



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI**

(CORAM: OMOLO, O’KUBASU & WAKI, JJ.A.)
CRIMINAL APPEAL 18, 22 & 24 OF 2004

BETWEEN

JAMES MAINA KARERO)

MICHAEL MURIGI MURATHI)..... APPELLANTS

WILFRED KAMAU KIMANI)

AND

REPUBLIC RESPONDENT

**(An Appeal from a Judgment and conviction of the High
Court of Kenya at Nyeri (Juma, Ombija, JJ) dated 13th August,
2003**

in

H.C.Cr. Appeal Nos. 212, 213 & 214 of 2001

JUDGMENT OF THE COURT

James Maina Karero, Michael Murigi Marathi and Wilfred Kamau Kimani, hereinafter called James, Michael and Wilfred respectively, were tried and convicted on one charge of robbery with violence contrary to section 296(2) of the Penal Code, and upon their conviction by the then Senior Principal Magistrate at Muranga, each of them was sentenced to death as is mandatorily prescribed by law. They then appealed to the High Court but by that court’s judgment dated and delivered on 13th April, 2003, their appeals were dismissed. They now appeal a second time to this Court and that being so, only matters of law fall for our consideration.

The particulars of the charge on which the appellants were convicted were that on the night of 8th/9th June, 1999, at Kongoini village within Muranga District of the Central Province, the three appellants jointly with others not before the Court, and while armed with dangerous weapons, namely a panga, arrows, axes and rungus, robbed Peter Abiud Maina of one black and white TV set, make Great Wall, one radio cassette and cash of Shs.600/- and that at or immediately before or immediately after the time of such robbery, the appellants and their confederates used actual violence and fatally wounded the said Peter Abiud Maina. Before the Magistrate’s Court, James was Accused 3, Michael was Accused 2 and Wilfred was Accused 1. There could not be any possible doubt from the recorded evidence that during the night of 8th/9th June, 1999 the late Peter Abiud Maina and his wife Rose Nduku Maina (PW1) were attacked in their house and it is also clear from the evidence that the intention of the group of persons who attacked that family was either to rob the family or simply to kill Peter Abiud Maina or to rob and kill

him. In the process Peter Abiud Maina who was a retired superintendent of police, was beaten and strangled to death. During the attack things were stolen from the house and hence the charge of robbery with violence. The three appellants were subsequently arrested and charged as already stated.

What was the prosecution's case against James? It was alleged by the prosecution that Wilfred, in a cautioned statement under inquiry made to Inspector Kenneth Njoroge on 10th June, 1999, mentioned the appellant James as having been among the group which attacked and robbed the deceased and his wife. That appears to have been the only evidence the prosecution brought in their attempt to connect James with the robbery. In dealing with the case of James, the trial Magistrate had only this to say about his involvement in the crime.

“The court further finds that 1st accused [Wilfred] was arrested with (sic) from an informer and he then recorded such a lengthy detailed statements (sic) which leaves the court with no doubt that the accused was in that robbery with 2nd and 3rd accused among others. The statement of 1st accused under section 32 (1) of the evidence (sic) Act has a lot of weight as against 3rd Accused.”

Section 32(1) of the Evidence Act to which the trial Magistrate referred in this quotation provides:-

“32 (1) Where more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession.”

With respect to the learned trial Magistrate, we do not see how the statement made by Wilfred could have been treated as having “a lot of weight” against the appellant James. Under section 32 (1) of the Evidence Act, all the magistrate was entitled to do was to take into consideration against James the statement made by Wilfred but that statement could not form the basis for convicting James. Wilfred's statement could only be taken into account when considering other available evidence against James, if there was any, and there is a long line of authorities on the point such as **GOPA s/o GIDAMBENYA & OTHERS V. REGINAM (1953) 20 EACA 318, KARAYA s/o NJONJI & OTHERS V. REGINAM (1953) 20 EACA, 266 and ANYANGU AND OTHERS V. REPUBLIC [1968] EA 239**. In the last case, the Court of Appeal for East Africa stated at pg. 240 letters G to I:

“..... It is the treatment of the statements [of coaccused] by the learned trial judge that has caused us some concern. The learned judge treated all the statements as evidence, albeit accomplice evidence against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial, be “taken into consideration” against that co-accused. It is, however, not only accomplice evidence but evidence of the “weakest kind” (Anyuna s/o Omolo and Another V. R (1953), 20 EACA 218) ; and can only be used as lending assurance to other evidence against the co-accused (Gopa s/o Gidambenya & Others V. R (1953), 20 EACA 318). “

James was convicted solely because Wilfred implicated him in the robbery. There was no other evidence connecting him with the offence, and in the circumstances, Mr. Orinda, learned Principal State Counsel was right in not supporting the conviction recorded against James. James will have the benefit of this holding. What about the appellant Wilfred? As is obvious from the foregoing, he made a cautioned statement under inquiry to Inspector Kenneth Njoroge (PW7). 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] E.A. 84 & KINYUA V. REPUBLIC (2003) KLR 294**. In respect

of Wilfred, there was the evidence of police constable Dan Kagambo (PW9) who stated that following the arrest of the appellants, Wilfred led him to a scene some 50 metres from the house of the deceased and showed him pieces of smoked cigarettes which the witness collected and were produced as Exhibit 6. In the cautioned statement under inquiry Wilfred is recorded as telling Inspector Njoroge that:-

“I then told them that I had no problems and we left the place upto Mjini mosque where we bought Karts (sic) and cigarettes. By then was some minutes past 8.00 p.m. We then started off on foot past the market where sheep are sold and then took a footpath upto Kongoini side. Breaker [Michael] then told us it was still early for it was around 9.30 p.m. We then hid under mango tree and started smoking. We were I (sic) Breaker, Maina Kareru [James] and Mwangi. While under that tree breaker showed us the house we were to go for security lights were on.”

This portion of Wilfred’s statement shows that he and his party bought cigarettes at a trading centre and that when they arrived near the victim’s house, it was still too early for them to embark on their mission to rob. They accordingly sat under mango trees near the victim’s house and smoked cigarettes there as they waited for what they considered to be an appropriate time to commit a robbery or whatever it was that they intended to do in the home of the deceased. The home was nearby and there were security lights on. Constable Kagambo (PW9) swore that Wilfred led him to a place some fifty or so metres from the house of the deceased and that at that place he found pieces of cigarettes which he collected and produced in evidence. Under the law that is presently applicable, i.e. the Statue Law (Miscellaneous Amendments) Act, No. 5 of 2003 the statement of Wilfred and the evidence of PW9 of being led to a place from which he collected pieces of smoked cigarettes, would be inadmissible in evidence but that was not the law at the time the appellants were tried and convicted. So the finding of smoked pieces of cigarettes at the place where Wilfred led PW9 corroborated Wilfred’s assertion in his statement that he was among the group of persons who robbed the deceased, killing him in the process. Of course Wilfred said in his statement that he remained outside throughout the robbery and only became aware of the death much later, but that cannot matter because he and his companions went to rob the deceased and a robbery was actually committed. The appellants were not charged with the murder of the deceased; they were charged with robbery. Like the two courts below, we are satisfied there was ample corroboration of the full and detailed cautioned statement of Wilfred and that statement clearly proved he was involved in the robbery in the home of the deceased.

What of the appellant Michael? First there was the evidence of Peter Mwachumbi Mwambi (PW2) who was present at the house of the deceased during the robbery. He was in fact in the same house with the deceased. He swore that the lights were on throughout the robbery and that during the robbery he was able to identify Michael who was wearing a jeans jacket and who was armed with an axe. PW2 described Michael as being tall, dark and thin. On 14th June, 1999, some six or so days after the robbery, PW2 was able to identify Michael at an identification parade conducted by Inspector Njoka (PW6). The two courts below found that the parade was properly conducted and nothing was shown to us to convince us that the parade was in any way defective. True PW2 saw Michael under stressful circumstances but there was electric light on in the house and the robbers took a considerable time in the house. The appellant Wilfred mentioned Michael as having been present in the robbery and the courts below were entitled to take that mention into consideration when dealing with the case of Michael. In our view there was sufficient evidence to justify the conclusion of the two courts below that Michael was equally involved in the robbery in the home of the deceased. Like in the case of Wilfred, the charge against the two of them was proved beyond any reasonable doubt and their convictions were safe.

Before we finally leave the matter, we must agree with Mr. Mahinda, learned counsel for the appellants, that the judgment of the High Court left a lot to be desired and it is surprising to us that the learned Judges of the High Court did not even notice that the only evidence against the appellant James was simply the mention of James by Wilfred in Wilfred’s cautioned statement. This kind of perfunctory judgment consisting of barely three typed pages must, of necessity, result in an injustice to the parties involved in the case. The Magistrate appears to have done a much better job of it than the High Court.

Our final orders in these appeals are and shall be that we allow the appeal of James, quash the conviction recorded against him, set aside the sentence of death imposed on him and order that he shall be released

from prison forthwith unless he is held for some other lawful cause. But the charge against the appellants Wilfred and Michael was proved beyond all reasonable doubts and we dismiss the appeal of each of them against conviction and sentence.

Dated and delivered at Nyeri this 28th day of October, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

certify that this is a true copy of the original.

DEPUTY REGISTRAR.