



**REPUBLIC OF KENYA**

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

**CORAM: KWACH, BOSIRE & O'KUBASU, J.J.A.**

**CRIMINAL APPEAL NO. 143 OF 2000**

**BETWEEN**

**PETER NJUNGE KURIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

(Appeal from a judgment of the High Court of Kenya at  
Nyeri (Juma & Mulwa JJ) dated 18th October, 1999

in

H.C.CR.A. NO. 180 OF 1998)

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**JUDGMENT OF THE COURT**

*Peter Njunge Kuria alias "Brigadier"* (the appellant) was convicted of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. The particulars of the charge were that on 10.5.1997 at Gatitu Market in Nyeri District within Central Province, jointly with others not before the court armed with a dangerous weapon namely a pistol, robbed Ndigithe Kariuki of a motor vehicle registration number KYV 541 Toyota Hilux valued at Shs.600,000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Ndigithe Kariuki and wounded Bernard Kabue Githiomi and David Mwangi Gathaka.

The trial magistrate accepted the evidence of two witnesses who identified the appellant as one of the robbers. He also admitted after a trial within a trial a charge and caution statement made to the police by the appellant in which he confessed his participation in the robbery. The appellant retracted the statement alleging that he had been tortured by the police to extract his confession. His appeal to the superior court against both conviction and sentence was dismissed. The learned Judges held that the appellant had been properly identified and that his confession was voluntary and no force was applied to extract it. He now appeals to this Court against those concurrent findings by the two lower courts.

The first ground of appeal is that the learned magistrate erred in admitting the confessionary statement of the appellant. In his unsworn statement in the trial within a trial, the appellant simply alleged that he had been beaten by the police and forced to confess. He did not show the court any injuries nor did he tender any medical evidence to back up the allegation. The statement itself was a very detailed account of

what happened given by the appellant in his own handwriting. He gave the names of the gang members who travelled from Nairobi for the specific purpose of robbing the complainant of his vehicle. They had a buyer ready and waiting in Nairobi and when the vehicle arrived there it was sold to one Hussein who paid Shs.55,000/- in cash which was shared out among the 5 robbers. The pistol used in the robbery had been hired from one Boniface Maina and it was returned to him after the robbery.

Mr Nderi, for the appellant, submitted that since the statement had been retracted no reliance should have been placed on it and the trial court should have looked for corroboration. The position in law is that a court can accept a confession (retracted or repudiated) if it is satisfied that in all the circumstances of the case the confession is true. The principle was stated by the Court of Appeal for East Africa in the case of TUWAMOI V UGANDA [1967] EA 84 at page 91G 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 be but true."*

The claim by the appellant that the confession was extracted from him by force is unsustainable having regard to the substance of the statement. There is no legal ground for rejecting it. Considering all the material points and surrounding circumstances the confession cannot be but true.

The second ground of appeal is that the appellant was not properly identified. It was Mr Nderi's submission that the circumstances in which the appellant was identified were not conducive to a positive identification. He said that the witness who said she had seen the appellant in the bar before the robbery could have been mistaken. He also submitted that the evidence of this witness should be disregarded as the trial magistrate did not warn himself about the danger of relying on the evidence of a single identifying witness. The evidence of Rose Muthoni (P.W.3), so far as material, was as follows:

*"I work at Kagi bar as a maid. On 10.5.97 I was on duty. At 10 p.m. two people came in. They were strangers to me. The one who had first gone to the toilet went outside the bar. I followed him to the next plot as they had not paid me. There was electricity outside. He then came back. The first two to enter in the bar were 1st and 3rd accused. 2nd accused entered last. I was serving 1st and 3rd accused. P.W.2 was serving 2nd accused at the counter. The one who pulled the door as Mwangi was closing the door is the 2nd accused. He is the same one who removed something from the jacket he wore and shot at Mwangi. There was electric light even outside that bar as I was following them because they had not paid for the beers. There was nothing to obstruct my visibility. I am not mistaking them for other people."*

That is very cogent evidence and it was not shaken in cross-examination. This witness had also identified the appellant in an identification parade. There is no ground for impeaching the concurrent finding by the two lower courts that the appellant was properly identified. The scene was lit by electric light and the witness had ample time to observe the appellant who spent a considerable length of time on the premises and in her presence before embarking on the robbery.

It is true that the learned trial magistrate did not warn himself about the danger of relying on the evidence of a single identifying witness, obviously because he thought that a second witness, Mary Njeri Nderi (P.W.2), had also identified the appellant. This was not so because this witness failed to identify the appellant at the identification parade. Be that as it may, we are satisfied that the appellant was positively identified by Rose Muthoni (P.W.3) and that his identification by her was free from error. Besides, the account of what happened before and during the robbery as related by the appellant in his confession agrees in material respects with the evidence of Rose Muthoni.

In the end we have come to the inevitable conclusion that this appeal has no merit and is accordingly dismissed.

Dated and delivered at Nyeri this 27th day of October, 2000.

R. O. KWACH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR