IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GICHERU, SHAH, JJ.A & BOSIRE, AG. J.A.)

CRIMINAL APPEALS NOS. 45 & 60 OF 1996

BETWEEN

SAMWEL KAHIGA GATHIRE ……APPELLANT

EVANS WANYONYI WEKESA……APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Rimita & Ondeyo, JJ.) dated 7th June, 1996

IN

H.C.CR.A'S NOS. 147 & 148 OF 1995)

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JUDGMENT OF THE COURT

The gravamen of the appellants' complaints in this appeal is, besides insufficiency of identification evidence of the alleged stolen motor vehicle and non-compliance with section 211 of the Criminal Procedure Code at the trial within a trial, the acceptance of the first appellant's retracted confession without corroboration in some material particulars which confession was in any event a nullity due to the non-compliance with the requisite legal procedures.

At the hearing of this appeal on 23rd September, 1997, Counsel for the appellants submitted that the identification of the motor vehicle the subject-matter of the offence of robbery with violence contrary to section 296 (2) of the Penal Code in respect of which the appellants were charged, tried, convicted and sentenced to death was insufficient to establish the ownership of the said vehicle. According to Counsel, however, this notwithstanding, the conviction of the appellants for that offence turned on the first appellant's confession. That confession was, to Counsel, wrongly admitted in evidence after some irregular trial within a trial in that even before the commencement of the trial within a trial the learned trial magistrate permitted that confession to be read over to the first appellant. The pertinent part of the proceedings complained of in this regard before the trial court reads as follows:-

"C.P.

The next witness is also going to give Cautionary statement about accused 3.

COURT

Statement read to accused 3.

Accused 3:

I did not write that statement.

COURT:

Trial within a Trial to be held."

The accused 3 referred to in the foregoing passage is the first appellant herein.

After the commencement of the trial within a trial and at the close of the case for the prosecution in that trial, there is nothing in the trial magistrate's record to indicate that section 211 of the Criminal Procedure Code was complied with in respect thereof. Nonetheless, however, the first appellant proceeded to give evidence on oath in retraction of his alleged confession in the charge and cautionary statement. The trial magistrate thereafter ruled that that statement was admissible in evidence as it was made voluntarily and in accordance with the Judges Rules.

Counsel for the respondent saw nothing wrong in the admission of the first appellant's charge and cautionary statement and according to him, the non-reference to Section 211 of the Criminal Procedure Code in the record of the trial magistrate in the trial within a trial did not in itself vitiate the admission of that statement in evidence. Besides, the appellants had been seen in the stolen motor vehicle which belonged to the complainant - Noordin Rehemtula Punja (P.W.1). Whatever irregularities that may have been in the proceedings before the trial court, they did not, according to Counsel, occasion a failure of justice.

On 5th August, 1991, between 8.00 p.m. and 9.00 p.m. the complainant with his wife, Doulat Khanu (P.W.2), returned to their residence at Kibuye Estate in Kisumu from a mosque in his motor vehicle registration number KZC 844, Mazda Saloon. As soon as they drove into the compound of their residence, they were surrounded by five men who were armed with pangas and rungus. These men ordered the complainant to surrender to them his car keys which he did. Thereafter these men demanded money from the complainant and got into the complainant's house ransacking it in search of money and in the process took therefrom a Television Set, a Video Cassette recorder, a stereo tape recorder, clothes and shoes. These were put into the complainant's vehicle and together with the complainants and his wife the robbers drove away in the vehicle.

The complainant and his wife were abandoned in a bush where their legs and hands were tied while the robbers drove away in the complainant vehicle. Eventually the complainant and his wife untied themselves and walked to the road from where they got a lift to their residence in Kisumu.

Meanwhile, the robbers drove to Bungoma where on the following day, the first and second appellants were seen by Joseph Wamwile Nasasi (P.W.3) who is the second appellant's brother-in-law, in the complainant's vehicle now bearing handwritten registration number KAA 868D. The second appellant

was also seen with the same vehicle on 11th August, 1991 by his brother, Richard Wekesa (P.W.4), to whom he said the vehicle was his after having bought it. On 16th September, 1991, along Kamukuya/Kimilili road, Police Constable Charles Akibala (P.W7) stopped this motor vehicle as he suspected its handwritten registration number to be false. It had neither an insurance policy certificate nor road fund licence affixed on its windscreen. According to P.W.7, the second appellant himself had no driving licence. P.W.7 therefore arrested the second appellant and ordered him to drive with him to Kimilili Police Station from where Kisumu Police Station was informed of the recovery of a reported stolen motor vehicle. That vehicle was identified by the complainant as his vehicle which had been robbed from him on 5th August, 1991. That identification was supported by the entries of its chassis number 250548 and its engine number ES/688369 in the log-book in respect thereof which was in the possession of the complainant. Subsequently, the first appellant was also arrested in connection with the robbery at the complainant's residence.

In the trial court the appellants denied having been involved in the robbery for which they were being tried. The trial magistrate, however, in his judgment dated and delivered at Kisumu on 9th March, 1992, relying heavily on the first appellant's confession together with the evidence outlined above concluded that the appellants were amongst the five men who robbed the complainant on the evening of 5th August, 1991. He found them guilty of the offence of robbery with violence contrary to Section 296(2) of the Penal Code, convicted them of that offence and sentenced them to suffer death in the manner authorised by law.

On their first appeal to the superior court, that court held that the appellants being found in possession of a recently stolen motor vehicle coupled with the first appellant's confession led to not other conclusion than that they committed the offence for which they were charged, tried, convicted and sentenced. Accordingly, the first appellate court dismissed the appellants' first appeal. It is against that dismissal that the appellants now appeal to this Court their complaints in the main being as are outlined at the beginning of this judgment.

Besides all else, there can be no doubt that less than one full day after the robbery at the complainant's house the second appellant was found in possession of the complainant's motor vehicle which had been stolen from the complainant on the date and time of the robbery. In it also was the first appellant. About 5 days later, on 11th August, 1991, the second appellant was still in possession of the said vehicle and on 16th September,1991, he was arrested while he was in possession of and driving the said vehicle. The evidence in relation thereto irresistibly connected him with the robbery at the complainant's residence on the evening of 5th August, 1991. The first appellant's confession which in terms admitted the offence of robbery with violence contrary to Section 296(2) of the Penal Code placed him in the complainant's stolen motor vehicle when it was in the possession of the second appellant on 6th August, 1991 at Bungoma. The efficacy of that confession was challenged by Counsel for the appellants as is indicated earlier in this judgment. However, although it was imprudent for the trial magistrate to permit the reading to the first appellant his retracted charge and cautionary statement before laying down the basis of its production in the trial within a trial, that lapse did not cause any prejudice to the first appellant since his main trial was not with assessors nor did the non-reference to Section 211 of the Criminal Procedure Code in the trial within a trial, though procedurally wrong, occasion a failure of justice. In the result, we think that there was sufficient evidence to sustain the appellants' conviction for the offence of robbery with violence contrary to Section 296(2) of the Penal Code and on account of this, their appeal is dismissed.

Dated and delivered at Nakuru this 26th day of September,1997.

J. E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S. E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR