



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

**CRIMINAL APPEAL NO. 62 OF 2000
BETWEEN**

1. PETER KALUNDA MASILA

2. STEPHEN ASANGA KAZUNGU.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at
Mombasa**

(Mr. Justice Waki & Comm. Tutui) dated 5th November, 1999

in

H.C.CR.A. NO. 302 & 303 of 1997)

JUDGMENT OF THE COURT:

Peter Kahinda Masila and Stephen Asanga Kazungu, hereinafter referred to as the first and the second appellants respectively, were after trial, convicted of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya and were both sentenced to death. Their first appeal to the High Court of Kenya at Mombasa was on 5th November, 1999, dismissed by Waki, J. and Hon. Tutui, Commissioner of Assize. Hence this second appeal.

The case for the prosecution was premised on the following facts which appear to be not largely in dispute. One Christopher Kasiwe (PW1) operated a shop at Magongo in the suburbs of Mombasa. At about 9 p.m. on the night of 13th May, 1997, PW1 and his workers were preparing to close the shop for the evening when four people, who appeared at first, to be genuine customers, walked in. No sooner had they appeared than they produced pangas and a pistol and ordered customers to lie down on the threat of being shot and cut. Three of the robbers positioned themselves inside the shop while the one who was armed with a pistol kept watch outside. They ransacked the shop and carted away cigarettes and other shop goods. The robbers ripped off the cash box and took off with Shs. 75,000/- in cash. They then ran into the car in which they had travelled. This was a Toyota Mk 3 registration number KYT 063, maroon or red in colour.

There were electricity lights in the shops and along the streets during the incident. In the course of the attack, the robbers slashed one of the workers, Said Mohammed (PW2) on the hand. He ran away screaming through the back door. The watchman, Hamisi Lamuna (PW3), escaped injury but was able to take down the registration number of the vehicle the robbers were using and which was parked not far from the shop. He gave it as KYT 063, maroon or red in colour. In his testimony before the trial court, he stated that he saw the appellants very well at the shop. He said:

"The 2nd accused (the first appellant) was the one with a pistol.----I saw him very well.....I also saw the 1st accused (the second appellant)."

We observe that despite this strong incriminating averment by the witness, the first appellant did not cross-examine him at all. However, we are not to be taken to mean that the first appellant ought to have done so. It was for the prosecution to prove its case against him beyond all reasonable doubt. The burden could not be shifted upon him.

Before Chanje Muselini (PW9), a resident in the area, retired to bed he thought of going to PW1's shop to buy a mosquito coil. A short distance from the shop, a motor vehicle passed him at high speed. As it approached the shop its lights were switched off. A few minutes later PW9 heard shouts emanating from the shop. He ran towards the direction of the shop. Before he reached there the same motor vehicle took off again at high speed. However, he was able to note its registration number - KYT 063, red or maroon in colour. He went into the shop and gave the details of the car to PW1 and, later to the Police. As soon as the Central Police Station received the report on the robbery, it passed on the number of the motor vehicle to the officers on the beat. P.C. Some (PW4) and P.C. Njuki (PW5) who were stationed at Casablanca within Chagamwe area of Mombasa, and on beat, spotted the same car in a traffic jam. They stopped it and on inspection the officers found a panga and a metal bar under the seats. They arrested the two occupants one of them being the second appellant. He was the driver of KYT 063. A further search at the police station yielded Shs. 4,600/- hidden inside the second appellant's underpants.

Three days later the second appellant led Sgt. Onyeru (PW7) and a team of police officers to King'orani where they arrested the first appellant from amongst a group of youths who were washing cars. An identification parade was conducted on 20th May, 1997. The first appellant was identified by PW1 as one of the people who had robbed him.

Inspector Mukuria recorded a charge and caution statement from the second appellant in which he partly admitted taking part in the robbery, but at the trial, he retracted his statement to the police, although the trial magistrate admitted it in evidence after holding a trial within a trial and after satisfying himself, that the statement was given voluntarily.

The two appellants made unsworn statements in court in their defence, the totality of which dissociated themselves from the commission of the offence charged.

Mr. Wameyo, counsel for the two appellants in this appeal submitted, in the main, firstly, that the trial magistrate erred when it sustained the convictions solely based on identification of one witness in very unsatisfactory circumstances; and, secondly, that the first appellate court ought to have found that the identification parade was conducted contrary to force standing orders and therefore any conviction based on the evidence on identification could not be sustained in law.

It is manifestly clear from the record that the second appellant was convicted not only on identification but also on his confession contained in the charge and caution statement.

It is trite law that there is no rule of law or practice requiring corroboration of a retracted statement of confession before it can be acted upon. It is, however, dangerous to act upon it in the absence of corroboration in material particulars or unless the court after a full consideration of the circumstances, is satisfied of its truth - Tuwamoi v. Uganda [1967] E.A. 84 at 88. What we mean to say here is that the second appellant's conviction could be founded on that retracted confession if the trial magistrate was either fully satisfied in all the circumstances of the case that that confession was true or there was corroboration of it in material particulars.

The second appellant was arrested at gun point in a traffic jam driving the car used in the commission of the robbery. Underneath his seat were a panga and a metal bar, the weapons used in the attack upon PW1 and his workers. Moreover, there was no or any reasonable explanation, as to why he kept the money found in his underpants.

The shop and the street along which it stood were well lit with electricity lights. PW1 and PW3 described the lighting inside and outside the shop as having been strong and adequate. There is no suggestion at all that the robbers had in any manner tried to conceal their identity. The first appellant was positively identified by PW1 at the scene of the robbery.

We are satisfied that the prosecution proved beyond all reasonable doubt that the two appellants robbed the complainant as charged and were therefore properly convicted. The convictions are just and safe in all the circumstances. We also find that their first appeals against convictions and sentences were correctly dismissed. It must follow that there is no merit in this second appeal which we order it be dismissed. These shall be our orders.

Dated and delivered at Mombasa this 19th day of January, 2001.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR