



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**Criminal Appeal 183 of 2003**

**SIMON LENGEMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence of P.M. Ndung'u,**

**P.M. in Isiolo Principal Magistrate's Court Criminal**

**Case No. 1438 of 2001)**

**J U D G M E N T**

The appellant, Simon Lengema, was originally charged with others not before the court, with robbery with violence contrary to Section 296(2) of the Penal Code. There was a second count of Being in Possession of Public Stores contrary to Section 324(2) of the Penal Code. He was convicted on both counts and sentenced to suffer death in respect to count I and serve a year's prison sentence in respect to Count II. He appealed against the convictions and the sentences.

The facts of the case are as follows: -

On 1st December, 2001 the complainant Pw1 was looking after goats in Komu area at Isiolo when she got surrounded by more than 20 people who were armed with guns. She ran away home in the Manyatta where she reported the incident. Pw2, Pw3, Pw4 and Pw5 armed themselves and rushed to the area where the complainant had left the goats. The witnesses found their goats being driven by a group of people. The two groups exchanged gun-fire and two people from the complainant's manyatta were shot dead while Pw2 shot one of them who was carried away by his group which escaped, leaving behind the animals they had set to steal. Pw2 and his colleagues then drove home their animals as they as well made a report of the incident to the police. Later the accused was found crawling along the road to Isiolo by army officers who were driving back to Isiolo. The army officers noticed that he had been wounded and that he wore some army uniform. At the police station the accused became suspect of the robbery. He was then taken to the hospital where he was identified by Pw2 as one of the robbers.

Upon the above evidence and reasons he was charged with the offences aforementioned.

When the appellant was put to his defence the appellant had denied taking part in the alleged robbery. He explained that he had been shot by one Lekina over the issue of a girlfriend in respect of whom the two were competing. He explained that he had obtained the army outfit from Lekina who had thrown it down during the struggle between the two at the river where the incident took place. He called two witnesses who supported his story although with minor contradictions in their stories.

Taking into account the above evidence, the honourable trial magistrate disbelieved the defence evidence and convicted the appellant.

When the appeal came up for hearing Mr. Muteti, the State Counsel, could not support the convictions on the grounds that the trial was a nullity having been partly conducted by a police constable contrary to the provisions of Section 85 of the Penal Code. He however struggled to persuade this court to allow the appeal but proceed to order a retrial.

There is no dispute that the appeal must be allowed on the ground that the trial was tainted with

illegality. It is accordingly declared to be a nullity. The consequence is that the two convictions should and are quashed and the sentence of death in respect to the robbery count and the one year sentence in respect to possession of public stores, are each set aside.

As touching the request for an order of retrial, we have carefully considered the evidence before us. We appreciate the fact that two people lost their lives possibly at the hands of the appellant and his colleagues. But the evidence on identification is sketchy and quite unreliable.

The chances of the prosecution securing a conviction upon the said evidence without popping on it is minimal. It would therefore be in the interest of justice not to order a retrial as such an order would be granting the prosecution a second chance to top up or improve their evidence to get the conviction. The end result therefore is that the appellant shall be set at liberty forthwith unless otherwise lawfully held in prison. It is so ordered.

**Dated and delivered at Meru this 28th day of July, 2005**

**D. A. ONYANCJUDGE**

**RUTH N. SITATI**

**JUDGE**