Case Number:	Criminal Appeal 133 of 1987
Date Delivered:	26 Oct 1998
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Joseph Raymond Otieno Masime, Harold Grant Platt
Citation:	Annah Wanjuhi Njagi & another v Republic [1998] eKLR
Advocates:	-
Case Summary:	**Annah Wanjuhi Njagi & another *v* Republic** **Court of Appeal, at Nairobi** **October 26, 1988** **Platt, Apaloo & Masime JJA** **Criminal Appeal No 133 of 1987** *(Appeal from a Judgment and Sentence of the High Court at Nairobi, Mbaluto & Bosire JJ)* ***Evidence** – corroboration - confession of an accused person – weight of such confession as evidence against a co-accused – when such a confession can be admitted – Evidence Act (cap 80) section 32 – whether evidence of an accomplice may be taken as corroboration of an accused's confession statement.* ***Evidence** – duty of trial court to weigh all the evidence – failure of court to consider alibi defence – whether conviction proper.* The appellants were convicted and sentenced on

a charge of robbery with violence contrary to the Penal Code (cap 63) section 296(2).

The evidence on which they were convicted was that on the material day, a group of people armed with weapons had broken into the house of the complainant, forcibly took money therefrom and injured him. The first appellant had made a confession statement which she retracted and repudiated but which was found by the trial court to have been properly made by her and accepted in evidence.

One witness claimed to have recognized the second appellant during the robbery and she had picked him out in an identification parade. However, both the first appellant and Paulina, an accomplice who it was said had waited near the scene of the robbery and taken part of the stolen money, gave evidence that the second appellant had not taken part in the robbery.

The trial court considered that the first appellant's confession was corroborated by the evidence of Paulina, the accomplice.

The High Court dismissed the appellants' first appeals and they appealed to the Court of Appeal. It was argued that the lower courts had failed to consider the second appellant's alibi defence and that it had been wrong to take Paulina's evidence as corroboration for the first appellant's confession statement.

Held:

1. A confession by an accused person implicating a co-accused may be taken into consideration against that other accused person but it can only be added to a case almost proved by the prosecution. This means that it can only be used as lending support to evidence which only falls short by a very narrow margin of the standard of proof.

2. The confession by the first appellant did not concern the second appellant and it carried the prosecution case no further. It should not have been relied upon under the Evidence Act (cap 80) section 32.

3. The trial court had failed to weigh up the alibi defence of the second appellant before reaching its decision that the second appellant's recognition was proper.

4. If the trial court had weighed the alibi, it would have found it was supported by the evidence of Paulina, the accomplice. If the evidence of Paulina was deemed sufficient to corroborate the confession of the first appellant, the court had to consider why Paulina's evidence supporting the second appellant's alibi could be rejected.

5. The courts below failed to appreciate the facts that the recognition of the second appellant was based on a fleeting glimpse of him in torch light which momentarily fell on his face. The recognition was not borne out by any immediate report or even an identification parade. In the circumstances, if the evidence of the prosecution had been weighed with the defence, it was doubtful whether the courts below would have come to the same conclusion.

6. In admitting the First Appellant's confession in evidence, the lower courts had considered the various factors and it could not be said that they had wrongly concluded that the confession was voluntary.

Moreover, the lower courts had properly directed themselves in seeking corroboration which was found in the evidence of Paulina, the accomplice.

First Appellant's appeal dismissed.

Cases

1. Gopa s/o Gidemabenya & Others v R (1953) 20 EACA 318

2. Kinyua v R [1980] KLR 141

3. Okale & others v R [1965] EA 555

4. Leonard Aniseth v R [1963] EA 206

5. Raphael v R [1973] EA 473

6. Bassan & Wathobia v R [1961] EA 521

	7. DPP v Gester (1973) 57 Cr App R 212; [1972] 3 All ER 1056; [1973] AC 296; [1972] 3 WLR 910 *8. Kiarie v R* [1984] KLR 739 **Statutes** 1. Penal Code (cap 63) section 296(2) 2. Evidence Act (cap 80) section 32 **Advocates** *Miss Mutua* for the First Appellant *Mr Oduk* for the Second Appellant
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	First Appellant’s appeal dismissed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Apaloo & Masime, JJ.A)

CRIMINAL APPEAL NO.133 OF 1987

BETWEEN

ANNAH WANJUHI NJAGI:::::::::::::::::: APPELLANT

WILLIAM WAMBIRU ::::::::::::::::::::::: APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a sentence and judgment of the High Court of Kenya at Nairobi (Mbaluto and Bosire, JJ) dated 2nd September 1986

in

Cr. Appeal Nos. 536 & 548 of 1985)

JUDGMENT OF THE COURT

These two Appellants, whose appeals were heard together, were convicted of capital robbery contrary to Section 296(2) of the Penal Code and sentenced according to law. Their appeals to the High Court were dismissed. They now appeal to this Court, and their appeals lie along different considerations, so that each must be considered separately. However, there was alleged to be a joint course of action, as the following short description of the facts will indicate.

It was proved without doubt that during the night of 8th and 9th May 1984 at about 2 a.m. that a gang of men, broke and entered the dwelling house of Joel Otomoi (P.W.1), and assaulted Joel grievously until he handed over his locked brief case, which contained a considerable amount of both Kenyan and Tanzanian money. Neither Joel nor his wife (p.w.8) was able to identify these intruders. This incident afforded a clear example of a capital robbery, because of the number of men involved, armed with weapons, including a gun with which Joel had been injured, in order to force him to hand over the money stolen. The questions raised by the evidence were whether the Appellants were involved. Putting the case in a nut shell, as it were, in the Appellant Annah's case, the question was whether the witness Paulina Muthoni Kimani (P.W.5) who was held to be an accomplice, gave evidence which could afford corroboration of Annah's retracted and repudiated confession. Annah and Paulina had been a little way off while the robbery took place, but were joined by the gang afterwards and given their share of the stolen money. With regard to the Appellant William Wambiru Gana he was present during the robbery according to Esther Wanjiru (P.W.4), because the latter found that William had bent over her after she awoke in bed, and had asked the way to Joel's room. Esther had shown the gang the bedroom of Joel. Esther 'identified' William on an identification parade later. But Annah and Paulina had made it quite

clear that William had not been present in the gang. So the evidence of Esther is all important. It is important to note at the onset that this is a second appeal limited to matters of law. In Mr. Oduk's grounds of appeal, the most obvious errors of law referred to concerned the corroboration, (if any) to be found in the confession of Annah, and the question whether the trial court did not consider William's alibi. But further questions of law arise under the heading whether presumptions and circumstantial evidence were sufficient to raise the inference of guilt. Under this heading the question will be what effect follows from the trial Magistrate; holding that the evidence of John Mburu was corroboration. Consequently the question will be raised whether the lower courts were right in their inferences that Esther had identified the Appellant William at the identification parade.

It is not clear why the lower courts considered the confession of Annah as lending corroboration to the recognition of the Appellant William by Esther. It is true that Esther thought that William was known as Gacitoko and that the witness Mburu Waitheri (P.W.3) said William was known as such. William's full name appears to be William Wambiru Gana and presumably Gacitoko is a nick name. But it is not William that Annah was talking about. She named the gang as Paulina, Kinyanjui Njoroge Kimani, Kinyanjui Gacitoko and herself. A person called Kinyanyui Gacitoko is not obviously the same person as William Gacitoko and there is no other reference to William in her confession. It is not therefore a case of Annah's confession directly implicating the Appellant William.

In so far as Paulina's evidence was taken as corroboration of Annah's confession, Paulina makes it quite clear that William was not a member of the gang. It seems then that Annah's confession and Paulina's alleged corroboration do not concern William.

Even if Annah's confession had had that effect, then it would be evidence to be admitted under Section 32 of the Evidence Act (Cap.80). It may be taken into consideration and as it is well known, that means that it can only be added to a case almost proved by the prosecution. It was said in GOPA s/o GIDAMEBANYA 7 OTHERS vs. Reg. (1953) 20 E.A.C.A. 318 that a confession by an accused person can only be used as a lending assurance to other evidence against the co-accused, evidence which only falls short by a very narrow margin of the standard of proof necessary for a confession. This statement was followed with approval in Wilson Kinyua V.R., Criminal Appeal No.70 of 1979, to which was added the view that the confession could not be the basis of the prosecution case. The result is that the confession of Annah carried the prosecution case no further in itself and should not have been relied upon under Section 32.

The High Court on first appeal held that the defence of the appellant had been an alibi, but that there was clear evidence at the trial to rebut the defence. In the view of the High Court, the failure of the trial Magistrate to specifically deal with the alibi did not lead to a miscarriage or failure of justice. The Appellant challenges this view.

There is no doubt that the High Court was correct in its view that the alibi was not dealt with. There was simply a statement that the alibi was rejected without it being set out. As will be seen from the judgment in Okethi Okale & Others vs. Rep., (2965) E.A. 555, the burden of proof is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as s whole. Consequently, before he came to a final decision on the recognition of the Appellant, the trial magistrate had to weight up the defence together with the evidence of the prosecution. Had he done so. he would have been bound to note that the evidence of Paulina supported the alibi. Paulina is quite clear that the Appellant was not a member of the gang, and this was an important prosecution witness who was the mainstay of the prosecution case against Annah. Though an accomplice, Paulina's evidence was held to corroborate the confession of Annah, the co-accused of the Appellant William. If the evidence of Paulina was sufficient for that purpose, then the trial court had to consider why Paulina's evidence that William was not present

could be rejected. In fact the prosecution had put forward two witnesses who contradicted each other. Esther said that she recognised the Appellant as a member of the gang and Paulina said that he was not a member of the gang.

Consequently it was of great importance in this case for the trial court to have weighted up the alibi, supported by Paulina's evidence, together with the rest of the prosecution case before a decision was reached whether the recognition was sound.

It will be recalled that from the judgments of such cases as Leonard Aniseth v. Republic[1963] E.A. 206 and Raphael vs. Republic [1973] E.A. 473 followed in Owen Kimotho Kiarie vs. Republic. Criminal Appeal No. 93 of 1983 (unreported) that the accused person does not assume the burden of proving his defence of alibi. Nevertheless if there has been a misdirection in dealing with the alibi, it may be that the error is not fatal. That was the view of the High Court. The Appellant however pleads that the evidence was such that the High Court was not entitled to take the view that the error made no difference. In order to test these submissions, we must weight up the evidence, and in doing so, we must take into account errors of law concerning the reception of it. We have already said that nothing was to be obtained from Annah's confession, or Esther's evidence against the appellant whether or not he has a nick name of Gacitoko. What remains is to consider whether the evidence of recognition was as strong as it was found to be.

The first question relates to the identification parade. Where a witness has seen an accused person before but the association has been slight and time has passed, it is quite acceptable to test the witness's recognition on an identification parade. If, of course, the association is close and of recent date, the value of an identification parade may be so little if of any value at all, as to make the identification parade useless. In this case the witness Esther saw the Appellant whilst she was a school girl at Ntarara beweeen the years 1975 and 1977. The offence took place in 1984. The Appellant admitted the association alleging that Esther had come back at Ntarara in 1984 and had been working in a shop near the Appellant's own shop. But it seems that esther did not rely on a recent encounter or having seen the Appellant just before the offence. But if the point is that Esther knew the Appellant well, then the identification parade was of less importance, whilst the necessity for Esther to report whom she had seen was greater. It is true that Esther reported to her friends that she could recognise one of the men if she saw him again but she did not give any description such as she had known the man as a school girl at Ntarara, or that she worked in a shop near the shop of the man in Ntarara. Her first report to Inspector Karanka included the description of the man's size but nothing as to his identity. It was not Esther's report which caused the Appellant William to be arrested and then released. But in her second statement given on 27th May, 1984, after the identification parade held on the 16th May 1984, Esther identified the Appellant as known as Gacitoko. This statement was given a long time after the event and appears to show that Esther had not recognised the Appellant at first because of her association with him.

That appears to be confirmed by the result of the identification parade. The corporal in charge of the parade was criticised by the trial court as being obtuse. It would appear from the evidence that he did make some strange statement. He also referred to a conversation with Esther for about 30 minutes before the parade and as to what she told him during this conversation. That was certainly very unwise. A witness to an identification parade should not talk to the officer in charge of the parade. But as things turned out, what the Inspector wrote on the report, as reported by the trial court, was - "the witness alleged he resembled one of the robbers who was black and a slender face." That idea was repeated in Kiswahili. It is clear that Esther did not recognise William on the parade as being present at the robbery; he was merely like one of those persons. However, both the corporal and Esther, claimed that Esther had recognised William. That was not borne out by the report. While the corporal gave an unfavourable

impression when giving his evidence in court, there was nothing to show that he had not conducted his parade in a correct manner. His fault seems to have been to try and get a firmer identification out of what was really a lack of identification on the parade. The result is that what was written by the Copl. at the time of identification parade, could not be ignored by either the trial court or the High Court on first appeal.

The situation as we see then is that the prosecution relied on Esther's recognition of the Appellant, gleaned from a fleeting glimpse of him. as torch light fell across his face for a moment. Her recognition was not borne out by any immediate report nor even on an identification parade. These facts were not clearly appreciated by the courts below. If we then withdraw Annah's confession & Mburu's evidence, but we take into account Paulina's support for the Appellant's alibi, it seems to us that if the evidence of the prosecution had been weighted with the defence, it is doubtful whether the courts below would have come to the same conclusion.

The appeal of the Appellant Annah undertaken by Miss Mutua raised the following questions:-

1)whether the accomplice evidence of the witness Paulina Muthoni provided corroboration of the confession statement of the first Appellant;

2)the confession statement was retracted and therefore if accomplice evidence was to be used as corroboration, the Court should be specific as to its evidential value; and

3)although the learned Judges in the High Court held that the conviction was safe, it was argued that their reasons for so finding were not specified.

Taking the first ground, the judgment of the trial court reveals that the substance of the confession was that on Thursday 8th May, 1984, Muthoni, Kinyanjui, Njororge Kimani and Kinyanjui Gacitoko and Annah went to Loitokitok from where they hired a vehicle. Having reached Muthangari they then went on to the house of Joel Otumoi. Annah showed the group the house and then she and Muthoni were left in the garden, it was about 1.30 a.m. At 2.00 a.m. the men came back and said that they should go. Annah asked how it had gone and Njoroge ordered her to stop asking questions. From there they went to Ntarara, at which place they robbed a driver and his passenger of a motor vehicle and used it until the petrol ran out. After that Annah and Muthoni were given money by Njoroge and Irungu which they were asked to carry. She did not know how much it was but it was a lot of money in a kikuyu basket. Annah was given her share of Kshs.4,000/= and Tanzanian shs.10,000/=. Muthoni was also given her share. She and Muthoni went to Taveta and took a bus to Nairobi. On the way to Loitokitok Kinyanjui Gacitoko had been carrying a gun and he had organised the robbery.

This statement was consistent with the evidence of John Mburu (P.W.3) whose vehicle had been taken away from him and his passenger at Ntarara. It was also discovered later that the vehicle had been left at the place where the patrol ran out. the wheels having been punctured. It was also consistent with the type of money which Joel Otomoi lost both Kenyan and Tanzanian shillings. A further point is that no women were seen in the house at the time of robbery by witness Wanjiru, they were all men but John Mburu thought that there must have been at least one woman in the group when his vehicle was stolen. Thus, as far as the prosecution goes, the background facts that are known, are consistent with the facts given by Annah.

The trial court was of the opinion that the evidence of John Mburu concerning the loss of his vehicle was corroboration of the confession. The High Court corrected that, and reconsidered the confession in the light of the remaining evidence. The attack on the confession was that Annah had been tortured after her

arrest on the 26th May, 1984. A certain person called Mburu threatened her with a gun saying that she must tell her story or be killed. She was then taken to C.I.D. Headquarters where she was locked in a room and beaten by Mburu and other police officers. The beatings lasted from 12.30 p.m. to 3.00 p.m. When she was allowed to go she met a brother of Joel Otumoi and another relative and they travelled together in a vehicle to Loitokitok. On the way she was hanged from a tree by a rope which passed under her arm-pits. They then went to her mother's house where money was demanded. Her evidence ends with a statement that "she was just told to sign some papers which she did not infact make any statement to anyone."

That was the evidence in a trial-within-a-trial, in answer to Sgt. John Ndegwa's evidence that after the arrest on 26th May, 1984 Annah had been taken to C.I.D. Headquarters. She had been taken to Loitokitok in a private vehicle, but Annah had never been hanged on a tree on the way and she had never been assaulted at the headquarters. She finally gave her statement on the 11th June, 1984 to Chief Inspector Peter Njoroge. A full caution was administered though it is called inquiry statement and according to the Inspector, it was recorded in Annah's own language and signed by her. According to Chief Inspector, he took no part in the investigation and knew nothing about the matter. The lower courts reviewed all these facts and came to the conclusion that the objections raised by the Appellant were not of great significance. On the question whether Annah had made the statement herself or had merely signed the papers, they accepted the evidence of Chief Inspector as well they might. But the Chief Inspector had not tried to find out how long Annah had been in custody. It was the period lasting from 26th May to 11th June, 1984. At the time of the trial she had no visible marks to show her injuries and that is understandable because the trial commenced in September 1984. By the time Annah gave evidence it was November 1984. It is unlikely therefore that she would have any visible marks even though the High Court thought that she might well still have some scars to show. Miss Mutua pointed out that the Appellant had gone to hospital shortly after giving her statement but as no evidence was called on this point, it is not clear what its significance is. Although the period of detention is rather long, the lower courts considered the various factors, and it cannot be said that they must have come to the wrong conclusion that the confession was voluntary. It is clear that they were well within their rights to hold that Annah made the confession herself, and that she did not just sign some papers without knowing what she was signing. This fact tends to withdraw credence from the rest of her allegations. We think therefore that the lower courts cannot be faulted in admitting the confession in evidence. At the same time we would suggest that the normal safeguards which are taken in murder cases are also applied to capital robbery, in having the accused medically examined, and in ascertaining how long the accused has been in custody.

Even so the lower courts properly directed themselves in seeking corroboration. The High Court found it substantially in the evidence of Paulina Muthoni, who was held to be an accomplice. That finding was quite correct. Basing their judgment on the authority of BASSAN and WATHOBIA vs. R., [1961] E.A. 521 and D.P.P. vs. HESTER [1973] 57 Cr. Appeal Reports 212, it was concluded that the confession and the accomplice evidence could mutually corroborate each other. The High Court concluded that in the circumstances, the accomplice evidence being substantially truthful, it was such that mutual corroboration would apply.

Miss Mutua submitted that the authorities did not lay down as general a proposition as that. That would only hold good in special cases. In Bassan's case the degree of complicity was slight. Here the Judges held that Paulina was involved to a considerable extent. As both pieces of evidence were doubtful in themselves, it was not a case for mutual corroboration.

The evidence of Paulina was that she was not part of the gang wittingly. She had come to buy cheap goods from Tanzania. She had not been at the scene of the robbery, but stayed at a place Annah had

shown her. Then she was called and she met the other persons. She had witnessed the commandeering of the vehicle of John Mburu. She had received some money. She and Annah had gone on to Nairobi from Taveta.

The lower courts were quite right to hold Paulina an accomplice; but she was not involved in the robbery charge. She might be described as an approver because of her actions during the escape. But if her evidence was truthworthy at all, it would be the kind of evidence which showed that the confession must be true. Paulina's evidence does not implicate Annah any further than Annah implicated herself. It could be that during Annah's absence, as related by Paulina, Annah pointed out the house of Joel. Paulina did not exculpate herself by throwing blame on to Annah. Neither woman had actually taken part in the robbery charged but they had joined up with the gang of men afterwards. It was much the same kind of story.

Paulina's evidence was held to be substantially truthfull and as the lower courts observed, it fitted in with the background evidence. Miss Mutua was critical of the fact that no specific finding was made whether the accomplice was a credible witness. It is difficult to see how the finding that the accomplice was substantially truthful did not also include the notion that evidence was credible. The lower courts did examine Paulina's evidence in various ways and came to their conclusion that it was reliable. There is no ground upon which their conclusion can be overturned.

Looking at the evidence concerning the shoe, it was not put forward from its source, Esther. It does not afford any firm evidence connecting Annah with the robbery, without clear evidence where it was found and perhaps matching it with its particular companion.

Having examined the complaints of the Appellant Annah, very well presented by Miss Mutua, we are still convinced that the combined effects of the confession and the accomplices evidence did provide assurance that Annah was properly convicted.

Accordingly we dismiss the appeal against conviction of the Appellant Annah.

Dated and delivered at Nairobi this 26th day of October, 1988.

H.G. PLATT

.....

JUDGE OF APPEAL

F.K. APALOO

.....

JUDGE OF APPEAL

J.R.O. MASIME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR