REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 63, 64, 65, 66 & 67 of 2003

GRACE MOKEIRA OMARIBA ……..…… 1ST APPELLANT

FRANCIS MWAKAMU MWASHI ……..…… 2ND APPELLANT

MUSA JUMBA MWASHI ……..…….. 3RD APPELLANT

HENRY AMUNAVI MWASHI ……..…….. 4TH APPELLANT

HESBON LIAKA SHINYAZA ……..…….. 5TH APPELLANT

AND

REPUBLIC ……..……..…….…… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nakuru (Hon. Mr. Justice Muga Apondi & Lady Justice Lesiit) dated 9th April, 2003

in

H.C.CR.A. NOS. 118, 177, 179, 180 & 181 OF 1997)

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JUDGMENT OF THE COURT

The five appellants were convicted by the Principal Magistrate, Nakuru, of two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code and each sentenced to mandatory death sentence. Their respective appeals against conviction and sentence which were consolidated were dismissed by the superior court.

Their respective second appeals to this Court have been consolidated.

GRACE MOKEIRA OMARIBA the 1st appellant was the first accused at the trial while ***FRANCIS MWAKAMU MWASHI*** *(2nd appellant)*; ***MUSA JUMBA MWASHI*** *(3rd appellant)*; ***HENRY AMUNAVI MWASHI*** *(4th appellant)* and ***HESBON LIAKA SHINYAZA*** *(5th appellant)* were the 1st accused; 2nd accused; 3rd accused and 4th accused at the trial respectively.

In the first count of robbery, the appellants were charged with robbing one, ***SIMON KIPTOO*** *(Kiptoo) (PW1)* of Shs.40,000 on the night of *17th and 18th July, 1994* at ***Kisanana Trading Centre*** in ***Baringo District.***

In the second count, the appellants were charged with robbing one, ***ELIJAH KIBET CHEPTAI*** *(Cheptai) (PW2)* of a weighing machine and 3 weighing stones valued at Shs.17,000 on the same night at the same trading centre.

PHILIP SIRMA CHEPTUMO *(Cheptumo) (PW12)* owns a hotel, shop, butchery and lodging rooms at Kisanana Market. He had employed Cheptai – complainant in Count II as a night watchman. He had also employed Grace, 1st appellant, in the hotel. On the night of *17th and 18th July, 1994* Cheptai was outside guarding the premises while Kiptoo –complainant in Count I was asleep in one of the lodging rooms that he had hired. The 1st appellant was not at the premises. At about 3 a.m., a gang of about seven robbers raided the premises. Some of the robbers were in police uniform. They awoke Kiptoo saying they were police officers. They took Kiptoo outside the building where Cheptai was with some other robbers. Both Kiptoo and Cheptai were taken outside the compound. Both Kiptoo and Cheptai lit a torch and through torchlight they saw and recognized the 1st appellant who was in the company of the robbers. The robbers thereupon attacked the two. Kiptoo was stabbed six times on the stomach with a Somali sword causing serious abdominal injuries requiring surgery and long hospitalization. His coat pocket was cut and Shs.40,000 which he had kept in the coat pocket was stolen. Cheptai was also beaten and cut on the head. The shop was broken into and a weighing machine and three weighing stones stolen. The robbery was reported at Solai Police Station after the robbers left. The neighbours also gathered and the 1st appellant was seen walking in the company of seven men past Jamhuri Primary School about 3 kilometres from the scene of the robbery. Among the seven people, *PC. Joshua Emunje* identified the first appellant; *Musa Jumba (3rd appellant)* and *Hesbon Liaka Shinyaza (5th appellant)*.

The 1st and 3rd appellants were carrying bags. The 3rd appellant dropped the bag that he was carrying and he and other six men ran away into a coffee plantation in the direction of Kabazi leaving the 1st appellant behind.

The 1st appellant was arrested. The 5th appellant was shortly after arrested by ***PW4*** near Milment farm. The people who had run away were pursued towards Bahati past Kabazi. ***PW3***, ***PW9*** and ***PW11*** saw three people ahead of them past Kabazi. Two of the people ran into a coffee plantation when they saw the pursuers while the third one ran into the forest. The two who ran into the coffee plantation are *Musa Jumba (3rd appellant)* and *Henry Amunavi Mwashi (4th appellant)*.

They were chased and arrested. ***PW11*** identified the person who ran into the forest as *Francis Makamu Mwashi (2nd appellant)*. The bag which the 1st appellant was carrying contained four torches among other things. The bag which the 3rd appellant dropped contained Masaai swords, one Somali sword, army uniforms, jungle jackets, berret, a weighing machine and (3) weighing stones.

The Somali sword was blood stained. The weighing machine and the weighing stones were identified by ***PW2*** and ***PW12*** as the ones stolen from the shop. The *2nd appellant* was arrested on *18th July, 1994* by *Cpl. John Onduso* at Nakuru Provincial General Hospital where he had been admitted with a fractured hand. He was wearing a blood stained coat.

Each of the five appellants made an extra judicial statement confessing the offences but each of them repudiated his/her statement.

Nevertheless, the trial magistrate admitted their respective statements as evidence after trial-within-trial.

The first appellant gave lengthy testimony at the trial disclosing that the robbery was committed in her presence by seven persons including the *2nd, 3rd, 4th and 5th appellants* but exonerated herself from the commission of the robbery. She explained that her employer Cheptumo had given her leave to go to Nakuru Town to get her clothes; that on *17th July, 1994* at 4 p.m. she boarded a vehicle to Kisanana at Nakuru bus stage; that the vehicle broke down on the way; that she and 10 other passengers in the vehicle decided to walk to Kisanana, that on the way she was interrogated about her employer by the seven people and forced to lead them to the premises of her employer where the seven people robbed the complainant. It was her testimony that she was beaten and raped by some of the seven people and that she did not participate in the robbery.

The *2nd, 3rd, 4th and 5th appellants* raised a defence of alibi. Each stated that he was asleep in his respective house on the material night.

The 1st appellant appeals on seven grounds but the main grounds of appeal are that the superior court erred in law in relying on a confession which was neither voluntary nor corroborated; that the superior court erred in upholding the conviction when the prosecution case was not exhaustively established as some of the ingredients of the charge were not proved and that the superior court erred in law in failing to "test" the 1st appellants defence.

The 1st appellant was represented by two counsel, namely Mwendwa and Aminga at the hearing of the appeal.

Mr. Mwendwa, while dealing with the last two main grounds of appeal, contended, among other things, that the 1st appellant was not identified at the time the robbery was committed; that the 1st appellant did not rob any of the two complainants and that her defence was never considered.

The trial magistrate at the outset recognized that he had to decide the question of culpability of each appellant for he said:-

"The fundamental question for this court to decide is whether or not any of the accused persons took part in the attack and the robbery."

The trial magistrate then analysed the evidence and made a finding that the 1st appellant was identified by Kiptoo and Cheptai at the time of robbery and by ***PW9 (Chelimo)*** walking in the company of others before she was arrested. The trial court was satisfied that the 1st appellant participated in the robbery.

The superior court exhaustively evaluated and re-considered the prosecution case against the 1st appellant, her defence and came to the conclusion that 1st appellant participated in the robbery. The superior court said in part:-

"***In the present case, it was the 1st appellant's defence that she had been hijacked on the way to her place of work where the robbery took place. She claimed to have been a victim and that she was even raped by the co-appellants. She did not come out clearly on the issue of rape. Her statement in defence was also self-serving in that she categorically stated that she did not go to the scene where PW1 and PW2 were accosted, assaulted and robbed. Yet the clear evidence of PW1 and PW2 was that she did go up to that place. In addition she accompanied the co-appellants after this incident from 2 a.m. when the attack occurred to 5 a.m. when she and the others were sighted and later arrested. Her explanation for that conduct was that the attackers decided to go with her instead of killing her and to abandon her on the way.***

The learned State Counsel submitted that she had not disassociated herself from her co-appellants. This is quite the position. At the time of arrest by PW4 and others, she did not complain of having been a victim. All the time she was in police custody, she did not say that she had been hijacked or raped by her co-accused. We are convicted that the 1st appellant was an accomplice and her clear role in this offence was to aid and abet the crime. She is an offender."

Indeed the 1st appellant admitted that she was at the scene of robbery but denied that she participated in the crime. Her testimony in Court lends credence to the evidence of Kiptoo and Cheptai that when each flashed a torchlight, each saw and recognized her.

Kiptoo testified that the 1st appellant infact attacked him. Kiptoo reported to ***Cherop (PW3)*** immediately after the robbery that he had been injured by soldiers who were with "*Grace Mokeira" (1st appellant)*.

There was also evidence from *Chebii (PW9)* that the 1st appellant tried to run away before she was arrested.

The 1st appellant was in the company of the robbers when she was arrested. She had 4 torches in her bag and one of her accomplices was carrying a bag containing weapons and uniforms used during the robbery.

The two courts below made concurrent findings of facts from which they deduced that the 1st appellant participated in the robbery. The findings facts are based on sound evidence and we do not find any ground justifying interference with the concurrent findings of fact.

Mr. Aminga, contended that the "confession" was imprecise and amounted to no confession and that both courts below fundamentally misdirected themselves by accepting part of the defence as true and part as self-serving. The superior court considered the confession made by the 1st appellant and was satisfied with that confession. The superior court, in addition, considered the evidence of the 1st appellant in court and made a finding that it was substantially true except that part in which the 1st appellant claimed to have been hijacked and raped. The superior court made a finding that that part of the evidence was "self-serving". Finally, the superior court found that the evidence of the 1st appellant lends assurance to her confession.

The contention by Mr. Aminga that the court cannot accept part of the testimony of the 1st appellant as false and part of it as true has no support in law. Indeed, Mr. Aminga did not cite any authority for that proposition.

In ***WERE V. UGANDA [1964] E.A. 596*** the predecessor of this Court stated the law correctly at page 601 para E thus:-

"***While it is clear that a confession must be taken as a whole, it is also clear law that it need not be believed or disbelieved as a whole. It is open to a trial judge to accept part of a statement and to reject another part. Where, however, the part which is rejected is so inextricably interwoven with another part that such other part would become something quite different if it were divorced from the rejected part, then we consider that it is not open to the judge to accept such other part save in the most exceptional circumstances".***

That dictum applies with equal force to testimony of an accused person given in Court. The superior court demonstrated in its judgment that substantial part of the testimony of the 1st appellant which it considered as true substantially corresponded with the evidence of the prosecution witnesses.

In the final analysis we are satisfied that the superior court adopted the correct approach as regards the confession and the testimony of the 1st appellant.

Lastly, the 1st appellant complains that she was under age at the time of trial and that the trial court erred in passing a capital sentence.

That ground was neither raised at the trial nor in the superior court. Had the 1st appellant done so, the complaint could have been fully investigated. The 1st appellant did not substantiate the complaint before us by producing material evidence such as a certificate of birth. We find no substance in the complaint.

As regards the appeals of the ***2nd, 3rd, 4th and 5th appellants***, Mr. Karanja, who appeared for them argued three main grounds namely that, both courts failed to consider the circumstances under which the confessions were recorded; that the defence of each appellant was not considered and that the evidence of the 1st appellant should have been rejected in total if it was found that part of the evidence was untrue.

The material prosecution witnesses Kiptoo and Cheptai did not identify the ***2nd, 3rd, 4th and 5th appellants*** at the time of the robbery. The prosecution case against these appellants was mainly dependent on their respective extra judicial statements and the testimony of the 1st appellant.

Both the ***2nd and 4th appellants*** made statements under inquiry before ***I.P. Joseph Biketi***.

The 3rd appellant and the 5th appellant made charge and cautionary statements before ***I.P. Patrick Mutei*** and ***IP Gramons Awuor*** respectively. The statements were repudiated but admitted after a trial within the trial. The ***2nd, 3rd and 4th respondents*** confessed having committed the offences and implicated the co-appellants in their statements. The 5th appellant confessed the offences. Mr. Karanja examined each statement pointing faults at each statement and submitted that the statements should not have been admitted as evidence. As the predecessor of this Court said in ***ANYANGU V. REPUBLIC [1968] E.A. 239***, the Judges Rule's are only rules of practice and the trial judge has a discretion to allow statements made by accused persons although they are not obtained strictly in accordance with the Rules. Whether the statements were voluntarily made is a question of fact. There are concurrent findings of fact that the ***2nd, 3rd, 4th and 5th appellants*** made the statements voluntarily. There are no grounds for interfering with the current findings of fact. Each of those statements amounted to a confession. The confessions of 2nd, 3rd and 4th appellants implicated all the appellants. By ***section 32(1)*** of the Evidence Act, the confessions of each of them could be taken into consideration against the co-appellants. Such evidence is however not only accomplice evidence but evidence of the weakest kind. (See ***ANYANGU V. REPUBLIC*** (supra) at page 240 para H). The legal status of a retracted or repudiated confession was succinctly summarized by the forerunner of this Court in an often cited passage in ***TUWAMOI V. UGANDA [1967] E.A. 84 at page 91 para G.***

In the passage referred to the Court said in part:-

"But corroboration is not necessary and the court may act on a confession alone if it is fully satisfied after considering all material points and surrounding circumstances that the confession cannot but be true."

(See also ***KOMORA V. REPUBLIC [1983] KLR 583).***

The superior court re-evaluated and considered the extra judicial statements made by 2nd, 3rd, 4th and 5th appellants and stated:-

"***The trial court considered all the evidence and the repudiated confessions of the appellants. We are satisfied that the court duly cautioned itself against reliance on the repudiated statements of the appellants. It nevertheless found them consistent and the contents truthful.***

We are satisfied that the court duly warned itself and accepted the confession of the appellants with caution. We cannot fault the trial court or the appellant's statements under caution. We are also satisfied that the court carried out trials within trials before admitting the statements into evidence.

The principle in <u>TUWAMOI V. UGANDA</u> [1967] E.A. 84 on repudiated/retracted statements was therefore carefully followed."

In the final analysis, the superior court concluded that the evidence against each appellant was overwhelming.

From the foregoing, it is true that the superior court re-evaluated and considered the evidence relating to the extra judicial statements and accepted the evidence in the following words:-

"***We do find that the evidence adduced was overwhelming and after carefully considering the circumstances of the case we find no reason to fault the trial court of its findings."***

The *2nd, 3rd, 4th and 5th appellants* raised defence of alibi. After the court accepted the confessions made by each of them, their defences could not stand and did not warrant further consideration.

We have already considered the testimony of the 1st appellant and concluded that the superior court was entitled in law to believe part of it and reject another part as untrue. Although the testimony of the 1st appellant contains self-exculpatory statement, we are of the view that it is a confession as defined in ***section 32(2)*** of the ***Evidence Act*** which provides:-

"In this section "confession" means any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence."

In the testimony, the 1st appellant admitted substantially all the facts which constituted the offence of robbery. In ***<u>GOPA S/O GIDAMEBANYA & OTHERS V. R.</u> (1953) 20 EACA 318*** the Court said at page 320 in respect of an extra judicial statement:

"***Although a statement may contain self-exculpatory matter it can still be a confession if the self exculpatory matter does not negative the offence alleged to be confessed."***

Both the trial court and the superior court recognized that the 1st appellant was an accomplice and treated her as such. By ***section 141*** of the Evidence Act, a conviction based on the uncorroborated evidence of an accomplice is not illegal. In this case the superior court found corroboration of her evidence in the prosecution case.

The testimony of the 1st appellant was comprehensive and corresponded with the prosecution witnesses as to how the robbery was committed. It is substantially a true account of what happened. It was tested by the cross-examination of the *1st appellant* by the *2nd, 3rd, 4th and 5th appellants*. The testimony of the *1st appellant* has more weight against the *2nd, 3rd, 4th and 5th appellants* than a retracted extra judicial confession. In our view, it was substantial evidence against the *2nd, 3rd, 4th and 5th appellants* which when considered together with their respective confessions left no doubt that the *2nd, 3rd, 4th and 5th appellants* were in the gang which committed the robbery.

For the foregoing reasons, we find no merit in the respective appeals. In the result, we dismiss all the five appeals.

Dated and delivered at Nakuru this 29th day of September, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR