



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 262 OF 2012**

**BETWEEN**

**MALIK OKINDA ABDALLAH.....1<sup>ST</sup> APPELLANT**

**ISMAEL ABDALLAH WERE.....2<sup>ND</sup> APPELLANT**

**KASSIM SHIUNDU MURUNGA (DECEASED) .....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from both conviction and sentence in Mumias Principal Magistrate's Court Case No. 339 of 2011 dated 24.10.2012)**

**RULING**

1. Though this appeal is meant to be for judgment today, a clear look at the file during preparations for writing the judgment revealed that apart from the third appellant Kassim Shiundu Murunga (now deceased), the first and second appellants' petition of appeal are not on the file. Secondly, when the appeal came up for admission on 27.11.2015, this court made an order requiring the Deputy Registrar of this Honourable Court to "Open 3 separate appeal files before fixing" the appeal for directions on a date in the new term." On 14.01.2016 and without first of all complying with the orders of 27.11.2015, this appeal was fixed for directions on 29.02.2016.

2. There is no record for 29.02.2016, but on 01.03.2016, the matter was placed before the Deputy Registrar for mention. The appellants were however not produced and an order was made for further mention on 07.03.2016. During the mention before the Deputy Registrar, only the first appellant, Malik Okinda Abdallah was in court. He informed the court that whereas the second appellant was being held at Naivasha GK Prison, the third appellant, Kassim Shiundu Murunga was since deceased. For those reasons the Deputy registrar gave a further mention on 07.04.2016 and a production order for the second appellant. During the mention on 07.03.2016, the first appellant was supplied with proceedings; however, it was not until 01.12.2016 that both appellants were produced before this court.

3. On 01.12.2016, both appellants were supplied with complete set of proceedings, including the charge sheet and the appeal fixed for hearing on 16.02.2017.

4. During the hearing of the appeal on `16.02.2017, the court very inadvertently, did not make an order

for consolidation of the appeals and did not also confirm that there were three separate appeal files nor did it deal with the issue of the appeal of the third appellant which should ordinarily have abated with his death. The record does not also contain a confirmation by the prosecution that the third appellant is indeed dead.

5. In light of all the above, and considering the fact that the appellants are on death row on two counts of robbery with violence contrary to section 296(2) of the Penal Code, it would be highly prejudicial to the appellants for this court to proceed and write a judgment on the appeal.

6. In the circumstances, I declare the hearing of this appeal on 16.2.2017 a mistrial and direct that this appeal be heard afresh before High Court 2. In the meantime, the Deputy Registrar shall forthwith open three separate appeal files for Criminal appeal numbers 261 of 2012, 262 of 2012 and 263 of 2012 respectively in which the appellants are Malik Okinda Abdallah, Ismael Abdallah were and Kassim Shiundu Murunga.

7. Mention before High Court 2 on 25.5.2017 for directions in the matter. The two appellants shall remain in custody.

Orders accordingly.

**Ruling delivered, dated and signed in open court at Kakamega this 23<sup>rd</sup> day of May 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Present in person.....for 1<sup>st</sup> appellant

Present in person.....for 2<sup>nd</sup> appellant

Deceased .....for 3<sup>rd</sup> appellant

Mr. Juma Ocheing.....for the state

polycap.....Court Assistant.