REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

CORAM: CHUNGA C.J., OMOLO & BOSIRE, JJ.A

CRIMINAL APPEAL NO. 33 OF 2000

BETWEEN

1. JOSEPH LEKULAYA LELANTILE

2. JESEPH LOMURU HEZRON.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The two appellants were charged in the Chief Magistrate's Court Meru, on two counts of robbery with violence, contrary to section 296 (2) of the Penal Code cup 63 Laws of Kenya. Their first appearance in court was on 21st July, 1997 when both of them pleaded not guilty to the two charges and the case was then set down for hearing.

The particulars of the two counts averred as follows

"Count 1.

> ***(1). JOSEPH LEKUYALA LELANTILE. (2). JOSEPH LOMULU HEZRON on the 17 th day of June, 1997 at 78 tank battalions area in Isiolo District within Eastern Province, jointly with others not before court, being armed with dangerous weapons namely, two fire arms, spears and rungus robbed Mr. Titus Munene Jackson of his money namel y Kshs.51 and at or immediately before or immediately after the time of such robbery, beat the said Titus Munene Jackson in order to retain the goods stolen."***

"Count 2.

> ***(1) JOSEPH LEKUYALA LELANTILE. (2). JOSEPH LOMULU HEZRON. On the 17th day of June, 1997 at 78 tank battalion area in Isiolo District within Eastern Province jointly with others not before court being armed with fire arms, spears and rungus, robbed Mr. M'Rimbeere Baikio of his money Kshs.412, one Somali sword and a hat valued at Kshs. 40 and immediately at, or immediately before or immediately after the time of such robbery beat the said M'Rimbeere in order to retain the goods stolen."***

According to their evidence, the complainant in the first count was the son of the complainant in the second count. On the 17th of June 1997 the two complainants were on the way to Isiolo driving ten herds

of cattle. As they drove the cattle along the road, suddenly a group of about six persons emerged from the roadside at or about 3.00 p.m. The group carried weapons such as guns, spears and rungus, and, according to the complainants, the two appellants were in the group and each of them was armed with a gun. The group attacked the two complainants and forcefully robbed them of the property mentioned in the particulars of the two counts as quoted in the preceding paragraph. The complainant in count two, said in evidence that he was assaulted with rungus and seriously injured. The complainant in count one was threatened with violence and generally roughed up. After the attack and the robbery the attackers disappeared in the road side bushes.

The complainants eventually reported the robbery to the police and investigations started. The appellants were subsequently arrested on 7th July 1997 and 16th July, 1997 respectively upon being seen and identified at Isiolo Market by the complainant in the first count.

Following the arrest, the police conducted two identification parades attended by the complainant in the second count as a witness. He was able to identify both appellants at the parades.

We do note however, that the police officer who conducted the identification parades was not called as a witness and did not give evidence in the subordinate court. The evidence about the parades was, therefore, given only by the complainant in the second count. We would observe that where an identification parade is conducted, the evidence about it has to be led by the prosecution, from the police officer who conducted the parade who must also produce the usual parade forms. Failure to do this would render evidence on identification parade valueless. In the present appeal however, nothing much turns on this point because of the decision we have reached as will emerge in due course in this judgment.

We also note that the complainant in the first count does not appear, from his evidence, to have been called as a witness in the identification parades. This, if true, would be right and proper because it was the complainant in the first count who on 7th July, 1997 and 16th July, 1997 saw and pointed out the two appellants to the police at Isiolo Market leading to the arrest of the appellants. In such a case, even if the complainant, on count one had attended the identification parade as a witness, his evidence of the parades would have had no probative value.

We also note from the record that before closing their case, the prosecution sought to produce an extra-judicial statement which the first appellant made to the police. One Inspector Antony Kamunde was called as P.W.3 to produce the statement. However, the appellant objected to the statement and the trial magistrate ordered that a trial within trial be conducted to determine the admissibility of the extra-judicial statement. The magistrate therefore, adjourned the case to another date when the trial within trial was to be completed. However, the Inspector subsequently failed to come to court to complete his evidence, with the result that the trial within trial was also not completed. Accordingly, the first appellant's extra-judicial statement was not produced in evidence although it had been marked for identification.

We pause to observe the undesirability of what happened as indicated in the preceeding paragraph. The record shows that the case was mentioned about 14 times to enable the Inspector to come to court to complete his evidence in the trial within trial. It is a matter of the greatest surprise and concern that, despite all the mentions, he did not do so. We wish to emphasise that the prosecution must always be ready with the witnesses to avoid repeated applications for adjournments. Here, Inspector Kamunde's failure to come to court despite several adjournments, clearly deprived the court of some apparently relevant evidence. The court was left in the unfortunate situation of not being able to complete the task it had started namely the trial within trial.

Eventually the prosecution closed their case and the appellants were placed on their defense in due compliance with Section 211 of the Criminal Procedure Code Cap 75 Laws of Kenya. Both of them gave unsworn evidence as it was their right to do. The first appellant, Joseph Lekulaya Lelantile said he was a herdsman at a place called Kathima in Isiolo District. On 7th July, 1997 he came to Isiolo Town to buy tobacco when he was arrested for an event in which he never took part. The second appellant, Joseph Lomulu Hezron said that on 16th of July, 1997, he had come to Isiolo town to buy food when police arrested him and took him to Isiolo Police Station. He denied taking part in the robbery as alleged by the

prosecution.

The trial Magistrate gave judgment on 17th September, 1998 in which he convicted both appellants on the first count and proceeded to sentence them to death as provided by law. In regard to the second count this is what the Senior Resident Magistrate said.

> ***"On count two I find it should have been preferred with count one. Indeed, count two is bad in law in duplicating and I do aquit both accused i n this charge under section 215 Criminal Procedure Code and do set them free on this count."***

We have given careful consideration to what the trial Magistrate said on count two. We are, however, unable to agree with him that there was duplication or duplicity in the manner this count was laid. As we mentioned earlier, the complainants in both counts were father and son. The son was the complainant in the first count while the father was the complainant in the second count. Both were walking together and were attacked together. Each of them was robbed of property that was in his possesion at the time of the attack. Under the circumstances, we are satisfied that the charges were properly laid in two counts although the robbery occurred on the same date, at the same place and at the same time. But the offence was committed against two individuals each of whom was robbed of his personal property in his possession at the time of the offence. This being so, there were two separate complainants arising from the commission of the offence and each had to be in a separate count. Putting them together in one count as the trial Magistrate said would have, in fact, made the charge bad for duplicity.

Not being satisfied with the conviction and sentence on count one, both appellants brought their first appeal to the High Court which was heard by a Judge of the High Court sitting with a Commissioner of Asize. After reviewing the evidence as they were required to do as a first appellate court, this is what they said

> ***"We are not satisfied with evidence of identification on record. The evidence lacks details which would reasonably persuade a court to entertain the same without any doubt."***

As can be seen, the High Court, sitting as the first appellate court in this matter, did not find favour with the evidence of identification. It was not satisfied that identification of the two appellants by the two complainants was free from doubt or mistake.

The whole case against the appellants rested on their identification by the two complainants. Although the offence was committed in broad day light the High Court was not satisfied that the appellants had been positively identified. Nevertheless, despite its misgivings on identification, the High Court, while allowing the appeal, did not set the appellants free. Instead, the High Court ordered a retrial in the following manner:-

> ***"Further, there is a serious anomaly in the proceedings as regards the statement which the prosecution alleged to have been made by the first accused who repudiated it claiming that he was forced to sign it. Upon the first accused claim, the magistrate ordered for a trial within a trial but subsequently this did (sic) materialise. He proceeded with the hearing of further evidence without making any decision on the issue. It is possible that he was in his verdict influenced by the contents of the statement since it had already been admitted at the trial***
>
> ***In the circumstances, we allow the appeal quash conviction and set aside the sentenc es. We order that the case be remitted back for retrial before another magistrate of competent jurisdiction".***

Being dissatisfied with the High Court order for retrial, the two appellants have brought second appeals before us through their advocate Mr. Charles Kariuki. He prepared and filed four grounds of appeal which he argued together before us.

The under-pinnings of Mr. Kariuki's submissions was that the High Court erred in ordering a retrial.

Once the High Court found that the evidence of identification could not support the conviction, that should have been the end of the matter and the High Court should have allowed the appeal and set the appellants free. A retrial is only to be ordered and to follow if there is a defect in the original trial. It should not be ordered to give the prosecution an opportunity to fill up the gaps in their case or to correct their mistakes. Therefore, Mr. Kariuki urged us to allow the appeal and set aside the order for retrial.

Mr. Oluoch, the Principal State Counsel, who appeared for the Republic agreed with Mr. Kariuki. He said that he conceded the appeal on two main grounds, namely:-

> ***1. The order for retrial was on wrong assumption by the High Court that the first appellants statement under inquiry had b een admitted in evidence. No such statement was admitted.***
>
> ***2. The core of the case against the appellants was identification. Once the High Court found that identification was not safe, the High Court ought to have allowed the appeal, quashed convictio n and set the appellants free without ordering retrial.***

Mr. Oluoch ended his submissions by emphasizing, like Mr. Kariuki, that there was no defect in the original trial and, therefore, there was no basis for ordering a retrial. We were referred by Mr. Kariuki to two authorities on the subject of retrial namely:-

> ***(a) Fatehali Manji vs. the Republic [1966] E.A. 343.***
>
> ***(b) M'Kanake vs. Republic [1973] E.A. 67.***

In ***Fatehali Manji's*** case, the East African Court of Appeal said as follows

> ***"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 the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that retrial should be ordered. Each case must depend on its peculiar facts and circumsances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause any injustice to the accused person."***

The preceding paragraph in ***Fatehali Manji's*** case has been quoted and followed by this Court in several appeals including the appeal of M'Kanake to which Mr. Kariuki referred us.

We reiterate what the Court said in the ***Fatehali Manji's*** case. An order for a retrial is to be made only where the original trial was defective or illegal. It is not to be made merely to provide the prosecution with an opportunity to improve their case or, to correct their mistake in the original trial or to fill up the gaps in their evidence.

In the present case, the High Court ordered a retrial, according to the passage we quoted earlier in this judgment, because of the prosecutions failure to bring Inspector Kamunde to complete his evidence in the trial within a trial. The High Court felt that the first appellant's extra-judicial statement was produced in evidence and may have influenced the trial Magistrate in his judgment in which he convicted the two appellants.

It is true the extra-judicial statement was marked for identification. But, it had not been formally produced in evidence and there is nothing to indicate that the trial Magistrate had perused it so as to influence his judgment. Furthermore, to order a retrial, was obviously going to enable the prosecution to improve their case by, for example, looking for and bringing before the court witnesses like Inspector Kamunde whom they were unable to bring to complete his evidence in the original trial. Finally, we do not find anything to make the original trial either defective or illegal. Certainly, Inspector Kamunde's failure to attend court did not have that effect.

For the preceding reasons, we are satisfied that this was not a proper case for ordering a retrial.

We therefore allow the appeal, and set aside the order for retrial. As we said earlier, the High Court found, on first appeal, that evidence on identification was not positive and free from doubt.

As the whole case turned on evidence of identification, there is nothing left to go for a retrial and accordingly we allow the appeal, set aside the order for retrial and order that the appellants be forthwith released unless otherwise lawfully detained.

Dated and delivered at Nyeri this 25th day of October, 2000.

B. CHUNGA

CHIEF JUSTICE

R.S.C OMOLO

JUDGE OF APPEAL

S.E.O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR