



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJ A)

CRIMINAL APPEAL NO 14 OF 1979

Between

OGERO OMURWAAPPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

This is the appellant's second appeal after the dismissal of his appeal by the High Court against his conviction and sentence in the Court of the Senior Resident Magistrate, Kisumu, for the offence of robbery with violence, contrary to section 296(2) of the Penal Code.

David Mecha was on duty as a watchman at Matutu secondary school. At about 2.00 am on 25th January 1978 he was attacked by a gang of about sixteen men who carried torches and were armed with bows and arrows, and simis. Mecha flashed his torch and identified the appellant whom he had known "for long", and whom he used to see every morning in the market. The appellant beat Mecha and cut him with a *simi* on his head, right thigh and thumb. Mecha cut the appellant on his head, then threw his knife at him when the appellant ran as help came.

The school was robbed of a typewriter (worth Shs 4,000) and certain other items listed in the charge sheet during the raid. The typewriter was recovered later in the bush near the school.

Apart from the appellant's identification by Mecha (which seems in no way doubtful in view of the fact that Mecha had known him for a long time previously) the appellant's connection with this crime was also established by other evidence.

The appellant woke up Samson Ongware at the latter's house at about 3.00 am on 25th January 1978. Ongware testified that the appellant was carrying a *simi* and he was bleeding profusely from his head and left hand. He told Ongware that he had been beaten by Kipsigis tribesmen on the way from Sotik. Ongware went and called his father-in-law, Omurwa, from his house. The appellant told Omurwa the same story. Omurwa told him to go to hospital for treatment; but the appellant refused to do so. He was allowed to sleep in Ongware's house. When the appellant saw an inspector of police coming to the house in the morning he threw his *simi* in the latrine.

After caution the appellant made an inquiry statement to the police, which he retracted at the trial. It was admitted in evidence after a trial within a trial as having been made voluntarily by the appellant. The appellant admitted in his statement having been present at the scene of the crime with other members of

the gang.

The appellant also made an unsworn statement in Court in which he said that he was drinking beer up until 11.00 pm on 24th January 1978. While he was walking back home from Sotik he met some people who had a fight with him and cut him on his head. He ran away, got tired and slept in the bush till 7.00 am. He went to Omurwa's home at about 8.00 am and he told him about the fight. While the appellant was at Ongware's house, on information received, the police came there and the appellant was arrested.

We will for the moment deal with the appellant's statement. With respect, Hancox and Sachdeva JJ in the High Court correctly pointed out that the magistrate erroneously stated that the appellant's police statement was corroborated by the one he made in Court. The judges then said that the instances in which an accused person makes a statement admitting his presence during the commission of a crime, but denying a positive act on his part, are frequent. They considered that the correct attitude to such statements was the one adopted by Trevelyan J in *The Republic v Kamau* (unreported), namely:

A confession (as defined) is not admissible in evidence if it was induced: Evidence Act 1968, section 26. Where an accused makes a retraction which the Court rejects there should nonetheless be corroboration, subject as aforesaid. It is a very favourable rule to an accused. An invitation to retract. But is the Court limited to acting on a statement only if it is true? I believe not. The criterion must be whether the statement represents what its maker has said. It may or may not be true but is entitled to go in as part of the evidence in the case generally without corroboration, unless there are circumstances making such corroboration desirable.

The judges continued:

Accordingly, we consider the statement in this case was entitled to go in as part of the prosecution case to prove the appellant's presence at the crime, a matter which he has since denied.

State counsel told us that he did not support the last sentence in the quotation from Trevelyan J's judgment as a correct statement of the law.

The Courts are almost daily faced with having to deal with statements both retracted and repudiated. We think the following excerpts, with which we respectfully agree and which we consider apply equally well in Kenya, from the judgment of the former Court of Appeal in *Tuwamoi v Uganda* [1967] EA 84,88,89, will prove of assistance generally:

We now come to the distinction that has been made over the years between a statement "retracted" and a statement "repudiated". The basic difference is, of course, that a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant, 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 the statement was not a voluntary one. On the other hand a repudiated statement is one which the accused person avers he never made.

We have had some difficulty in tracing how this distinction arose. The first reported decision in East Africa relating to retracted confessions appears to have been in 1935. We refer here to the decision of this Court in *R v Muthiwa* (1935) 2 EACA 66 in which this Court held that it would be unsafe to convict on the retracted confession in that case and it adopted as a correct statement of the law the rule of practice referred to by Sir Grimwood Mears CJ in *Emperor v Shambhu* and the judgment quotes this rule as follows (1932) ILR 54 All at page 358): "The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars".

This rule was more fully explained and modified by later decisions and before referring to the decision in 1936 which first made the distinction between a retracted and a repudiated statement, we would refer to some of these decisions. We would first refer to *R v Keisheimeiza* (1940) 7

EACA 67 and to the following extract from the judgment of the Court delivered by Whitley CJ: “We would refer to the judgment of this court in the case of *R v Robert Sinoya* (1939) 6 EACA 155 in which the authorities are reviewed and the opinion was expressed that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. We agree that in ordinary cases as a general rule when a confession is definitely and categorically retracted it is unsafe for the Court to act upon it without corroboration but if after enquiring into all the material points and surrounding circumstances the Court is fully satisfied that the confession cannot but be true there is no reason in law why the Court should not act upon it (*R v Durgaya*, 3 Bom LR 141).

The law is concisely summarised in *Woodroffe and Ameer Ali* (9th Edn) at p 277, in the following words: ‘It is unsafe for a Court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence or unless the character of the confession and the circumstances under which it was taken indicate its truth’.”

We would also refer to the judgment of this Court read by Sir Alastair Forbes V-P, in *Toyi v R* [1960] EA 761 where it was stated: “We agree that there is no rule of law or practice which requires corroboration of a retracted confession before it can be acted upon. But we think the learned judge was understating the case in merely saying that ‘it is desirable ... to have such corroboration’. It is a well-established rule of prudence that it is dangerous to act upon a retracted confession unless it is corroborated, in material particulars or unless the Court, after a full consideration of the circumstances is satisfied of its truth - *R v Kaperere Muaya* (1948) 15 EACA 56. *Miligwa Mwinje v R* (1953) 20 EACA 255. With respect, we think that the learned judge’s direction, in so far as it fell short of a warning to the assessors that in the absence of corroboration a retracted confession is to be received with great caution and reserve, amounted to a misdirection. However, we were satisfied that in fact in his judgment the learned judge had accepted the appellant’s extra-judicial confession as true only after full consideration of the circumstances, and that there was every justification for such acceptance.”

In the recent case of *Kamau v R* [1965] EA 501 this Court set out the rule as at present applied by this Court to a retracted confession. This was an appeal from Kenya (Farrell J) but the rule as thus set out would equally well apply to Uganda and Tanzania. We quote ([1965] EA at page 505): “As we have earlier said, the other material evidence against the appellant was her own cautioned statement, which she retracted at the trial. In relation to this, the learned judge directed the assessors that it is dangerous to rely upon a retracted confession in the absence of corroboration, but that they might do so if fully satisfied that the confession must be true. He further directed them that they might properly treat the evidence of Wambui as corroboration of the cautioned statement. We think that the learned judge’s direction regarding retracted confessions was correct (*Toyi Kalihose v R* [1960] EA 501; *Pyaralal Melaram Bassan v R* [1961] EA 521) and that Wambui’s evidence, not itself requiring corroboration, was capable of affording corroboration.”

The present rule then as applied in East Africa in regard to a 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 that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true.

In particular the former Court of Appeal also said ([1967] EA at page 90):

On reconsideration of the position we find it difficult to accept that there is any real distinction in principle between a repudiated and retracted confession.

We would re-emphasise that if a statement is retracted, it should be an unfailing practice for the Court to look for corroboration of the material particulars in the statement unless the Court is able to come to the

unhesitating conclusion that the confession is true in the manner stated in the quotation from *Woodroffe and Ameer Ali (supra)*.

We would refer to the following two passages in the judgment of the High Court which might create a wrong impression:

1. We further agree that the appellant's attempt to rid himself of the *simi* when the police came was an additional suspicious circumstance against him.
2. The magistrate also impliedly accepted the identification of the appellant by the watchman notwithstanding that it was at night.

We consider that there is no more here than that the words "suspicious" in paragraph (1) above, and "impliedly" in paragraph (2) above, were used ill-advisedly.

We would now turn to the instant case. We are satisfied that the appellant was rightly convicted of the offence with which he was charged. After consideration of the whole evidence in the case we find ourselves in the position to come to the unhesitating conclusion that the appellant's statement that he was at the scene of the crime was true. His attack upon Mecha with a lethal weapon, his immediate recognition by Mecha, and the injuries inflicted upon him by Mecha, his being seen with injuries within hours of the commission of the offence, leave us in no doubt that the appellant was actively involved in the robbery at the school.

We allowed the appellant to raise an additional ground of appeal on the first occasion when he appeared before us to the effect that he was under eighteen years of age on the date of commission of the offence. We made an order for the appellant to be examined for this purpose which has been done. The medical report of the examination received by us negatives this ground of appeal.

Appeal dismissed.

Dated and delivered at Nairobi this 17th day of July 1979.

C.B MADAN

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR