his statement was what he himself wanted to say and not what Chief Inspector Cornelius Ngugi wanted this appellant to say. It is quite clear by saying in his statement that he admitted robbing the complainant and cutting her with a knife that all he was doing was associating himself with the crime that took place on that night. In no way does it indicate that the second appellant was admitting to something that did not happen nor does it indicate that the complainant was not telling the truth or was mistaken."

Now John says that the magistrate erred fatally in relying on a confession which was retracted without considering its weight critically. What John told the trial magistrate was that he made the statement admitting the robbery charged because of threats and beatings from the police. He said:

"I was afraid I was going to be injured so I had to admit."

In the case of *Tuwamoi v Uganda* [1967] EA 84 p 88 the Court of Appeal for Eastern Africa said:

"… a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one."

In this appeal it appears the appellant John accepted the magistrate's ruling that the confession was voluntary, but what he is not satisfied with is the weight of that confession. The position with regard to a retracted and/or repudiated statement or confession was clarified in the *Tuwamoi's* case in which after the predecessor of this court had reviewed the authorities on the point it said:

"We would summarize the position thus - a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

The same court had made the same point in *Toyi v R* [1960] EA 760, and we are in agreement that there is no rule of law or practice requiring corroboration of a retracted statement or confession before it can be acted upon. It is, however, dangerous to act upon it in the absence of corroboration in material particulars or unless the court after a full consideration of the circumstances, is satisfied of its truth - also see *Swai and Others v Republic* [1974] EA 373. Trevelyan and Sachdeva JJ held in *Sahal Mohammed Hussein v The Republic* [1976] Kenya LR 53 that an appellant, who has made an unjustified attack on the person who took the statement, should not be allowed to argue that it was unsafe for him to be convicted in the absence of corroboration of that statement or a caution by the court as to the danger of convicting without corroboration when the statement was manifestly true and an experienced counsel had not thought fit to question the weight to be attributed to it. We do not think an accused or appellant should be punished for attacking in court the person who recorded his statement, but if the attack is unjustified the court is entitled to take into account that fact. Of course it was not John's case that there was no corroboration of his retracted confession or that the trial magistrate should have cautioned himself as to the danger of convicting without corroboration. We understand his point to be that the magistrate did not critically consider the weight to be placed on the retracted confession before convicting.

In our view what the trial magistrate was required to do once he had decided that the statement was voluntary and admissible, was to accept it with caution, and that he did, for in his judgment he said:

"I carefully considered the evidence given by the prosecution witnesses relating to the taking of the statement and bore in mind that the accused had in fact been injured. I also took into account his unsworn evidence about the taking of the statement and that it was upon the prosecution to satisfy me beyond any doubt that the statement was given voluntarily. I was so satisfied and admitted the statement"

Then before founding a conviction on that retracted confession the magistrate had either to be fully satisfied in all the circumstances of the case that that confession was true or there was corroboration of it in material particulars. This appellant did not injure Mercy according to her evidence and when it was recorded in his charge and caution statement that he said that he did so it is probable that he did not use those words. Nevertheless we are satisfied that the prosecution proved by other cogent evidence that the appellant was one of the two men who robbed Mercy, and, in any event his conviction could not be and was not based on that part of the confession, because both courts were by inference aware of the inconsistency between the confession and Mercy's evidence.

However in the circumstances we think that the cautionary statement should not have been accepted as true in any way. We are satisfied that the prosecution proved that the appellants robbed Mercy on August

10, 1981, and immediately before or after or during the robbery they used actual violence on her person; they were armed with offensive or dangerous weapons; they wounded Mercy and they were in the company of one or more other persons. The appellants were therefore properly convicted; their first appeals were correctly dismissed and as there is no merit in these second appeals against both conviction and sentence we order that they be dismissed.

Dated and Delivered at Nairobi this 13th day of October 1983.

A.A.KNELLER

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JUDGE OF APPEAL

Z.R.CHESONI

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AG.JUDGE OF APPEAL

H.G.PLATT

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AG.JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR