REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 170 of 2004

HUSSEIN OSMAN KAMAKIA

STEPHEN KARIBO NDEGWA …….…… APPELLANTS

AND

REPUBLIC ……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ) dated 23rd July, 2004

in

H.C.CR.A. NOS. 31 OF 2OO1 & 118 OF 2004)

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JUDGMENT OF THE COURT

The first appellant *HUSSEIN OSMAN KAMAKIA* and the second appellant ***STEPHEN KARIBO NDEGWA*** were jointly charged with four others including ***MARTIN BARASA WANYONYI*** before the Chief Magistrate Nakuru with one count (count 1) of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the charge alleged that on 23rd November, 1999 at 7.30 p.m. at East Gate Bar the appellants and co-accused while armed with rifles robbed ***WILLIAM WAWERU*** of his motor vehicle registration number KAJ 221Z Toyota Corolla, wrist watch and other personal documents.

The first appellant and ***MARTIN BARASA WANYONYI*** were, in addition, charged in count II and count III with the offences of possession of an AK 47 rifle and 13 rounds of ammunition without a firearm certificate contrary to ***section 4 (1)*** of the Firearms Act. Martin Barasa Wanyonyi escaped from custody before trial.

The first and second appellants were convicted after the trial for the offence of robbery with violence and each sentenced to death. The first appellant was further convicted of the offences in count II and count III and sentenced to 10 years imprisonment, in each count, the sentences to run concurrently.

The appellants appealed to the superior court but their respective appeals were dismissed triggering the present appeals.

The prosecution case against the appellants was briefly as follows: On 23rd November, 1999 at about

7.30 p.m. ***WILLIAM GAKURU WAWERU***, the complainant, ***WILSON MWANGI and MBURU KAHUNGA*** were drinking beer at East Gate Bar, Greenstead near Stem Hotel Nakuru, when a gang of five robbers raided the bar. One member of the gang was armed with a rifle. They ordered the customers to lie down and produce money. After the three customers lay down, the robbers frisked their pockets and stole money and other valuables. They stole Shs.400/= and a wrist watch from the complainant. Thereafter, the robbers demanded the car keys of motor vehicle registration No. KAJ 221Z Toyota Corolla which William had parked outside the bar. The complainant surrendered the car keys and switched off the alarm as demanded by the robbers. The robbers boarded the complainant motor vehicle and drove away. The complainant reported to police.

On the following day, 24th November, 1999, the complainant's motor vehicle was found abandoned at Mwariki Estate. The complainant went to Mwariki where he found his motor vehicle. It had been vandalised. All the four wheels had been removed and were missing. The battery and radio were also missing.

On the 28th November, 1999, P.C. Maurice Otieno and other police officers arrested the second appellant and another on information that they were about to commit an offence. The second appellant and another led police to Bondeni Estate within Nakuru Municipality where the first appellant was arrested. The first appellant in turn led police to a house which was locked. The first appellant opened the house. They found one ***MARTIN BARASA*** inside the house. The first appellant pointed to the ceiling of the house where an AK 47 rifle and 13 rounds of ammunition were recovered.

On 29th November, 1999 ***MARTIN BARASA*** led police to the premises of ***Benedict Kiteke Keshia*** (Benedict) and ***Peter Kilonzo Get*** (Peter) where three tyres, three rims and three tubes were recovered. Both Benedict and Peter gave evidence at the trial that it is Martin Barasa who sold those items to them for Shs.1,800/= on 24th November, 1999. The complainant identified the recovered items as the ones stolen from his car.

On the 30th November, 1999 the second appellant made a statement under inquiry to IP Absolom Muniri Israel. The second appellant, however, repudiated the statement at the trial.

The first appellant stated at the trial that he lives in Bondeni Estate and that he was arrested on 28th November, 1999 at Langa Langa Estate and taken to the police station.

Similarly, the second appellant stated that he was arrested at Langa Langa on the same day and taken to police station.

Although the trial magistrate did not evaluate the evidence she nevertheless made a finding that the first appellant and ***MARTIN BARASA*** were found in possession of the rifle and rounds of ammunition and that the second appellant gave an elaborate account of how he and others robbed the complainant.

The two appellants were differently represented by a counsel in the superior court. The first appellant's counsel contended in the superior court, among other things, that the rifle and the rounds of ammunition were not found in the house of the first appellant but in the house of Martin Barasa. It was further contended in the superior court that the properties recovered from the house of the appellant were a black mask, black hat, torch, metal bar and sword, which had no connection with the robbery on the complainant.

As regards the second appellant, it was contended in the superior court that the trial magistrate erred in law in convicting the second appellant solely on the retracted and uncorroborated confession.

The superior court after re-evaluating and reconsidering the evidence, as it was required to do, made a finding in respect of the first appellant that Martin Barasa who had sold the tyres, rims, and tubes of the complainant's vehicle to Benedict and Peter were found in the house of the first appellant and that the rifle and ammunitions were found in the house of the first appellant.

The superior court concluded:

"***In the instant case, the 1st appellant was linked to the robbery by the AK 47 rifle which was recovered from his house and also by the presence of Martin Barasa who was to be proved of having been in possession of the three tyres that were removed from PW1's motor vehicle. The confession by the 2nd appellant was thus further corroboration of the strong evidence against the 1st appellant ……".***

Mr. Simiyu, learned counsel for the first appellant relied on the three grounds in the supplementary grounds of appeal.

The third ground of appeal states that the superior court erred in law and fact in convicting the appellant on contradictory evidence in relation to the ownership of the house in which the firearm was recovered. Mr. Simiyu submitted in support of that ground that the firearm was not recovered in the house of the first appellant.

With respect to Mr. Simiyu, there are concurrent findings of fact by the two courts below that the firearm and ammunitions were recovered in the house of the first appellant. It is trite law that the second appellate court cannot interfere with the concurrent findings of fact of the two courts below unless they are shown to have been based on no evidence (see ***Karingo vs. Republic*** [1982] KLR 213. In this case there was evidence from PC Maurice Otieno which the first appellant did not specifically refute that the appellant led police to a house in Bondeni Estate which was locked; that the first appellant opened it; that the police arrested Martin Barasa who was inside and that the first appellant pointed to the ceiling where the rifle and rounds of ammunition were recovered. The first appellant stated in his defence that he lives in Bondeni estate.

Moreover, the legal possession as defined in ***section 4*** of the Penal Code at page 16 leaves no doubt that the appellant was in possession of the rifle and ammunition even if it is believed (which is not the case) that the house did not belong to him. That section defines "*be in possession of*" or "*have in possession*" as:

"***Includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of oneself or any other person".***

By leading police to a locked house, opening it and pointing at the ceiling where the AK 47 rifle and rounds of ammunition were recovered the first appellant is deemed to be in possession of the rifle and the rounds of ammunition irrespective of whether the house belonged to him or was occupied by him.

Mr. Simiyu, further submitted in support of the second ground of appeal that it was improper to withdraw the charge against Martin Barasa in the absence of the appellants. This ground has no merit. The appellants did not say that the charge was withdrawn in their absence nor raise this ground in the superior court. It is apparent that the charges were withdrawn to facilitate trial of appellants under a section of the law, which does not bar fresh charges against Martin Barasa. The withdrawal of the charges did not occasion any prejudice to the appellants.

Lastly, in support of the first ground, Mr. Simiyu submitted that the proceedings were a nullity because firstly, the rank of the prosecutor, Kiptum is not shown in some instances, secondly, that G. A. Ndenda, the Chief Magistrate took over the trial from S. Muketi, Senior Resident Magistrate without complying with the provisions of ***section 203 (3)*** of the *Criminal Procedure Code* and, thirdly, the language used by some witnesses is not shown.

The proceedings show that the prosecution was conducted throughout by IP Kiptum. Mr. Simiyu could only refer to one instance – 7th December, 1999 when the plea of not guilty was recorded when the rank of the prosecutor – Kiptum was not shown. There was no prosecution on that day and the appellants have not said, as a matter of fact, that prosecutor Kiptum who attended is not the IP Kiptum who attended the

subsequent proceedings.

The proceedings do not support Mr. Simiyu's submission that the trial was partly conducted by S. Muketi SRM and G. A. Ndenda C.M. On the contrary, the trial was conducted by G. A. Ndenda, C.M. throughout.

On the question of language used at the trial, it is true that the trial magistrate did not in some cases record the language used by the witnesses or the appellants. The plea was taken on 7th December, 1999. The record shows that the court clerk was one ***GACHUNJI*** and that the charge was read over and explained to the accused in English and Kiswahili. Some witnesses are recorded to have given their evidence in Kiswahili. The appellants participated in the trial, cross-examined witnesses and made their respective statements in defence.

The court clerk ***GACHUNJI*** attended throughout the trial. The appellants have not specifically said that the evidence was not interpreted to them or that the trial was conducted in the language which they did not understand. Indeed, they did not complain of interpretation either in their grounds of appeal in the superior court or in this Court.

In the circumstances, there are no grounds on which we can justifiably find that the trial was conducted in a language that the appellants did not understand. There are no irregularities complained of by Mr. Simiyu, which would vitiate the trial.

In the result, we are satisfied that the first appellant was properly convicted.

The conviction of the second appellant was solely based on the repudiated confession.

The law on the retracted and repudiated confessions is succinctly stated in ***Tuwamoi vs. Uganda*** [1967] EA 84 at page 91 paragraph G, thus:

"… ***a trial court should accept any confession which has been retracted or repudiated or both retracted or repudiated with caution and must before founding a conviction on such 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".***

By ***section 25A*** of the *Evidence Act* which came in force on 25th July, 2005 vide *The Criminal Law (Amendment) Act 2005* – Act No. 5 of 2005, a confession is not now admissible in evidence unless made in court. The confession of the second appellant was recorded on 30th November, 1999 when extra judicial statements were allowed.

The trial magistrate did not make a specific findings that she was satisfied that the confession was true. She merely stated that the second appellant gave an elaborate account of how they robbed the complainant. The superior court said regarding the confession:

"***As regards the 2nd appellant his confession had a ring of truth in it. It corroborated the evidence of PW1 and PW2 and PW4 as regards the sequence of events that took place at East Gate Bar on the material day of the robbery. The trial court found that the 2nd Appellant's confession was elaborate. We have no reason to disagree with her findings as regards the guilt of the 2nd Appellant. Even though the confession was retracted at the trial, the 2nd Appellant gave no evidence to support his allegation that he had given his statement to PW8 involuntarily. It is our finding that the said statement was voluntarily given and was properly admitted in evidence ……".***

The appellant repudiated the statement at the trial saying:

"***He interrogated me, in the swahili language over the robbery. I told him I didn't know. He wrote what he thought. He didn't beat me or threaten me. What I told him had nothing to do with the robbery".***

It is apparent that the superior court treated the statement as a retracted confession and proceeded to find that the statement was voluntarily given. In this, the superior court misdirected itself. The second appellant was denying ever making the statement as recorded. The appellant was not retracting a statement he had admitted making – that is, he was not saying that he had made a statement which was unlawfully obtained from him. Secondly, the superior court, with respect, did not apparently fully appreciate the principles of law stated in ***Tuwamoi's*** case (supra) particularly that usually, the court will only act on retracted or repudiated confession if it is corroborated in some material particular by independent evidence.

The second appellant was not arrested in connection with the robbery with which he was charged. He was arrested on information that he and others were preparing to commit an offence. He was in custody for two days before he made the statement. The statement was an inquiry statement. As the second appellant correctly stated, he was being interrogated in respect of several offences. He did not state that the robbers had a gun during the robbery at East Gate bar. Although he said in the statement that he was given the battery and car cassette of the complainant's car, these were not recovered from him.

The two courts below failed to inquire fully whether it was safe to rely on uncorroborated statement before basing a conviction on it. In our view, it is unsafe to solely rely on the repudiated statement which was not corroborated by any independent evidence.

The first appellant was sentenced to death for the offence of robbery with violence and to prison terms for possession of firearm and rounds of ammunition. We have said on many occasions before that it is inappropriate to pass a capital sentence and custodial sentence against the accused at the same time. The appropriate procedure is to order the custodial sentence to remain in abeyance (see ***Kushida vs. Republic*** [2002] 2 KLR 89.

In the result, we dismiss the appeal by the first appellant save that we order the concurrent custodial sentences in count II and III do remain in abeyance.

And for the foregoing reasons, we allow the appeal by the second appellant, quash the conviction for the offence of robbery with violence and set aside the sentence. The second appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 2nd day of March, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR