



**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Criminal Appeal 205 & 312 of 2006**

**JOSEPH LOMIS ECHOKULE**

**EDWARD ECHAGAN LOKITOI**

**SOLOMON LOKWAI LOKUN .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya at Nakuru***

***(Koome & Kimaru, JJ) dated 13<sup>th</sup> July, 2006 in***

**H.C.Cr. A. No. 523-525 of 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is a second appeal. All the three appellants together with another were jointly charged before the Chief Magistrate at Nakuru with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code in that:

***On the night of the 28<sup>th</sup> and 29<sup>th</sup> day of May, 2001 at Rumwe Farmers Co-operative Society Njoro in Nakuru district of the Rift Valley Province jointly with others not before court being armed with dangerous weapons namely pangas, rungas and iron bars robbed Michael Kitara of 1 handbag, 39 metal tea cups, 12 lowel cups, 96 spoons, 2 kgs of sugar, 3 tins of melo, 2 packets of tea leaves, 1 packet of omo, 1 lantein (sic) lamp, 1 utility knife, 4 pipe arrench No. 24, 1 sugar dish and cash Kshs.67,082/= all valued at Kshs.87,040/= (sic) and at or immediately before or immediately after the time of such robbery wounded the said Michael Kitara.”***

The third appellant **Solomon Lokwai Lokun** faced an alternative charge of handling stolen property contrary to **section 322(2)** of the Penal Code, particulars of which were that:

***On the 30<sup>th</sup> day of May 2001 at Industrial Estate Njoro in Nakuru District of Rift Valley Province otherwise than in the cause (sic) of stealing dishonestly retained 20 metal tea cups, 1 lantein (sic) lamp and 5 spoons knowing or having reasons to believe them to be stolen goods”.***

The second appellant together with another who was acquitted and is therefore not before us, were charged with the alternative charge of handling stolen property contrary to **section 322(2)** of the Penal Code. The particulars of the charge were that:

***“On the 30<sup>th</sup> day of May, 2001 at Industrial Estate Njoro in Nakuru District of Rift Valley Province, jointly otherwise than in the course of stealing dishonestly retained 5 spoons knowing or having reasons to believe them to be stolen goods.”***

The first appellant also faced an alternative charge of handling stolen property contrary to **section 322(2)** of the Penal Code in that:

***“On the 30<sup>th</sup> day of May, 2001 at Khwamuhoro Estate Njoro in Nakuru District of the Rift Valley Province otherwise than in the course of stealing dishonestly retained 15 spoon (sic) knowing or having reasons to believe them to be stolen goods.”***

They pleaded not guilty to the main charge of robbery with violence contrary to **section 296(2)** of the Penal Code and to the alternative charges of handling stolen property contrary to **section 322(2)** of the Penal Code. After full hearing, the learned Senior Resident Magistrate (S. M. Muketi) found the appellants guilty of the offence of robbery with violence, convicted each of them and sentenced each to suffer death as by law prescribed. The fourth person who was the second accused in that court was acquitted in respect of the robbery charge and of the alternative charge of handling stolen property and was released. The appellants were dissatisfied with the conviction and sentence imposed by the subordinate court. Each appealed to the superior court and the appeals which were ***High Court Criminal Appeal Nos. 523, 524 and 525 all of 2001*** were consolidated by the superior court and heard together. In a judgment delivered on 13<sup>th</sup> June, 2006, the learned Judges of the superior court (Kooome and Kimaru, JJ.) dismissed the appeals, upheld the appellants’ convictions and sentences imposed and confirmed the same. That is what has given rise to this appeal.

**Mr. Karanja**, the learned counsel for the appellants, adopted the grounds that were filed by each of the appellants in person and raised during his submissions a matter that we need to consider first before we go to the facts and to consider the rest of the grounds of appeal before us, if we have to do so. The point he raised was that the learned Senior Resident Magistrate’s conduct of the case was irregular and vitiated the entire trial.

The record shows that after six witnesses were heard on 28<sup>th</sup> September, 2001, the prosecution closed its case saying:

***“This is the close of the prosecutions (sic) case.”***

The learned Senior Resident Magistrate then made a Ruling stating:

***“Ruling:-***

***A prima facie case has been established, accused has a case to answer. File to go for re-allocation on the 28<sup>th</sup> September, 2001.”***

Thereafter, the record shows that further hearing was adjourned from time to time with the learned Magistrate clearly stating that what was being adjourned was defence hearing. On 9<sup>th</sup> November, 2001, the matter came up before the same Senior Resident Magistrate and she adjourned it stating specifically as follows:

***“Defence hearing on 15<sup>th</sup> November, 2001. Accused remanded in custody.”***

On 15<sup>th</sup> November, 2001 when the case came up presumably for defence hearing as had been ordered on 9<sup>th</sup> November, 2001, the record shows that the prosecution proceeded with its case and PW7 one

**James Ndungu Karanja** was called as a witness for the prosecution. There is nothing on record to indicate that the prosecution, which had closed its case applied to the court to open up its case. There is nothing on record to show that the learned Senior Resident Magistrate was exercising her powers under **section 150** of the Criminal Procedure Code and indeed that witness PW7 was apparently not a witness summoned by court under that provision. There is nothing to indicate what really necessitated the court to ignore her order by which she had taken action and made a specific finding, that the appellants had a case to answer. Be that as it may, after PW7 had given evidence the prosecution closed its case yet again and the learned Magistrate made another finding for a prima facie case having been established.

Mr. Karanja submitted that that conduct of the case was prejudicial to the appellants as prosecution was allowed a second bite at the cherry, as it were, and without any application by the Prosecution. **Mr. Gumo**, the learned Assistant Deputy Director of Prosecution, conceded the appeal on that ground, stating that he would not seek to legitimize such serious irregularity. With respect, we agree with both learned counsel. If there had been an application by the prosecution to adduce further evidence after the close of its case, the appellants would have been afforded opportunity to oppose or to consent to that application. There was no such application and so the appellants, having prepared their case for defence on that date 15<sup>th</sup> November, 2001 as set for their defence case, were clearly prejudiced when the court, without any reasons whatever and without any warning to the appellants allowed another prosecution witness to give evidence. This was clearly an irregular and indeed prejudicial to the appellant. If what happened here were to be allowed to be the order of the day in criminal hearings, then there would be no need for the Criminal Procedure Code which guides the conduct of criminal cases in the courts. We have carefully perused the superior court's judgment. The learned judges of the superior court did not comment on this glaring irregularity at any stage of their judgment. We think that this irregularity vitiated the entire proceedings.

Do we order a retrial? Mr. Karanja submitted that it is now close to eight years since the appellants were arrested and charged with these offences in respect of which they were convicted. Because of time lapse, he submits that it would not be fair to order a retrial. Mr. Gumo at first asked for retrial but thereafter he said that due to the time that has lapsed, the prosecution would not be able to get witnesses to mount a successful or meaningful prosecution. He asked us not to order a retrial as such an order would be prejudicial in this particular case.

To order a retrial or not would depend on the circumstances of each particular case. This is the trite law. In this case, the Prosecution says it would not be able to marshal witnesses for a successful trial if a retrial is ordered and it is not seeking a retrial. The appellants counsel cites time that has lapsed since the matter came to court and which the appellants have spent in custody and urges us not to order a retrial. In our view justice would in the circumstances of this case demand that we order no retrial.

In the result, the convictions are quashed, the sentences are set aside. The appellants shall be released from custody unless they are otherwise lawfully held.

***Dated and delivered at Nakuru this 6<sup>th</sup> day of March, 2009***

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**