REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 135 & 136 of 2003
(CONSOLIDATED)

BETWEEN

LEMONGEN LEKOMOISA.....1ST APPELLANT

TIWA LEBULUKASH.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 594 of 2002 of the PM's Court at Isiolo (Mr. P.M. Ndung'u, PM) dated 25.6.2003)

JUDGMENT OF THE COURT

The two appellants, Lemongen Lekomoisa and Tiwa Lebulukash were tried, found guilty and convicted on three counts of robbery with violence contrary to section 296(2) of the penal Code. The appellant's co-accused who was accused number 1 in the lower court was acquitted for lack of evidence.

The particulars of the charge on count 1 were that **on the 13th day of November 2001 at Lemposerek area in Isiolo District of the Eastern Province, jointly with others not before the court, being armed with offensive weapons namely rifles robbed SIMON NJARAMBA of Seiko 5 watch, one jacket and cash Kshs. 23,050/= and at or immediately before or immediately after the time of such robbery shot and killed GRACE LOLOCHUM and CHRISTOPHER KILAI KITHUKA.**

The particulars of the charge on count 2 were that on the 13th day of November 2001 at Lemposerek Area in Isiolo District of the Eastern Province jointly with others not before the court being armed with offensive weapons, namely rifles, robbed Italangin Loishopoko of cash Kshs. 10,000/= and at or immediately before or immediately after the time of such robbery wounded the said ITALANGIN LOISHOPOKO.

The particulars of the charge on count 3 were that on the 13th day of November 2001 at Lempaserek in Isiolo District of the Eastern Province, jointly with others not before court being armed with offensive weapons namely rifles, robbed LINA SABINA of cash Kshs. 6,000/= and at or immediately before or immediately after the time of such robbery, short and killed GRACE LOLOCHUM and CRHISTOPHER KILAI KITHUKA.

The appellants had also been charged in the 4th count with robbery with violence contrary to section 296(2) of the Penal Code, but they were not found guilty of the same and were accordingly acquitted.

Each of the two appellants appealed against both conviction and sentence on the grounds that:-

> 1. The evidence adduced by witnesses was wholly inadequate and unsatisfactory to sustain any conviction.
>
> 2. The learned trial magistrate erred both in law and fact for upholding the evidence of PWI who claimed he identified the appellants and further that the identification parade wasn't convenient therefore the parade evidence should not be relied upon.
>
> 3. The trial magistrate erred in both law and fact for failing to direct his judicial mind to the standing order of the law provided in section 9 of the Judges' Rules.
>
> 4. The learned trial magistrate erred both in law and fact when he failed to consider that the prosecution case was not proved beyond any reasonable doubt.
>
> 5. The trial magistrate erred both in law and fact when he based his judgment on sole evidence of identification failing to consider that the identification parade was a piece of manufactured evidence because the prosecution witnesses claimed that they did not give the description of the appellant when reporting the matter at the police station.

During the hearing of the appeal, each of the two appellant put in written submissions. In addition to the five grounds of appeal we have set out above, the 1st appellant also contended that his appeal should succeed on the basis that the prosecution's case was conducted by an unqualified prosecutor contrary to section 85 of the Criminal Procedure Code (C.P.C.), while the 2nd appellant contended that having been found with none of the stolen property, then his appeal should have succeed. Each of the appellants also denied participation in the alleged crimes.

The learned state counsel, Mr. Oluoch, did not oppose the appeal but urged the court to make an order for retrial. Mr. Oluoch conceded to the appeal on the main ground that the prosecution case in the lower court was conducted by an incompetent prosecutor contrary to section 85 of the CPC.

Section 85 of the CPC provides as follows:-

> "**85(1) The Attorney General, by notice in the Gazette may appoint public prosecutors for Kenya or for any specified area thereof and either generally or for any specified case or class of cases. (2) The Attorney General, by writing under his hand may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of police to be a public prosecutor for the purposes of any case. (3) Every public prosecutor shall be subject to the express directions of the Attorney General."**

We have ourselves perused the court record and find that indeed the prosecution's case in the lower court was conducted by one Police Constable Ngugi. It is trite law that proceedings of the prosecution's case can only stand when the prosecutor is not below the level of Assistant Inspector of Police. This was the Court of Appeal decision In **Elirema & 4 Others V. R. – Criminal Appeal No. 67 of 2001** (Court of Appeal sitting at Mombasa). We entirely agree with learned state counsel and say no more about that issue.

The next issue for our determination is whether or not we should order a retrial which Mr. Oluoch has urged us to do. According to the learned state counsel an order for retrial in this case is merited on the grounds that there is sufficient evidence to warrant a conviction on retrial. In addition, it was submitted on behalf of the respondent that all the prosecution witnesses were readily available in case of a retrial and finally that because lives were lost during the robberies, then this court should be persuaded to make an order for retrial as such an order would clearly be in the interests of justice. In our view the point that the learned state counsel was making is that a retrial in this case would be for the good of society.

Before we consider whether or not an order for retrial is merited it is necessary for us to set out the facts of this case.

On 13.9.2001, at about 4.30pm, Corporal Ndalanya Lachopoko (PWI), Simon Njaramba Mwangi (PW2), Patrick Muchemi Ndegwa (PW3) and Lina Habina (PW4) were traveling together in motor vehicle registration number KQX 192, a Mitsubishi 1011 together with other people. Altogether there were about 16 people on board. The vehicle belonged to PW2 and at the material time it was being driven by PW3. The group was traveling from Maralal to Oldonyiro.

On reaching near the Waso Nyiro River, the vehicle fell victim to a bandit attack. The bandits were armed with guns. When the bandits shot at the vehicle, the vehicle lost control. It was during that attack that the two deceased persons, namely GRACE LOLOCHUM and CHRISTOPHER KILAI KITHUKA were shot dead. After the vehicle overturned, the bandits went ahead to rob PWI, PW2, PW3 and one other person by the name Timothy Olemisiony who was the complainant in count 4.

During the investigations, a number of suspects were arrested and taken to the police station for parade identification. The two appellants herein were among the suspects who were arrested by police. The other suspect was the first accused in the lower court but who was acquitted as he was found to have no case to answer after the close of the prosecution's case.

The 1st appellant, just like the 2nd appellant gave unsworn testimony. He had no witnesses to call. 1st appellant stated that on the day in question, the police in the company of the local chief went to the 1st appellant's manyatta where he was sleeping and rounded up all the people in the Manyatta on the allegation that they had attacked a motor vehicle. He stated further that there was a grudge between him and the chief over the chief's failure to pay dowry for the 1st appellant's sister who was married to the chief. That the chief's failure to pay the dowry had led to quarrels and some two fights between them. That during the identification parade, he was identified by one of the victims of the attack. It was 1st appellant's contention that the case against him was a frame up by the chief and the witness who identified him for the reason that both the chief and that witness belonged to the same clan.

The 2nd appellant testified that on 11.4.2002, he was taking cattle for grazing in the morning when he noticed a police van at the manyatta. He was then asked whether the people in the manyatta had guns and when he mentioned that one person in the manyatta had a gun, he was made to sit down and later taken along with seven others to the police station. He also stated that he was not identified by any of the witnesses during the identification parade.

In his judgment, the learned trial magistrate found that the prosecution had proved its case beyond any reasonable doubt against each of the two appellants on counts 1, 2 and 3 and convicted each one of them accordingly. It is that evidence upon which each of the two appellants was convicted and which, Mr. Oluoch submitted, is so watertight that if the case is sent back to the magistrate's court for retrial it is sufficient to sustain a conviction.

It is our duty as the first appellate court to submit the prosecution's evidence to fresh scrutiny and reconsideration with a view to establishing whether indeed the findings of the trial magistrate were sound and secondly whether that evidence would sustain a conviction against both or either of the appellants on retrial. The factors to be taken into account by the court in deciding whether or not to order retrial were set out by the Court of Appeal in **Njuki & 4 others V. R. (2002) KLR 771**. The factors were also earlier set out by the Court of Appeal for Eastern African in the case of **Fatehali Manji V. Republic (1966) EA 343** where it was 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 purpose of enabling the prosecution to 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 own facts and circumstances and an order for**

retrial should only be made where the interests of justice require it."

It was also held in the case of **Aloys V. Uganda (1972) EA 469 that "in general, a retrial would be ordered only when the original trial was illegal or defective……"**

In reaching this conclusion, the learned judges of appeal followed the earlier decision in **Fatehali Manji V. R**. (supra).

We have ourselves carefully considered the evidence in support of the case against the two appellants in the lower court. We have also carefully considered the defences put forward by each of the two appellants. Further, we have considered the submissions by the learned state counsel on his prayer for an order of retrial. We have also taken into account the appellants' submissions in opposition to the prayer for an order of retrial. The 1st appellant is opposed to a retrial on the ground that he has been in prison for a total of 3 years 8 months. For the 2nd appellant he has contended that there is no sufficient evidence against him and in effect therefore that making an order for retrial would only be giving a second chance to the prosecution to look for other evidence to fill the gaps in the evidence adduced against him in the lower court.

We shall first of all deal with the 2nd appellant's case. Apart from PWI who said he could identify the 2nd appellant, all the other eye witnesses, namely PW2, PW3, PW4 never saw the attackers and could not identify the 2nd appellant. Though PWI had testified that he could identify the 2nd appellant, PWI was not able to identify the 2nd appellant during the identification parade. It is for this reason that we have reached the conclusion that contrary to what Mr. Oluoch contended there is no sufficient evidence that is likely to lead to a conviction of the 2nd appellant on retrial. In the result, the 2nd appellant's appeal is allowed in its entirety. We accordingly quash the conviction against the 2nd appellant on the 1, 2 and 3 counts. We also set aside the sentence of death imposed upon the 2nd appellant on counts I, 2 and 3. Unless otherwise lawfully held, the 2nd appellant is to be released from prison forthwith.

We now turn to the appeal of the 1st appellant. After carefully reconsidering the evidence on record, we are of the view that an order for retrial is merited against the 1st appellant who was the 2nd accused during the trial in the lower court. Prosecution's case against the 1st appellant is based on the evidence of PWI, Corporal Ndalange Lochopoko, and a lesser extent on the evidence of PW7, Inspector Joseph Kendinyo. PWI's evidence against the 1st appellant is in our view watertight. It is the evidence of PWI that he stood face to face with 1st appellant who had got hold of PWI as the 1st appellant demanded money from PWI. That PWI spoke to 1st appellant as PWI pleaded with 1st appellant to spare his (PWI's) life. PWI was also able to identify 1st appellant during the identification parade conducted by PW7 on 27.4.2002. In this regard, we find that the available evidence against 1st appellant is such that it is likely to lead to a conviction on retrial. It is our considered view that in the circumstances of this case, it would serve the interests of justice and would be for the good of society to order a retrial of the case against the 1st appellant.

The 1st appellant has contended that he has been in prison for a total of 3 years 8 months. We have taken that fact into account but have reached the irresistible conclusion that the good of society demands that the 1st appellant be retried. It is also our considered view that when the 1st appellant's complaints are weighed against the general good of society, any delays that may arise as a result of the re-trial cannot be said to be fundamentally prejudicial to the 1st appellant who in any case faced a death sentence.

In the result, the 1st appellant's appeal is allowed. The convictions on counts 1, 2 and 3 are quashed and the resultant sentences of death imposed upon the 1st appellant on each of the three counts are set aside. However for the reasons that we have given above, we order that the case against the 1st appellant shall go back for retrial in the Principal Magistrate's Court at Isiolo, only that the case will be heard before a magistrate other than the one who heard the case the first time.

To expedite the process of retrial, we order that the 1st appellant be produced before the Principal magistrate's Court Isiolo on 4.7.2005 for purposes of taking early dates for the retrial.

It is so ordered.

Dated and delivered at Meru this 29th day of June 2005.

D.A. ONYANCHA

JUDGE

29.6.2005

RUTH N. SITATI

JUDGE

29.6.2005