

**IN THE COURT OF
APPEAL AT
NAKURU
(CORAM: MATIVO, GACHOKA & KORIR,
JJ.A.) CRIMINAL APPEAL NO. 80 OF
2018**

BETWEEN

**LANG'AT RICHARD CHERUIYOT.....1ST
APPELLANT SIGEI ELIJAH KIPKIRUI ALIAS
WESLEY.....2ND APPELLANT RUTTO ANTHONY
KIPNGETICH.....3RD APPELLANT
NGETICH REUBEN KIPKOECH.....4TH
APPELLANT AND REPUBLIC**

RESPONDENT

*(An appeal from the judgment by the High Court of
Kenya at Kericho (M. Muya, J.) delivered on 29th
November 2018*

in

HCCRA No. 11 of 2016)

JUDGMENT OF THE COURT

1. The appellants Lang'at Richard Cheruiyot, Sigei Elijah Kipkirui alias Wesley, Rutto Anthony Kipngetich and Ngetich Reuben Kipkoech, faced the following raft of offences:

Count I - the 1st to 3rd appellants were charged with the offence of forgery contrary to section 349 of the Penal Code. The particulars of the offence were that on or before 14th April 2011, at an unknown place within the Republic of Kenya, with intent to defraud, forged certain minutes of a meeting held on 14th April 2011, at

Chepchilat residence, purporting to be genuine.

Count II - the 1st appellant was charged with the offence of forgery contrary to section 350 of the Penal Code. The

particulars of the offence were that on or before 4th April 2012, at an unknown place within the Republic of Kenya, jointly with others not before the court, with intent to defraud, forged a certain title deed for land parcel number Kericho/Silibwet/1428 purporting it to be a genuine title deed issued by the land registrar, at Bomet Land Registry. Count III - the 1st appellant was charged with the offence of forgery contrary to section 350 of the Penal Code. The particulars of the offence were that on or before 4th April 2012, at the Bomet Land Registry, within Bomet County, jointly with others not before the court, with intent to defraud, forged a certain white card for land parcel number Kericho/Silibwet/1428 purporting entry number five and six on the white card were genuine entries entered by the land registrar at Bomet Land Registry.

Count IV - the 4th appellant faced the count of abuse of office contrary to section 101 (1) as read with section 36 of the Penal Code. The particulars of the offence were that on 25th March 2011, at the Bomet township chief's office, within Bomet County, being a person employed in the public service as a chief Bomet township location, arbitrary wrote a letter dated 25th March 2011 indicating that Tapnyobi Maiga was willing to sell land parcel number Kericho/Silibwet/1428 to Richard Cheruiyot in abuse of authority of his office.

Count V - all the appellants were charged with the offence of conspiracy to defraud contrary to section

317 of the Penal Code. The particulars of the offence were that on

diverse dates between 25th March 2011 and 14th April 2012, at Bomet township, within Bomet County, jointly with others not before court, conspired with intent to defraud by means of signing false minutes of a meeting dated 14th April 2011 and a letter dated 25th March 2011 thereby falsely pretending that Tapnyobi Maiga was willing to transfer land parcel number Kericho/Silibwet/1428 to Richard Cheruiyot Langat by way of sale at Kshs. 5,400,000.00.

2. The appellants were arraigned before the Kericho Chief Magistrate's Court in **Cr. Case no. 2494 of 2013**. They all pleaded 'not guilty' to the counts preferred against them. At the close of the prosecution's case, the trial magistrate found that the prosecution had not established a *prima facie* case against the appellants as to place them on their defence. Accordingly, the appellants were acquitted of all the charges under section 210 of the Criminal Procedure Code and set at liberty.
3. Aggrieved by those findings, the respondent lodged an appeal before the Kericho High Court in **HCCRA No. 11 of 2016**. Upon hearing the appeal, *Muya, J.* on 29th November 2018, found that the acquittal was premature. His view was that the most appropriate order was for a retrial. Thus, the learned judge quashed and set aside the acquittal, directing the parties to

present themselves before the Kericho Chief Magistrate's Court for further orders and directions.

4. The appellants are dissatisfied with those findings. They filed their notice of appeal dated 4th December 2018. They also filed their memorandum of appeal dated 21st December 2018 that raised seven grounds impugning the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: the order for retrial was without any legal basis, prejudiced their right to a fair trial, unconstitutional, an infringement of their human rights and amounted to double jeopardy; the complainant has since passed on rendering their right to cross examine her inoperative; the court gave the prosecution a second chance to correct their mistakes to the detriment of the appellants since it failed to discharge its burden of proof to the required standard; the learned judge failed to take cognizance of the fact that issues in the criminal proceedings were the same issues raised in Kericho **ELCC No. 80 of 2013**; and the learned judge failed to recuse himself on account of open bias.
5. For those reasons, the appellants urged this Court to allow their appeal by setting aside the judgment of the High Court and

reinstating the findings of the learned magistrate.

6. The appeal was heard on 10th February 2026 on the basis of the parties' written submissions. The appellants were represented by learned counsel Kipyego Rotich while the respondent was represented by Senior Assistant Director of Public Prosecutions Mr. Omutelema. Both parties relied entirely on their written submissions.
7. The appellants filed written submissions and a list of authorities dated 26th November 2025. Learned Counsel argued that if the decision of the High Court is undisturbed, essentially the appellants will be called for retrial a fourth time since the matter has been heard afresh on three occasions. He submitted that the learned judge misapplied the law by invoking section 348 (A) of the Criminal Procedure Code as it did not grant him jurisdiction to order for a retrial.
8. Persuading this Court to set aside that impugned judgment and reinstate the findings of the trial magistrate, learned counsel submitted that the judgment of the High Court was unsafe, unconstitutional and gave an unfair advantage to the prosecution, against the dictates of Article 50 (2) (i), (l) and (o) of the Constitution for the following reasons:
PW1 the complainant is now deceased. In the circumstances,

the appellants will not have

the chance to cross examine her. Be that as it may, **PW1** denied recording any statements at the police station. Secondly, a retrial was akin to punishing the appellants for the prosecution's botch since they failed to discharge their burden of proof to the required standard. Thirdly, the evidence adduced did not support the charges leveled against the appellants.

9. Learned counsel advanced that the case was so hapless that no judgment could be sustained. This, he argued, was what the learned magistrate held. He pointed out that haplessness could also be discerned from counsel watching brief as they caused a lot of drama when the proceedings were being conducted.
10. It was then argued that the criminal proceedings were an abuse of the process of the court, precipitated only by the filing of Kericho **ELCC No. 80 of 2013** since they were arrested weeks after the suit had been filed. He submitted that the issues raised in the ELC fundamentally address all the issues purported to be raised in the criminal proceedings. Finally, it was complained that though an application for recusal was placed before the learned judge, he refused to hear it, demonstrating open bias with how he dealt with the appeal. He

confirmed that the criminal proceedings were stayed by the High Court and that the ELC

dispute was yet to be concluded. The appellants thus prayed that for those reasons, their appeal be allowed.

11. The respondent opposed the appeal. State Counsel filed written submissions, a case digest and a list of authorities all dated 25th November 2025. After summarizing the evidence of the prosecution, it was submitted that the order for retrial was justified for meeting the parameters set out in section 348A (1) of the Criminal Procedure Code. It was therefore well founded in law.
12. Mr. Omutelema submitted that the evidence, as it stood, at the close of the prosecution's case, the facts were such that in the absence of any other explanation, no doubt was left that the appellants were guilty. He opined that the appellants ought to have been placed on their defence. For those reasons, the respondent urged this Court to sustain the order for retrial, or in the alternative, have the appellants placed on their defence.
13. We have considered the parties' rival written submissions, examined the record of appeal and analyzed the law. The Court in ***Karani vs. R*** [2010) 1 KLR 73 succinctly set out our role as a second appellate court in the following terms:

“This is a second appeal. By dint of the provision of section 361 of the Criminal

Procedure Code, we are enjoined to consider only matters of law. We

cannot interfere with decision of the superior court on fact unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.”

14. The main issue for determination is whether the learned judge was correct in making a finding that an order for retrial was necessary for the administration of justice. An order for a retrial is a remedy provided in our law by dint of section 348A of the Criminal Procedure Code. It is trite that the same is only granted in special circumstances where it is demonstrated that no injustice will be occasioned to an accused person.

15. In **Obedi Kilonzo Kevevo vs. Republic** [2015] eKLR, this Court held:

“Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of *Muiruri v Republic* [2003] KLR 552, the court considered a similar situation and held as follows, inter alia:-

“Generally whether a re-trial should be ordered

or not must depend on the circumstances of the case.

It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

16. Setting out the principles governing an order for retrial, this

Court held in **Jason Akhoya Makhokha vs.**

Republic [2014] eKLR as follows:

“The question we have to ask ourselves now is whether this is a proper case for a retrial. In the case of Mbae Morison and Another v. Republic (Nyeri Cr. Appeal No. 306 & 305 of 2006 it was held, inter alia, that a retrial should only be ordered where interests of justice require it. In Kanyeki v. Republic [2004] 2 KLR 164 there is the proposition that a retrial will be ordered where witnesses could be easily traced. In Sinaraha & Another v. Republic [2004] 2 KLR 328, the proposition is that a retrial will be ordered only when the original trial was illegal or defective but not for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. In the case of Ekimat v. Republic [2005] 1 KLR 182 there is the proposition that a retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result and should not be ordered where it is likely to cause an injustice

to an accused person.

In M'Obici & Another v. Republic [2006] 2 KLR 166, the Court ruled that a retrial should not be ordered unless the appellate Court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. See also the case of Kedisia v. Republic [2009] KLR 604 for the proposition that regarding an order for a retrial, the Court of Appeal is entitled to look at all the circumstances surrounding the case, taking into account the admissible or potentially admissible evidence available for determination as to whether a conviction was likely to be obtained or not; save that each case must depend on its own peculiar circumstances."

17. This appeal turns on only one question: whether the learned judge applied the correct principles in ordering a retrial. We note that in ordering a retrial, the learned judge only stated as follows:

"22. In the prosecutions (sic) case, the acquittal was under section 210 of the CPC before the accused persons were given the chance to offer their defence. No conviction can be at this stage. The most appropriate order therefore is that of a retrial. It is noted that this a very old matter. It ought to be given the priority it deserves."

18. We have carefully considered the record of appeal. Firstly, we note that due to various reasons, the case was heard *de novo* by three different magistrates. In between, the trial was

stopped at one time to allow the appellants and the complainant to negotiate out of court. The negotiations failed, paving way for the trial.

19. It is common ground that the appellants were acquitted under section 210 of the Criminal Procedure Code. In acquitting the appellants, the learned trial magistrate found that there were serious doubts cast in the evidence of the prosecution. In view of the trial court, the prosecution had not established a *prima facie* case as to place the appellants on their defence. In finding that none of the appellants had a case to answer, the court opined that even if it were to put the appellants on their defence, and they elected to remain silent, a conviction would still not be sustainable.
20. This Court further takes into account that, as observed by the first appellate court, the learned magistrate also established that the dispute revolved around a debt best resolved in the civil dispute, that is Kericho **ELCC No. 80 of 2013**. This is not controverted. It is trite that in ordering a retrial, the learned Judge ought to have considered the fact that an acquittal alone is not a sufficient ground for ordering a retrial. This is a power that should be exercised sparingly and in special cases. The prosecution ought to have demonstrated among many factors that: the interest of justice required a retrial; that injustice would not be caused to the appellants; the length of time

since the

arrest and arraignment in court; whether the acquittal was caused by the mistake of the prosecution or not; whether the witnesses could easily be traced, whether the original trial was defective or illegal and that looking at all circumstances surrounding the trial or potentially admissible evidence, a retrial was necessary.

21. We have considered the grounds of appeal and the submissions by the parties. We note that in ordering a retrial, the learned judge did not give any reasons for doing so save for the fact that the appellants were not placed on their defence and that there was no conviction at that stage.
22. With respect to the learned Judge, the essence of Section 210 of the Criminal Procedure Code is for the acquittal of the accused persons without placing them on their defense if the prosecution failed to establish a prima facie case. We note that the trial magistrate gave a very detailed ruling on this issue. The learned Judge did not give even one reason or ground to demonstrate that the learned magistrate was wrong. Although this appeal does not turn on the import of section 348A of the Criminal Procedure Code, we do not think that an order for retrial is available under the provision. Assuming (and we say

so because there is nothing

on record to show why the impugned judgment was arrived at) that the learned Judge had found that a prima facie case had been established by the prosecution against the appellants, what he ought to have done was to order that the appellants to be placed on their defence.

23. It is also instructive to bear in mind that this is a very old case. The appellants were first arraigned in court on 2nd December 2013. The appellants submitted, and it was not denied by the respondent, that the complainant has since passed on. She is the central figure in this case, which revolves around whether her parcel of land namely **Kericho/Silebwet/1428** was illegally transferred. If indeed the matter is retried as is, there will be an injustice on the part of the appellants who will not have the opportunity to cross examine her evidence.
24. We also note that this is being a very old matter in which the appellants were charged in 2013, the risk of having the matter retried is the eroded memories of the witnesses who may not have the best recollection surrounding the charges leveled against the appellant. How will justice be served with the likelihood that the witnesses may not have a proper reminiscence of what transpired many years back. That would

amount to an injustice in our view.

25. Finally, we also note that the appellants will be facing a different magistrate for the 4th time. We agree with the appellants that this will amount to an injustice and falls short of a fair hearing in line with Article 50 of the Constitution. In any event, the acquittal does not in any way affect the pending civil matter whose standard of proof is lower than in criminal matters.

26. In view of the foregoing, we do not hesitate to find that the present appeal is merited. Accordingly, we set aside the decision of the learned judge delivered on 29th November 2018 and reinstate the findings of the trial court delivered on 22nd July 2016, acquitting the appellants.

It is so ordered.

Dated and Delivered at Nakuru this 10th day of April, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCI Arb.

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a

true copy of the original.
Signed
DEPUTY REGISTRAR