REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 105 of 2006

KARANJA WAMBURA ……..…….. 1ST APPELLANT

PAUL GICHUKI ……..…….…….…….. 2ND APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Nairobi (Mutungi & Ochieng, JJ.) dated 15th March, 2005

in

H.C.CR.A. NOS. 502 & 509 OF 2002)

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JUDGMENT OF THE COURT

On *23rd November, 2001* the two appellants herein were arraigned before the Chief Magistrate's Court at Kibera in *Criminal Case No. 7308 of 2001* on a charge of robbery with violence contrary to *section 296(2)* of the Penal Code. Each appellant pleaded "*Not Guilty"* to the charge. The particulars of the charge were as follows:-

"*1. PAUL GICHUKI GIKUNG'A, 2. KARANJA WAMBURA: On the 19th day of November, 2001 at Dagoretti Market within the Nairobi Area Province jointly with others not before court while armed with dangerous weapons namely pangas and simis robbed FRED OWINO of assorted hardware goods valued at Kshs.296,290/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said FRED OWINO."*

The appellants' trial commenced before the learned Senior Resident Magistrate *(Ms. Siganga)* at *Kibera* on *31st December, 2001* who delivered her judgment on *3rd May, 2002* in which she convicted both appellants and sentenced each appellant to death as provided by law. The appellants' first consolidated appeals were dismissed by the superior court (Mutungi & Ochieng, JJ.) on *15th March, 2005*. The appellants now come to this Court by way of second appeal and that being so only matters of law fall for consideration – see ***section 361*** of the ***Criminal Procedure Code***.

The facts as accepted by the two courts below were as follows. On the night of *19th November, 2001* ***Fred Owino (PW1)*** was a night guard at a hardware shop belonging to ***Kenneth Kinyanjui Ndaro (PW2)*** when a group of about twelve men armed with various dangerous weapons raided the hardware shop. These people assaulted Owino and tied his hands with a rope and proceeded to break into the shop. They removed a piece of cloth from the shop which they used to cover Owino's head and also tied it around his neck. Owino was then forcibly escorted to a nearby forest where he was abandoned after which the thugs returned to the shop to accomplish their mission. During the incident Owino was able to identify the 2nd appellant herein *(who was the 1st accused during the trial at Kibera Court)*. At about 5:00 a.m., Owino was rescued from the forest by members of the public who heard his shouts for help. He went back to the shop only to find various hardware items stolen from therein. The matter was reported to ***Ndaro (PW2)*** and the police. ***Ndaro (PW2)*** made a list of all the stolen items which list was produced in evidence as *Exhibit 3*. Information emerged that some of the items stolen during the robbery were being sold by ***Kenneth Paul Ndungu (PW3)*** and ***Stephen Nyoike Muthami (PW9)***. These two, *(Ndungu and Muthami)* were arrested and they revealed that it was the 2nd appellant who had supplied them with these items. Later the police recovered a ***delivery book*** (Exhibit 9), ***stamp*** (Exhibit 10) and ***a pad*** (Exhibit 11) from the house of the 1st appellant. These exhibits bore the name of Ndaro's shop. The police accepted the explanation given by ***PW3*** and ***PW9*** which led to their release. The 2nd appellant recorded a statement to the police but retracted the same during the trial. However, it was admitted in evidence after a trial within the trial. When put to their defence each appellant made an unsworn statement and the 1st appellant called two witnesses.

In his unsworn statement, the 2nd appellant stated that at the material time he worked at Njiru slaughter house and that on *21st November, 2001* he went to Kikuyu to hire a lorry for his employer in order to go to *Narok* for some work only to be arrested and taken to the police station. As he was unable to pay ***Shs.20,000/=*** to the police to secure his release, he was charged with this offence together with the 1st appellant, a man he did not know.

On his part, the 1st appellant stated that on the material night he was in his house and that he was arrested in his house where the police recovered nothing. He called his wife Beatrice and one Nasser Kamau Otieno, who confirmed that the 1st appellant was indeed in his house on the material night.

In the course of her judgment, the learned trial magistrate stated as follows in respect of the 2nd appellant, who was the 1st accused during the trial:-

"***Regarding accused 1 the prosecution relies on the complainant's testimony that accused 1 was seen by the complainant during the robbery. The incident occurred at night after 3:00 a.m. but complainant said that the same compound where he was confronted by the robbery (sic) as well lit by electric light from an adjacent building. The complainant further said that accused 1 was the one who brandished a pistol during the incident. The complainant's employers – PW2 and PW5 – further confirmed that though the shop had no electricity, lights from the adjacent building usually lights up the compound of the shop. There is therefore a very strong possibility that accused 1 was seen by the complainant during the robbery as the compound was well lit.***

The prosecution's case against accused 1 is further corroborated and strengthened by the statement under inquiry (exhibit 13) which accused 1 recorded while in police custody. In that statement accused 1 confessed to breaking in to the complainant's shop jointly with other people he named there in and stealing from there. Accused 1 further says that he sold some of the stolen property to PW3 and PW9 and further that he accused 1 was arrested as he went to collect payments for such sales. The testimonies of PW3 and 9 corroborated the contents of this statement as far as they relate to accused 1's sale to PW3 of some of the items (exhibit 4 o 8) which later turned out to have been stolen property belonging to complainant. The sale of these items occurred barely 5 to 6 hours after the robbery. Although accused 1 retracted his, this (sic) statement during the trial, the court rules that it was admissible in evidence. The said statement can be relied on by the prosecution as being of great evidential value as to testimonies of PW3 and PW9 provide evidence that corroborates its contents."

As regards the 1st appellant who was the 2nd accused during the trial, the learned trial magistrate in her judgment delivered herself thus:-

"***Regarding accused 2, the complainant herein did not see him during the robbery in fact, accused 2's defence is that he was on that material night in his house sleeping with his wife (DW3) and his wife's cousin (DW4). DW3 and 4 testified in court confirming that accused 2 did indeed spent the entire night in his house sleeping. The prosecution did not controvert this piece of evidence in defence.***

However, the prosecutions evidence rests on the fact that accused 1 recorded a statement under inquiry (exhibit 13) in which the accused 1 named accused 2 and (sic) one of the robbers. This piece of evidence cant be relied on to sustain a conviction unless there is evidence to corroborate it. Further evidence adduced by the prosecution is that accused 1 led police to accused 2's house, slightly more than 24 hours after the robbery, where PW8 recovered a delivery book (exhibit 9), a stamp (exhibit 10) and a pad (exhibit 11) from accused 2's house. The fact that accused 1 led police to accused 2's house where the recovery was made implies accused 2's involvement in the robbery."

The superior court Judges were satisfied that the conviction of the two appellants was safe and hence confirmed the conviction and the mandatory death sentence.

When this appeal came up for hearing before us on *31st May, 2007*, Mr. Evans Ondieki appeared for both appellants while Mr. Kaigai, *(Senior State Counsel)* appeared for the State.

Mr. Ondieki boldly told us that this appeal ought to succeed on the first ground alone which is to the effect that the charge sheet was defective in that the particulars of the charge did not contain sufficient information. We set out the particulars of the charge at the commencement of this judgment. Our perusal of these particulars left us in no doubt that the appellants were properly charged. All the relevant ingredients of the charge were stated and it cannot be said that the appellants were in any doubt as to what charge they were facing. We therefore reject that bold submission by Mr. Ondieki to the effect that the charge was defective.

Mr. Ondieki raised various issues in the course of his submissions like the issue of police beating up people during investigations, the appellants being tortured while in police custody etc. With due respect to Mr. Ondieki, we did not find any substance in these complaints. What we considered to be the main issues in this appeal related to identification of the appellants, the doctrine of recent possession, and retracted confession. The 2nd appellant's conviction was based on the fact that he was identified during the robbery, found in possession of some of the property stolen during the robbery and that he made a confession which he later retracted.

We have already reproduced part of the trial court's judgment as regards the 2nd appellant. That court was satisfied that in view of the lights in the shop compound, the 2nd appellant was properly identified by the watchman ***Owino (PW1)***. Further to that evidence of identification there was evidence that only a few hours after the robbery the 2nd appellant was offering, for sale, some of the stolen property to the shopkeepers within the area. Finally, there was the retracted confession by the 2nd appellant.

It must be emphasized here that where the evidence relied on to implicate an accused person is that of identification, that evidence should be watertight – see ***R. V. ERIA SEBWATO [1960] E.A. 174*** and ***KIARIE V. REPUBLIC [1984]*** KLR 739. As regards the 2nd appellant, there was evidence that he was offering for sale some of the property stolen during the robbery. This was evidence of recent possession of the stolen property. But that was not the only incriminating evidence. The 2nd appellant recorded a statement to the police in which statement the appellant gave a detailed account of how the robbery was planned and executed. The 2nd appellant, however, retracted that confession. The question is whether a court of law can base a conviction on a retracted confession. In ***TUWAMOI V. UGANDA*** *[1967] E.A. 84*, the predecessor of this Court considered that issue and in a well researched judgment expressed itself thus:-

"***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."***

Hence, the position here is that the 2nd appellant's conviction was based on evidence of identification by a single witness which evidence was accepted by the two courts below as reliable and free from any possibility of error, evidence of being in recent possession of some of the property stolen during the robbery and his own confession which he, however, retracted and was only admitted in evidence after a trial within the trial.

We have carefully considered Mr. Ondieki's submissions as supported by various decided cases which he cited but have come to the conclusion that the 2nd appellant's conviction was based on very sound evidence of identification, recent possession of property stolen during the robbery and his own confession. In absence of any explanation from him as to how he came by them, we have no alternative but to hold that he was one of the robbers and accordingly dismiss the 2nd appellant's appeal against both conviction and sentence.

As regards the 1st appellant, it is to be observed that the only evidence connecting him with the offence is the items recovered from his house in unclear circumstances and the fact that he was mentioned by his co-accused. In his own defence he gave what appears to us a plausible explanation in that the search conducted by the police in his house and recovery of the items produced in evidence was conducted in his absence and in the absence of any other independent person. For these reasons, we do not think that his conviction was based on sound evidence. He ought to have been given the benefit of doubt. We are unable to uphold his conviction and consequently, his appeal is allowed, conviction quashed and the sentence of death set aside. We order that the 1st appellant, ***Karanja Wambura*** be set free forthwith unless otherwise lawfully held.

Dated and delivered at NAIROBI this 6th day of July, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR