REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 23 of 2005

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No.2825 of 2002 – Kathoka Ngomo [S.P.M.])

NAKOKONI LONDUNGKIOK LOSIKOR…....….1ST APPELLANT

PARMISA LONDUNGKIOK LOLMENTOE.....2ND APPELLANT

VERSUS

REPUBLIC……...…….……..……RESPONDENT

JUDGMENT OF THE COURT

The appellants, Nakokoni Londungkiok Losikor and Parmisa Londungkiok Lolmentoe were charged with three counts of Robbery with v**iolence contrary to Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the 24th September 2002 at Gatami village, Laikipia District, the appellants, jointly with others not before the court, while armed with dangerous or offensive weapons, namely AK 47 rifles, rungus and stones robbed Peter Mwangi Wambugu, Simon Matu Wambugu and Milka Wairimu Wambugu of four blankets, one Sanyo radio and a bicycle all valued at Ksh.4,749/=, and at or immediately before or immediately after the time of such robbery used violence and shot dead Peter Mwangi Wambugu and Simon Matu Wambugu. The appellants also threatened to use actual violence to Milka Wairimu Wambugu during the said robbery.

The appellants were alternatively charged with **Handling stolen goods contrary to Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the 25th September 2002 at Aiyem area Rumuruti, in Laikipia District, otherwise that in the course of Stealing, jointly and dishonestly retained one bicycle make Rala and two blankets, the properties of Milka Wairimu Wambugu, knowing or having reason to believe them to have been stolen or unlawfully obtained. The appellants were further charged with two counts of being in possession of a firearm and ammunition without a firearm certificate contrary to **Section 4 (1)** of the **Firearm Act (Cap.114).** The particulars of the offence were that on the 25th September 2002 at Aiyem area, Rumuruti in Laikipia District, the appellants, were jointly found in possession of an AK 47 rifle body No.2 C.17923/448754 and 12 rounds of 7.62 mm special ammunition without a firearm certificate. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge.

After full trial, the appellants were found guilty of the three counts of **Robbery with violence** and the two counts of **being in possession of a firearm and ammunition without firearm certificate**. They were sentenced to death in respect of the robbery offences as is mandatorily provided by the law. They were sentenced to serve three years imprisonment on each of the two firearm offences. The sentences were ordered to run concurrently. The appellants were aggrieved by their conviction and sentence and have

appealed to this court.

In their petitions of appeal, the appellants raised seven grounds of appeal challenging the decision of the trial magistrate in convicting them. The two separate appeals filed by the appellants were consolidated at the hearing and heard together as one. Mr. Ndegwa, for the appellants, made submissions urging the court to allow the appeal, quash the convictions and set aside the sentences imposed. Mr. Mugambi for the State submitted that the prosecution had established its case to the required standard of proof beyond reasonable doubt. He urged the court to uphold the conviction and the sentences imposed on the appellants.

While perusing the proceedings of the subordinate court as we were writing this judgment, we noted that on the 8th August 2003, the prosecutor who appeared in court, and who led PW3 Joseph Wambugu Ndiangui in his testimony, was sergeant Migwi. He was a police officer of a rank lower than that of an Assistant Inspector of police. He was thus not authorized to prosecute criminal cases before a magistrate's court in accordance with **Section 85(2)** of the **Criminal Procedure Code**. In **Eliremah & Another vs Republic [2003]KLR 537**, the Court of Appeal held that where such a police officer prosecutes a criminal case before a magistrate's court, the proceeding thereto will be a nullity. We have no option but to declare the proceedings before the trial magistrate's court leading to the conviction of the appellants to be a nullity and as a consequence of which the said conviction is quashed, and the sentences imposed on the appellants set aside.

The issue that remains for determination by this court is whether or not to order for a re-trial. The principles to be considered by this court in deciding whether or not to order a re-trial were set out by the then Court of Appeal for East Africa in **Fatehali Manji vs Republic [1966] E.A 363** at page 344, Sir Clement de Lestang Ag. P held that;

"***In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particulars facts and circumstances and an order for retrial should only be made where the interests of justice required it and should not be ordered where it is likely to cause injustice to the accused person."***

In **Mwangi vs Republic [1983] KLR 552**, the Court of Appeal held at page 538 that;

"***We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result…"***

We have re-evaluated the evidence that was adduced before the trial magistrate's court to determine if there is admissible or potentially admissible evidence that would enable a court of competent jurisdiction to likely convict the appellants if a retrial is ordered. We have also re-examined the said evidence with a view of deciding whether it would serve the interest of justice if a retrial is ordered.

In the present appeal, a gang of robbers attacked the homestead PW1 Milka Wairimu Waweru (*the complainant*). The robbery occurred on the night of the 24th September 2002 at about 10.00 p.m. The robbers were armed with an AK47 rifle. In the course of the robbery, five children of PW1 were shot. Two of the children succumbed to their injuries and later died. A bicycle, among other properties, was robbed from the complainant. After the robbery, she was able to raise alarm. Her neighbours came to her aid. The children who were injured were rushed to Nyahururu hospital for treatment. Meanwhile the neighbours, under the leadership of PW8, John Nderitu Chege, the area Assistant Chief, mounted a search for the robbers. They were able to trace the foot prints of the robbers for about eighteen kilometres. They were aided by the fact that the robbers made no effort to conceal their tracks. The robbers were also pushing a bicycle which left trend marks on the ground. The foot prints led PW8 to a manyatta, where they arrested the appellants.

The appellants were found sleeping in a house within the manyatta. They were found in possession of a bicycle and blankets, which were positively identified to belong to the complainant. An AK 47 rifle was also found wrapped in a blanket inside the house where the appellants were arrested. When the expended cartridges recovered from the homestead of the complainant were examined and compared with the cartridges test fired from the AK rifle recovered from the appellants, PW11 Emmanuel Kiptanui Lagat, a Firearm Examiner found that the said cartridges were fired from the same gun.

It is therefore evident that there is potentially admissible evidence that may result in the conviction of the appellants. We have noted that the appellants have been in remand custody for over five years. We have however taken into consideration that in the robbery which the appellants were charged, two children were killed and three others shot and injured. The appellants will be sentenced to death if they are found guilty. The interest of justice in the present case demands that this court orders a retrial. The appellants will have an opportunity to ventilate whatever deficiencies they complained of in the vitiated trial in the case to be retried. The appellants shall therefore be retried.

They shall remain in custody pending their retrial before the Nyahururu Principal Magistrate's Court. They shall appear before the said court on the 6th December 2007 to take fresh pleas in the retrial.

It is so ordered.

DATED at NAKURU this 29th day of November 2007

M. KOOME

JUDGE

L. KIMARU

JUDGE