**Odeyo v Republic**

**Division:** Court of Appeal of Kenya at Mombasa

**Date of judgment:** 27 January 2006

**Case Number:** 6/05

**Before:** Tunoi, O’kubasu and Waki JJA

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Criminal procedure – Calling of witnesses – Discretion of prosecution – Failure to call material*

*witnesses – Whether failure to call witnesses rendered conviction unsafe.*

*[2] Evidence – Confessions – Retracted confessions – Corroboration – Whether a court could convict*

*on an uncorroborated confession.*

*[3] Evidence – Identification – Quality of light present during the incident – Whether the identification*

*of the appellant was satisfactory.*

**JUDGMENT**

**Tunoi O’Kubasu and Waki JJA:** At about 9pm on the first of September 2001 the complainant Sylvester Otieno (PW1) a Sales and Marketing official with KK Security Company stopped at the Kengeleni junction within Nyali area of Mombasa to drop his passengers Mary Talu (PW2) and Grace Mwashumbe (PW3). They had all attended a wedding reception at Voyager Hotel. Suddenly out of the blue a person bent at the driver’s window as if trying to speak to PW1. That person produced a hand-gun and ordered PW1 to surrender everything he had otherwise he would be shot. When PW1 hesitated the man hit him with the gun butt on the face above the right eye and snatched his watch. He demanded his wallet but PW1 was still seated on the driver’s seat and the assailant was leaning over the window. PW1 pretended to be removing his wallet from the pocket but he suddenly swung the door open hitting the man’s knees and causing him to swagger backwards. PW1 then jumped out and grabbed the man’s hand that held the gun. A struggle ensued and the gun dropped. Both dashed for it but they fell down and continued to fight for the gun. PW1 was overpowered and he let go to the gun. The assailant picked it and pointing it at the witness he once again demanded his wallet. PW1 gave him the wallet and as the assailant turned to go away PW1 jumped at him shouting “mwizi” “mwizi” (“thief “thief”). PW1 ran after him and wrestled him to the ground and as the two rolled on the road a Kenya Air Force bus came by and stopped. Some officers jumped out of the bus and went to the witness’s rescue. They arrested the assailant and took him to Makupa police station. PW1 followed in his car. The assailant turned out to be Washington Odongo Odeyo, the appellant in this appeal. At Makupa police station, in the presence of PW1, the appellant was searched and PW1’s watch and wallet containing KShs 1500 were recovered from him. PW1 was firm in his evidence that there were no other people at the scene and that he never lost sight nor grip of the appellant until the Kenya Air Force officers came and arrested him. On this basis, the appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code and on two counts being in unlawful possession of a firearm without a firearm certificate. He was convicted on all the three charges. The first appeal to the High Court of Kenya at Mombasa was dismissed. This is therefore a second appeal. The evidence of PW1 was amply corroborated by that of PW2 and PW3 with the latter adding that Kengeleni junction is well lit with street lights and that with Kenya Air Force bus head lights beaming on PW1 and the appellant as they struggled they were able to see the appellant well and there was no possibility of another person being arrested by mistake. Also on this aspect of the evidence it is to be remembered that PW1 wrestled with the appellant until the Kenya Air Force officers arrested him. We are therefore satisfied that the question of any mistaken identification of the appellant does not arise. With due respect it must follow that the forceful submission by Mrs Abuodha that the identification of the appellant was unsatisfactory must be rejected. Mrs Abuodha has also submitted that the conviction of the appellant is unsafe because the Kenya Air Force officers who allegedly arrested the appellant were not called to testify. It is not denied that the Kenya Air Force officers took PW1, PW2 and PW3 together with the appellant to Makupa police station and handed them all together with the gun and ammunition to captain Mutuma Mberia (PW5). As the prosecution did not need the Kenya Air Force officers to testify the appellant was at liberty to call them, if he so desired. The law in this respect is that the prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable one without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution (see section 119 Evidence Act (Chapter 80): illustration (*g*) to section 114, Indian Evidence Act 1872; and *Sarkar’s Law of Evidence* (12ed) 1971 at 1005-1007. See also *Ngodia v Republic* [1982-1988] 1 KAR 454. We are satisfied that failure by the prosecution to call Kenya Air Force officers to testify did not weaken the prosecution’s case nor did it prejudice the appellant in any manner. We reject this ground of appeal. The appellant on 1 September 2001 at about 11am made a charge and caution statement to Inspector Moses Mwangi (PW4) in which he admitted robbing PW1, but at the trial he retracted it. However, the trial magistrate admitted the statement in evidence after holding a trial within a trial. The magistrate was satisfied and found that the statement was given voluntarily. In it the appellant confesses, *inter alia*, that: “I recall on 31 August 2001 I went to Mwembe Tayari where I met my friend Mohamed who sells watches. He gave me a gun which had three rounds of ammunition and asked me to find a buyer. It was wrapped in an envelope and I went carrying it. I recall on the 1 September 2001 I left our house to a neighbour in Mnazi Moja where they sell changaa. I took a drink (*sic*) one jik for KShs 120. I was still holding the paper bag with my small pistol. I decided to go to Mwembe Tayari on foot in the island to buy miraa. I left Kongowea at 5pm or thereabout and I bought miraa at Mwembe Tayari worthy 35. I returned on foot and on reaching Kengeleni lights I just stopped a car pointing the gun to him (*sic*) and asked him for money. The man alighted and started struggling with me. I saw an army bus behind his car and some people alighted from the bus and joined the struggle. They disarmed me. They also did beat me with other members of the public. I later found myself at Makupa police station.” It is urged before us by Mrs Abuodha that the trial magistrate erred in relying on a confession which had been retracted without considering its weight critically and the same should be rejected. We have considered this submission and the law governing retracted or repudiated confessions. In a situation like the one presenting itself before us where the trial magistrate decides that the statement was voluntary and admissible, he is bound to accept the statement 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 or there was corroboration of it in material particulars. See *Tuwamoi v Uganda* [1967] EA 84 at 88, *Swai v Republic* [1974] EA 1974 and *Bakari Omari v R* [1982-1988]1 KAR 349. Was the confession corroborated? What aspects of the prosecution’s case corroborate it? There was the consistent testimony of PW1, PW2 and PW3 and also that of PW5, the duty officer at Makupa Police Station to whom the appellant was handed. PW5 also recovered the gun, PW1’s wallet and watch from the appellant after frisking him. We think therefore that there was ample corroboration of the confession in all material particulars. However, we hasten to add that 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. See *Tuwamoi* (*ibid*) and *Toyi v R* [1960] EA 761. The confession we have reproduced is indeed detailed and it can safely be concluded that it cannot but be true. On evaluation of all the evidence on record we are satisfied that the prosecution proved that the appellant robbed Sylvester Otieno of his property on 1 September 2001, and immediately before or during the robbery used actual violence on his person. The appellant was armed with an offensive and dangerous weapon, namely a berretta pistol and wounded Sylvester Otieno. The appellant was therefore properly convicted and his first appeal was correctly dismissed. We see no merit in this appeal and we order that it be dismissed.

For the appellant:

*Information not available*

For the respondent:

*Information not available*