



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO.178 OF 2010**

**SAMUEL MWANGI GITAHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

On 6<sup>th</sup> June 2017 when I set this appeal down for hearing afresh, it was on the basis of the High Court Petition No.3 of 2016 which sought a retrial of the appeal under Article 50(6)(2) of the Constitution, on the strength of the **Supreme Court Petition No.5 of 2015 Republic -vs- Karisa Chengo & 2 others.**

I was of the mistaken view that the petitioner's appeal had ONLY been heard and dismissed by a High Court Bench that was *improperly constituted* as was envisaged in the **Karisa Chengo case.**

However, when I retired to write the judgment, I realized that that judgment of the improperly constituted bench had also been appealed against in the **Court of Appeal in Criminal Appeal No.89 of 2014 Samuel Mwangi Gitahi and Another vs. R** (Visram, Koome & Odek JJA) whose judgment was delivered on 17<sup>th</sup> March 2015 upholding the decision of the improperly constituted bench.

For some reason, and I think, with the wisdom of hindsight, the fact that the petition for a retrial was not opposed, this judgment of the Court of Appeal never came up. It appears to have escaped all our minds, the counsel for the petitioner did not refer to it in his submissions for the petition, the state prosecutor did not notice it and unfortunately neither did this court.

My actions therefor were on the mistaken basis that this appeal had only been heard by a court of concurrent jurisdiction.

In the circumstances, that the Court of Appeal had already expressed itself on the matter, this court cannot by any stretch of imagination purport to sit in review or in any sort of manner on a judgment of the superior Court.

The final orders in the Karisa Chengo case are clear the court affirmed the decision of the Court of Appeal that only a judge of the High Court could hear and determine a criminal appeal and upheld the decision of the Court of Appeal that the petitioner's appeal before the High Court be heard afresh by Judges of that court. The court held.

**(b)The Court of Appeal order that the appeals before the High Court be heard afresh by judges of that court, excluding Meoli Judge is hereby upheld.**

It appears to me that the beneficiaries of these orders were those appellants whose appeals were pending before the High Court. At paragraph 113 of the Supreme Court decision the court stated:

**“It therefore follows that in the light of Article 2 (4) of the Constitution despite the draw back our decision will have on the backlog of cases in our courts, we have no choice but to accede to the respondent's plea that the appeals at the High Court level be reheard. Our decision must of necessity has a similar effect on all the appeals that were determined by similarly empaneled High Court Benches”.**

My reading of the decision does not tell me anything about those that had already reached the Court of Appeal and had the judgments upheld. I cannot make assumptions about jurisdiction. What is clear is that those that had been heard by the high court would have to be reheard. In this case, the matter had already left the High Court and gone to the Court of Appeal which made a determination on issues before it.

With regard to what to do with those already determined by the Court of Appeal, my view is that it is only the Court of Appeal that can say what ought to happen to its decisions. Hence it my humble view that the application made before this court regarding the Court of Appeal decision, ought to have been made before the Court of Appeal so that the Court of Appeal would make its own determination with regard to its decision in this matter.

I find therefore that the orders I issued on 6<sup>th</sup> June 2017 regarding the Court of Appeal decision is that matter was without jurisdiction and I must of necessity vacate them and expunge them from the record.

Consequently, the appellant will have to go before the Court of Appeal first for directions. Until that is done and with due respect to counsel and the appellant, I cannot proceed any further with this matter.

**Dated, signed and delivered in open court this 11<sup>th</sup> day of April 2018 at Nyeri.**

**Mumbua T. Matheka**

**Judge**

In the presence of: -

Court assistant: A. Atelu

Ms. Jebet for state

Appellant

Mr. Ng'arua for appellant