



IN THE COURT OF APPEAL

AT NYERI

(Coram: Gicheru CJ, O’Kubasu JA & Ringera Ag JA)

CRIMINAL APPEAL NO 131 OF 2002

DANIEL KABIRU THIONG’OAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ) dated 31st July, 2002 in HCCr Appeal No 438 of 2002)

JUDGMENT

The appellant was together with four other persons charged in the Magistrate’s Court with two counts of robbery with violence contrary to section 296 (2) of the Penal Code and one count of assault contrary to section 251 of the Penal Code. The particulars of the robbery counts were that on 17.12.99 at Skuta village, Nyeri district, armed with dangerous weapons they robbed Wilson Muguro Gichane of Kshs 118,000/= and motor vehicle KAL 977B and that on the same date and place they robbed Godfrey Wakeenyu of Kshs 12,000/= .They were found guilty as charged and convicted. On first appeal to the superior court, the Republic conceded the appeals by three of the appellants and the Court allowed the appeal of one other appellant. The appeal by Daniel Kabiru Thiong’o, the appellant herein, was however dismissed. He now appeals further to this Court by way of a second appeal.

The brief summary of the pertinent evidence is as follows. On 17.12.00 Wilson Muguro Gichane (PW1) was driving motor vehicle KAK 977B, a canter, from Kirinyaga where he had gone to sell dry cell batteries for his employer, Ng’ang’a Kamithi (PW 3), with the turn-boy, Paul Kagiri (PW 4). In the same vehicle as a passenger was Godfrey Wakonyo (PW5). The day’s sales in the sum of Kshs 118,000/= was in a cash box behind the driver’s seat. After passing Kiangai Market, they found motor vehicle KRM 987, a Peugeot 504 saloon parked off the road with its bonnet open.

They passed it but a little while later, the same vehicle caught up and passed them. They drove behind it and after Karatina Market the Peugeot car diverted onto another earth road and they didn’t see it again. However, when they reached Skuta which is on the outskirts of Nyeri town, the car came and overtook them. It then suddenly blocked their way and the canter rammed in to its rear. Both vehicles then stopped. Some men emerged from the car brandishing a pistol and ordered them to open the doors.

When they hesitated, one of the said men shot through the windscreen shattering it. The bullet hit the left hand of PW2. Both PW2 and the driver (PW1) managed to jump out and ran and hid behind the shops. PW5 dived down on the floor of the cabin. It was then about 7.30 pm and dark.

Two men got in and one of them drove the canter with PW5 still inside. The canter followed the Peugeot car. Later the canter was diverted to a side road and parked. The men took Kshs 12,000/= which PW 5 had. He was removed from the front cabin and locked up at the back of the canter which had a built up body. He was locked in and the robbers left. Meanwhile, after sometime, PW1 and PW2 went back to the road and found the canter and the Saloon car had left. They went and reported to Nyeri Police who swung into action. The report of the robbery was circulated over the police radio. At about 10 pm PC Joel Ndambuki (PW11) who together with 3 other police officers was on mobile patrol found both the Peugeot and the canter at Misha area. They knew the owner of the Peugeot as a man called Kabiru (the appellant) who hailed from Nyeri town. After recovering the vehicle they found the passenger who had been locked inside the canter and released him. He told them he had been robbed of Kshs 12,000/=. They then went to the home of the appellant but did not find him there.

At about 11.30 pm Simon Kahiga Kamore (PW7) a taxi driver in Nyeri town received a call from Gatitu from a man who wanted a taxi to take him to Karatina police station. As his vehicle was not in order, he requested William Gicheru Thuku (PW6), another taxi driver, to go with him. They went with PW6's vehicle, a red Nissan Sunny KAD 080D; They found the customer (whom they identified at the trial as the appellant). He told them that he wanted to go to report that his motor vehicle had been stolen.

He got into the vehicle and they proceeded to Karatina police station where they arrived at midnight. He was paid Kshs 1000/=. The appellant went into the report office leaving the two taxi drivers waiting for him outside. After about 10 minutes they saw him being locked up at the station for a reason they did not know. They then left.

At the report office, the appellant found PC Shadrack Wambua (PW8) on duty. The appellant told him that he was driving his motor vehicle KRM 987 from Murang'a towards Sagana and on the way he was car jacked and dumped at Baricho area around 6 pm. He further told him that he had walked from there to come and report the incident. PW8 called Nyeri Police Radio room to ask them to circulate the car jacking. However, he was informed by the deputy OCPD that the car had been used in a robbery and the reporter should be locked up as a suspect. PW8 arrested the appellant and put him in custody. Shortly thereafter, PW11 and the other officers on mobile patrol who had learnt that the appellant had gone to Karatina police station went there to collect him. When he was searched by PC Segei, his car keys were found in his pocket. On further interrogation he gave the police the names of the other four men involved in the robbery.

All of them were subsequently arrested separately and taken to Nyeri police station.

At Nyeri CID office, the appellant gave a statement under caution in which he confessed his participation in the robbery and implicated the other accused persons. At the trial he retracted that statement but it was held admissible after a trial within the trial.

After considering the above evidence, the trial court found that although the robbery occurred at night and PW1, PW2 and PW5 did not recognize their attackers, the circumstantial evidence was such that the only logical conclusion was that the appellant and the others were involved in the robbery. In that regard, the trial court disbelieved the appellant's story that he had been car-jacked in his motor vehicle KRM 987 near Sagana and dumped in Baricho area from where he walked to Karatina police station to report the incident. The Court found such story to be unbelievable by the fact that the appellant was clearly located by PW6 and PW7 at Gatitu petrol station around 11.30 pm from where he was ferried to Karatina police station. The Court noted that the appellant did not challenge the evidence of PW6 and PW7 at all. The Court further noted that Gatitu is on the opposite side of Baricho from where the appellant claimed to have walked from to Karatina. The Court also found the appellant's confession very detailed and to be in the appellant's own handwriting.

That confession implicated him and the other accused persons. The superior court, on first appeal, concurred with the findings and conclusions of the trial court and up held the conviction of the appellant.

Before us, Mr Mukunya, counsel for the appellant, argued that the trial court and the superior court erred in law and misdirected themselves in relying on the fact that the appellant's car keys which were not produced as exhibits were recovered from him. He argued that those keys were the only link which would have connected the appellant with the vehicle at the time of the robbery and thereby shifted the evidential burden of proof to him. Counsel argued that in the absence of the production of those keys, the appellant's defence that he had been car-jacked and dumped near Baricho area remained a reasonable one. He poured cold water on the prosecution's case that such explanation was not credible as the appellant had been picked up at Gatitu by a taxi and dropped at Karatina.

In his submissions, only a very foolish person would, after being involved in a robbery and being picked up by a taxi cab from near the scene and going to a police station to report that he had been car-jacked, retain the said cab outside the police station. Counsel also argued that there was an inconsistency in the prosecution case regarding the identification of the vehicle used in the robbery in that whereas PW1 and PW2 said the Peugeot which had followed their vehicle was KRM 987, PW5 who was a passenger in the canter said the registration numbers of the Peugeot were tampered with and he did not see the registration number. Last, but not least, counsel argued that the appellant's confession which was relied on by the trial and first appellate courts was a retracted one which required to be corroborated and there was no corroboration of it. Counsel pointed out that the other accused persons who had been implicated in the robbery by the appellant's confession had their appeals allowed by the first appellate court.

Counsel for the Republic supported the conviction. He argued that the retracted confession was supported by strong circumstantial evidence that the appellant was involved in the robbery. Those circumstances were that a motor vehicle belonging to the appellant was found near the scene of the robbery soon after the robbery, and the appellant's conduct of faking an explanation for his motor vehicle's use in the robbery – an explanation which was correctly rejected by the two lower courts as incredible in view of the evidence of PW6 and PW7 that they had picked the appellant from Gatitu after a call from their by him and driven him to Karatina police station contrary to his story that he had walked from Baricho (where he said he had been dumped) to Karatina police station. Counsel argued that the appellant very well knew that he was not at Baricho at the time of the robbery. He argued that although the car keys were not produced as exhibits there was other strong circumstantial evidence to connect the appellant to the robbery. As regards the retracted confession, counsel for the Republic argued that the same was as strong and detailed that it could not have been but true. Moreover, the facts contained in it coincided with other evidence on record given by the prosecution witnesses. He concluded that the conviction of the appellant was safe and urged us to dismiss the appeal.

We have now considered the material before us and the submissions of the learned advocates who canvassed this appeal. We state at the outset that as this is a second appeal it can only be on matters of law by dint of section 361(1) of the Criminal Procedure Code, (cap 75) Laws of Kenya.

In that regard, one of the complaints made before us was that the trial and the first appellate courts acted on the retracted confession of the appellant which was not corroborated in material particulars. In that respect, we hasten to state that there is no rule of law that a court cannot act on a retracted and/ or repudiated confession unless it is corroborated in material particulars. What exists is a rule of prudence or practice that a court should be cautious to act on such a confession unless it is corroborated in material particulars. However, the Court could act on it if it came to the conclusion in the light of all the circumstances that the confession could not but be true. The law, in this respect, was authoritatively laid down by the East African Court of Appeal (the predecessor of this Court) in *Tuwamoi v Uganda* [1967] EA 84 at P 91 letter G in the following words:

“... 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 it is 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.”

Now it is evident from the summary of evidence we outlined earlier that the conviction of the appellant was not founded exclusively on his confession. The conviction was founded and affirmed on the findings that the appellant was the owner of the motor vehicle KRM 987, that that motor vehicle was identified by PW1 and PW2 as the one which was used in the robbery against them, that the said vehicle was indeed found near the scene of the robbery at Misha area near Rirungi in Nyeri town, that the appellant had called for a taxi cab from Gatitu petrol station near the scene of the robbery at 11.30 pm and that he had been transported to Karatina police station, that at Karatina police station he had reported that he had been car-jacked near Sagana at about 6 p.m and dumped in Baricho area from where he had walked to report his alleged ordeal, that on being searched, his motor vehicle’s keys were found in his pocket, and that his report of a car-jack in the Baricho area was found to be untrue.

From those circumstances, the trial and the first appellate courts found that the appellant was involved in the robbery in question even though he had not been identified during the robbery. To ask us to depart from the conclusions of the two courts, as counsel for the appellant urges us to do on the grounds that the keys which were said to have been discovered from the appellant were not produced as exhibits or that the registration numbers of the vehicle involved were tampered with, or that only a foolish person would have behaved as the appellant did by going to report an untrue allegation of a car-jack in a taxi and leaving that taxi outside the police station, is really tantamount to inviting us to depart from concurrent findings of fact by the trial and the first appellate courts. This Court will not do so unless it can be persuaded that there are compelling reasons for doing so. And the compelling reasons would be that no reasonable tribunal could on that evidence have arrived at such findings or, in other words, the findings were perverse and therefore bad in law. In that regard, we would reiterate what this Court said in *Stephen Muriungi & others v Republic* (1982- 88) 1 KAR 360. Chesoni, Ag JA (as he was then) in delivering the majority judgment said at page 366:-

“We would agree with the views expressed in the English case of *Martin v Glywed Distributors Ltd* (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat finding of fact and law as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

And in *Nyambane v Republic* [1986] KLR 248, this Court held that:

“An appellate court should be reluctant to disturb concurrent findings of fact on a second appeal unless there were compelling reasons.”

In our view, the findings of fact we have alluded to were open on the evidence on record and we do not think that the fact that the keys were not produced as exhibits or that the appellant’s conduct in going to report his alleged ordeal in a taxi and leaving of such a taxi outside the police station was patently foolish were considerations which made those findings perverse. The findings could stand without the element of the discovery of the car keys in the appellant’s pockets and his folly was not extra ordinary: on the contrary his conduct was consistent with that of a smooth liar who had taken precautions to camouflage his involvement in the crime but fell short of perfection. In short, we find no compelling reason to depart from the concurrent findings of fact that the appellant’s car was involved in the robbery, that he was located near the scene of the robbery by the evidence of PW 6 and PW 7 which was not challenged at all, that he was driven to Karatina police station where he made a report that he had been car-jacked and dumped in the Baricho area, and that his story of the car-jack was implausible. All those findings constituted circumstances which irresistibly led to the conclusion that the appellant was involved in the

robbery as they were incompatible with his innocence and incapable of explanation on any other reasonable hypothesis than that of his guilt, and, accordingly, they satisfied the test of sufficient circumstantial evidence as propounded in the case of *Kipkering Arap Koske v R* (1949) 16 EACA 135 and reiterated in several other decisions of the East African Court of Appeal and of this very Court. We would, on that basis alone reject this appeal.

Now, turning to the confession of the appellant, we would agree to the submissions of counsel for the Republic that the same was amply corroborated. In the confession, the appellant detailed under his own hand

how the robbery was planned, how they trailed the canter, how they blocked it, how they executed the robbery, how he went to Gatitu petrol station and called a taxi to take him to Karatina police station to report he had allegedly been a victim of a car-jack and how he was transported there by a taxi and made a report. All those pertinent admissions were amply corroborated by the evidence of PW1, PW2, PW5, PW6, PW7, and PW8. It was thus safe to rely on that confession. Moreover the said confession was so detailed on the planning and execution of the robbery that taken with the other circumstances in the case as revealed by the prosecution witness, it was manifest that the same could not but be true.

In the result we have come to the conclusion that whether in the basis of the circumstantial evidence adduced by the prosecution, or on the basis of the confession of the appellant, or on the basis of both the circumstantial evidence and the confession, the appellant's conviction for the offences with which he was charged was well founded and quite sound. We accordingly dismiss his appeal.

Dated and delivered at Nyeri this 14th day of May, 2004

J.E. GICHERU

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CHIEF JUSTICE

E.O. O'KUBASU

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JUDGE OF APPEAL

A.G. RINGERA

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Ag. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR