



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, MWILU & GATEMBU, JJ.A.

CRIMINAL APPEAL NO. 75 OF 2007

BETWEEN

PETER MUSYOKA WAMBUA

STEPHEN KYALO MUTISO APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Ojwang & sitati, JJ) dated 18th May, 2007

in

HC.CR A. NO. 89 & 90 OF 2003)

JUDGMENT OF THE COURT

1. The appellants, **PETER MUSYOKA WAMBUA** (the 1st appellant) and **STEPHEN KYALO MUTISO** (the 2nd appellant) and four other persons were charged with the offence of robbery with violence contrary to **section 296(2) of the Penal Code** and arraigned before the Principal Magistrate's court at Machakos. Prior to the conclusion of the trial the 3rd and 4th accused died. The appellants, alongside the 1st and 6th accused were convicted and sentenced to death following which they appealed to the High Court. Prior to the conclusion of the appeal in the High Court the 1st and 6th accused died. In a judgment delivered on 18th May, 2007, the High Court (*Ojwang and Sitati, JJ*) dismissed the appellants' appeal and upheld the conviction by the trial court.
2. The particulars of the charge on which the appellants were convicted are that on 7th January, 2000, at about 3.00p.m at Masewani village in Matuu location of Machakos District within Eastern Province, jointly with others not before the court while armed with weapons, namely, home made explosives, *rungus*, *pangas*, bows and arrows robbed **PATRICK MUSYOKA KILUNGYA** cash (KShs.20,000.00) and at or immediately before or immediately after the time of such robbery used personal violence on the said Patrick Musyoka Kilungya, who died later.
3. Based on the evidence of 16 prosecution witnesses presented before the chief magistrate's court at Machakos, it was proved that on the night of 6th and 7th January, 2000, two successive explosions

- shattered the doors and windows of the residence of Patrick Musyoka Kilungya, deceased. Unknown persons then entered the house of the deceased, robbed him of KShs.20,000.00 and hit him with an object that led to his death as he was being taken to hospital. Investigations conducted by the Police led to the arrest and prosecution of the appellants alongside four other accused persons who have since died. None of the witnesses were able to identify the robbers that night.
4. The trial court however convicted the appellants of the offence based entirely on statements of the accused persons made under inquiry and the recording of which was captured on video. All accused persons, including the appellants, retracted the statements at the trial. The trial magistrate conducted a trial within a trial with respect to each retracted statement and concluded that the statements were voluntary and admitted the statements into evidence. The trial magistrate expressed himself as follows:

“The court is aware of the legal implications of a recorded statement. The law requires that it be corroborated by other evidence. I find corroborating these statements are the video recordings and the statement of each accused as all relates to the others. These statements are quite lengthy and taken by different inspectors. I do note where they were collected by the inspectors. (sic) Furthermore, the statement of Nathan Maingi Musembi [accused 1] gives details of how they all met at Tala and planned on how to raid the home of Kilungya with Mutiso the other suspects and Mr Kioko who was not arrested. This statement is corroborated by the statement of Benson Wambua Nzuki and that of Peter Musyoka Wambua. I need not analyse what each inspector said in his statement but since in my view they were voluntary, they corroborated each other.

I hold that the evidence though based on their own statements is sufficient to show their participation in the robbery.

I find every accused guilty of the offence as charged and convict them accordingly.”

5. On appeal from that decision to the High Court, the appellants complained that the corroboration that the trial magistrate found by matching the statements on inquiry of the accused persons against one another was wrong in law because the evidence contained in those statements was accomplice evidence and that the trial magistrate erred in admitting the confessional statements.
6. After considering the matter, the High Court when dismissing the appeal held that:

“Now given all the care which we find the trial court in the instant case to have taken, as it admitted the confessional statements made under inquiry even though these were repudiated, we find that whether as regards retracted or repudiated confessions, on the one hand, or accomplice evidence on the other, the learned Senior Principal magistrate conducted the proceedings within the law, rightly entered convictions as he did, and rightly imposed the mandatory death penalty against the appellants as provided in s.296(2) of the Penal Code (Cap 63). We dismiss the appeal brought by the 1st and 2nd appellants.”

7. Aggrieved by that decision, the appellants have, in this second appeal, appealed to this Court. This being a second appeal, only matters of law fall for consideration. **(SEE SECTION 361 OF THE CRIMINAL PROCEDURE CODE AND THE CASE OF NJOROGE VS R (1983) KLR 288).**
8. The first appellant presented a memorandum of appeal to this Court with 9 grounds the 2nd appellant presented a memorandum of appeal with 6 grounds. At the hearing of the appeal before us, Mrs. Betty Rashid, learned counsel for the appellants condensed the grounds into the complaint that the trial court and the first appellate court erred in convicting, and upholding the conviction, respectively based on retracted and repudiated confessions which were not supported by any other independent evidence.
9. Counsel for the appellants submitted that the only evidence on the basis of which the trial court convicted the appellants and on the basis of which the High Court upheld the conviction was retracted and repudiated statements made under inquiry; that the statements were not voluntary as

the appellants were tortured and threatened with death and that the lower courts wrongly dismissed the submissions on torture; that retracted statements by an appellant and co appellant implicating another appellant have to be supported by some other independent evidence; that such evidence is of the weakest kind and the lower courts should not have relied on it in the absence of any other independent evidence especially considering that the offence occurred at 2.00am, the appellants were not identified by anybody and were not arrested with any stolen items but were arrested on mere suspicion and arraigned in court; that the record shows that in the course of trial the appellants applied to be taken to hospital for treatment for injuries sustained as a result of the torture by the police which has subsequently led to four of the accused persons dying in custody and 2nd appellant is currently in a wheel chair as a result; that **section 32 of the Evidence Act** to which the High Court referred in reliance of the statements does not apply to retracted statements and the court thereby arrived at a wrong finding.

10. Counsel for the appellant further submitted that on the strength of the case of **JAMES MAINA KARERO AND OTHERS V R, CRIMINAL APPEAL NOS. 18, 22 & 24 OF 2004**, the evidence relied upon by the lower courts in this case of the weakest kind and that corroboration is required of a retracted confession and that in this case there is no other evidence except the retracted statements under inquiry which renders the case so weak that the appellants should have been acquitted.
11. Ms. Jacinta Nyamosi, learned Senior Principal Prosecution counsel submitted that the appeal should be dismissed; that even though the lower courts relied on confessions from the appellants and other accused persons who are now deceased, the lower court conducted trials- within- a-trial with respect to each confession; that the confessions were lengthy and gave elaborate details on how the accused persons planned and executed the crime and corroborated each other; that when the confessions were taken, there was a video recording to ensure the confessions were without demur; that the trial court correctly found that no force was used to extract the confessions and that the same were made voluntarily; that the High Court correctly found that the trial court had warned itself of the danger of reliance on accomplice evidence; that the appellants were arrested on a tip off and on sufficient basis and that the High Court re-evaluated and analyzed the evidence and properly upheld the convictions.
12. In her brief reply Mrs. Rashid, learned counsel for the appellants reiterated that a retracted statement cannot corroborate another retracted statement.
13. We have considered the submissions. The circumstances in this appeal are not dissimilar to those in **JAMES MAINA KARERO AND OTHERS V R, (supra)** where the only evidence connecting one of the appellant's in that case to the crime was mention of that appellant's involvement by an accomplice in a cautioned statement under inquiry. This Court had the following to say in that regard:

“What about the appellant Wilfred? As is obvious from the foregoing, he made a cautioned statement under inquiry to Inspector Kenneth Njoroge (PW 7). At the trial, Wilfred repudiated that statement saying he was given blank papers to sign and he did so. The trial magistrate admitted the statement in evidence following a trial within the trial and the High Court on first appeal to it, found nothing wrong with the admission of the statement. Both courts were satisfied that the statement was voluntary. There is, of course, no law requiring that a repudiated or retracted statement or one which is both retracted and repudiated be corroborated, but practice requires that such statement be corroborated by other independent evidence tending to show that an accused person is guilty of the offence charged see TUWAMOI V UGANDA, [1967] EA 84 and KINYUA V R, (2003) KLR 294.” (emphasis added).

14. In **TUWAMOI V UGANDA, [1967] EA 84**: Duffus, Ag. V-P stated:

“We would summarise 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 not 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.” (emphasis added).

15. In the present case, there is no doubt that the retracted statements were the only connection between the appellants and the crime, there not having been any identifying witnesses. We are not persuaded that the video recording taken at the time those statements were recorded, in itself, or the implication of one accused by the other, can be regarded as “other independent evidence” to corroborate the statements.
16. In the absence of other independent evidence, we do not think the both lower courts were right in convicting and upholding the conviction of the appellants. After careful consideration of the circumstances of this case, we do not think it would be safe to allow the conviction to stand.
17. Accordingly, we allow the appeal, quash the convictions against the appellants, set aside the sentence of death imposed on the appellants and order that they be released from prison forthwith unless held for some other lawful cause.

Dated and delivered at Nairobi this 19th day of July 2013.

J. W. MWERA

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR