**Thiong’o v Republic**

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

**Date of ruling:** 14 May 2004

**Case Number:** 131/02

**Before:** Gicheru CJ, O’Kubasu JA and Ringera AJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Appeal – Points of law – Duty of second appellate court – Whether second appellate court can interfere with findings of fact.*

*[2] Crime – Robbery with violence – Car-jacking and robbery by gang with weapons – Incident at night when difficult for complainants to identify accused – Whether conviction would stand on basis of retracted confession and circumstantial evidence.*

*[3] Evidence – Confession – Whether retracted confession must be corroborated – Material particulars of confession corroborated by circumstantial evidence – Whether circumstantial evidence sufficient corroboration – Whether second appellate court could interfere with findings of fact.*

**Editor’s Summary**

The Appellant was convicted of robbery with violence and the conviction affirmed on first appeal. He was the owner of a motor vehicle the occupants of which had been involved in a robbery with violence against three occupants of a second motor vehicle. The complainants were ambushed when their route was blocked by the vehicle of the accused. The incident took place after nightfall, and the complainants could not identify the accused persons. However, the Appellant went to a police station four hours after the robbery and reported the theft of his car after a car-jacking. He was arrested. When he was searched some time thereafter, his car keys were found in his pocket. His car-jacking story was found to be unbelievable because the directions and distances did not agree. The Appellant subsequently wrote a detailed confession in his own handwriting which he later retracted. The court relied on the retracted confession and the circumstantial evidence linking the Appellant to the offence and convicted him. His first appeal was dismissed. On second appeal, he alleged that the conviction was improper as the retracted confession had not been corroborated by credible evidence. The failure of the prosecution to adduce in evidence the car keys allegedly found in his possession was argued to have completely rendered worthless the evidence of the search.

**Held** –There is no rule of law that a court cannot act on a retracted and/or repudiated confession unless it is corroborated in material particulars. What exists is a rule of prudence that a court should be cautious to act on such a confession unless it is corroborated in material particulars (*Tuwamoi v Uganda* [1967] EA 84 adopted). In the current case, the retracted confession was amply corroborated. The circumstantial evidence tendered by the prosecution was credible and corroborated the Appellant’s confession. A second appellate court would not interfere with concurrent findings of fact unless the findings were bad in law for being perverse ie no reasonable tribunal could on the evidence have arrived at such findings (*Muriungi v Republic* [1982-88] 1 KAR 360, *Nyambane v Republic* [1986] KLR 248 followed). The circumstantial evidence was sufficient because it was incapable of explanation on any other reasonable hypothesis other than that of his guilt (*Kipkering arap Koske v Republic* [1949] 16 EACA 135 considered). **Cases referred to in judgment** (“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled) ***East Africa*** *Kipkering arap Koske v Republic* [1949] 14 EACA 135 – **C** *Muriungi and others v Republic* [1982-88] 1 KAR 360 – **F** *Nyambane v Republic* [1986] KLR 248 – **F** *Tuwamoi v Uganda* [1967] EA 84 – **A *United Kingdom*** *Martin v* *Glywed Distributors Ltd (t/a MBS Fastenings)* [1983] 1 CR 511