IN THE COURT OF APPEAL

AT KISUMU

CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CRIMINAL APPEAL NO. 30 OF 2013

BETWEEN

JARED OTIENO AMBEGO ……..….. APPELLANT

AND

REPUBLIC ……..……...…. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu

(Ali-Aron & Chemitel, JJ.) dated 31st July, 2012

in

H.C.CR.A NO. 192 OF 2012)

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JUDGMENT OF THE COURT

1. On 24th November, 2011, the appellant was convicted on four counts of robbery with violence. The trial magistrate sentenced the appellant to death in respect of the first count but sentences on the other counts were held in abeyance.

2. The robbery for which the appellant was so sentenced to death was committed at Bondo on the night of 11th May, 2010. It was alleged that the appellant together with his accomplices, robbed **William Oyim Kachi, Sarah Oyim, Jacinta Anyango Arwa** and **Grace Atieno Oyim** of several items, including a mobile phone, Nokia 1208 by make, and at or immediately before or immediately after the time of such robbery used actual force to the said victims. At the time of the robbery the appellant and his co-accused were also armed with dangerous weapons, namely, an AK 47 rifle, pangas, rungus and iron bars.

3. The appellant's first appeal to the High Court was unsuccessful, hence, this second appeal. In the supplementary memorandum of appeal filed by the appellant's advocates, **Lore & Associates,** the appellant contended that the High Court erred in law in accepting an uncorroborated alleged confession statement linking him to the robberies and in upholding the conviction when there was insufficient evidence of his involvement in the robberies.

4. During the trial the complainants testified as to how they were robbed on the material night by a gang of about eight people. They were unable to identify any of the robbers. They reported the robbery to the police and gave particulars of the stolen mobile phones.

5. Following intense investigations, the police were able to trace one of the mobile phones that had been stolen from the complainants, a Nokia 1208. It was with one **George Owino Ngesa,** a vehicle painter in Kisumu. Ngesa told the police that he had exchanged his phone with another one given to him by the appellant, the Nokia 1208, and he also gave the appellant Kshs.700/=. The police then proceeded to arrest the appellant, who was pointed out to them by Ngesa.

6. Following the appellant's arrest, on 21st May, 2010, Chief Inspector **Ali Ibrahim, PW 6,** recorded the appellant's statement under inquiry. The police officer informed the appellant of his right to have an advocate or relative present during the recording of the statement. The appellant elected to have two of his relatives, **Tony Otieno Abengo** and **Stephen Awino Abengo,** present, and they both sat through the recording of the statement. The appellant chose to have the statement recorded in Kiswahili. After the recording, PW 6 signed the appropriate certificate and the appellant as well as his two relatives also counter signed it.

7. The statement was produced before the trial court as an exhibit. The appellant did not object to its production. In the statement, the appellant, a mechanic, did not make an express admission of his participation in the robbery. He stated that a certain person by the name Onyango took him to Bondo ostensibly to repair a certain vehicle. Upon arrival, they were joined by some other friends of Onyango. He saw them robbing a man and several women who had just alighted from a car. After the robbery he was given a phone, Nokia 1208 and Kshs. 1,000/= and told to go back to Kisumu.

8. The first appellate court held that the cautionary statement that amounted to a confession was properly recorded and produced. The court rejected the appeal against conviction but as regards sentence, the death sentence was quashed and substituted with a jail term of 15 years. Before the hearing of the second appeal, the Director of Public Prosecutions filed a notice of enhancement of sentence.

9. At the hearing of the appeal, **Mr. Lore**, the appellant's learned counsel, submitted that both the trial court as well as the High Court failed to appreciate that despite the confessionary statement having been admitted in evidence, there was need to exercise caution before relying on the alleged confession as a basis for founding a conviction. Counsel added that a trial within a trial ought to have been conducted to determine whether the confession statement had been freely obtained.

10. Mr. Lore further submitted that the two relatives of the appellant who were allegedly present when the confession statement was recorded ought to have been called to testify before the trial court. The two relatives of the appellant did not also record any statement, he added.

11. As regards the notice of enhancement of sentence, the appellant's counsel chose to leave the issue to the Court.

12. **Mr. Ogoti,** Senior Assistant Director of Public Prosecutions opposed the appeal. He submitted that the confession statement had been properly admitted into evidence and rightly applied by both the trial court and the first appellate court. The statement was recorded in Kiswahili, the language chosen by the appellant, and in the presence of his two relatives. The appellant, having not objected to its production, could not rightly assert that his two relatives ought to have been called as witnesses, Mr. Ogoti contended.

13. As regards sentence, Mr. Ogoti submitted that under **section 296 (2)** of the **Penal Code,** the only prescribed sentence for robbery with violence is death. He urged the court to regularize the illegal sentence that was substituted by the High Court.

14. We have duly considered the submissions made by counsel. There is no dispute that the only evidence that connected the appellant to the robbery for which he was convicted is the recovery of one of the

stolen mobile phones and the confession statement that he made. The gravamen of this appeal is whether the confession statement was properly obtained and admitted into evidence.

15. **Section 25 A (1)** of the **Evidence Act** states as follows:

> **"A confession or any admission of a fact tending to the proof of guilty made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice."**

16. The statement was recorded by Chief Inspector of police, **Ali Ibrahim, PW 6,** who was then the District Criminal Investigations Officer, Bondo. The investigating officer was **Corporal Benard Muasya, PW 7.** The appellant chose to have two of his relatives present at the time of recording the statement. The appellant and his two relatives counter signed the certificate that was prepared by PW 6 in compliance with **rule 14** of **The Evidence (out of court confessions) Rules, 2009.**

17. The rule states that:

> **"14. The recording officer shall certify, in writing, that a confession was not obtained as a result of any inducement, threat or promise having reference to the charge against the accused person."**

18. The appellant neither objected to the production of the statement by PW 6 nor retracted it. There was therefore no need for corroboration before admission of the statement. As this Court stated in **KOMORA V REPUBLIC** [1983] KLR 583:

> **"1. There is no rule of law or practice that requires corroboration of a retracted confession before it can be acted upon; but it is improper to act upon it in the absence of corroboration in material particulars; unless the court is satisfied of its truth after a full consideration of the material facts and surrounding circumstances.**
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> **2. A retracted confession occurs when the accused person admits that he made the statement recorded but now seeks to retract or to take back what he said, generally on the grounds that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one (Tuwamoi V Uganda [1967] E.A. P 84 & 88)."**

19. In the circumstances, we are satisfied that the confession statement was freely obtained and properly admitted into evidence by the trial court. The confession had not been retracted by the appellant and it was not necessary for the prosecution to call the appellant's two relatives who were present when the same was recorded. In any event, the appellant was at liberty to call them as defence witnesses, if he so wished, but did not do so.

20. Prosecution evidence revealed that the appellant was the one who exchanged one of the mobile phones that was stolen from the complainants, a Nokia 1208, with another phone that was owned by his friend, George Owino Ngesa. Although Ngesa had been called as a prosecution witness, he was stepped down before he could fully testify about his role in the recovery of the said mobile phone. Unfortunately the prosecution closed its case before recalling Ngesa. That notwithstanding, the investigating officer testified that they found Ngesa with one of the mobile phones that the complainants had been robbed of and Ngesa explained how he had obtained it from the appellant. Thereafter the appellant was arrested. In his confessionary statement the appellant alleged that he had exchanged the Nokia 1208 with a Nokia 1200.

21. The recovery of the stolen phone was made just ten (10) days after the robbery and in the absence of a reasonable explanation as to how the appellant had otherwise obtained it, and coupled with the

confession statement that was freely and lawfully obtained from the appellant, we are satisfied that the appellant's conviction was well founded on the doctrine of recent possession and is therefore unassailable.

22. As regards substitution of the death sentence by the first appellate court, we agree with Mr. Ogoti that **section 296 (2)** of the **Penal Code** stipulates that where a person is convicted of robbery with violence, **"he shall be sentenced to death."** There is no alternative sentence prescribed.

23. The constitutionality of death sentence in light of the provisions of **Article 26** of the **Constitution of Kenya, 2010,** which stipulates that every person has the right to life was recently interpreted by this Court. In a 5 judge unanimous decision in **JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC** [2013] eKLR, the Court affirmed that death sentence for a person convicted of robbery with violence was the only lawful sentence. The Court held that the decision in **GODFREY MUTISO V REPUBLIC** [2010] eKLR to have been made per incuriam in so far as it purported to grant discretion in sentencing with regard to capital offences. It follows therefore that the High Court misguided itself in substituting the death sentence with fifteen years' imprisonment.

24. We hereby dismiss the appeal against conviction and set aside the sentence that was pronounced by the High Court and reinstate the death sentence that was handed down by the trial court.

DATED and delivered at Kisumu this 20th day of November, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR