



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL NO. 141 OF 2009**

**SAMSON MATENDE.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**RULING**

**Introduction**

1. This Ruling is in respect to the Appellant's oral application challenging the jurisdiction of the Court as currently constituted to hear and determine his appeal. The Appellant herein was convicted for the offence of Robbery with violence contrary to section 296(2) of the Penal Code and was consequently sentenced to suffer death in the lower court.
2. The Court, as currently constituted, is informed by the provisions of Section 359 of the Criminal Procedure Code Cap 75 of the Laws of Kenya to the effect that all appeals from Subordinate Courts shall be heard by two judges of the High Court, except when in any particular case the Chief Justice or a Judge whom the Chief Justice has given authority in writing, directs that the appeal be heard by one Judge of the High Court.
3. On 4<sup>th</sup> October, 2013, vide Gazette Notice number 13601, the Chief Justice, in the exercise of his general powers of direction and control vested in him as the head of the Judiciary, directed that all the Judges of the High Court, Industrial Court and Environment and Land Court hear pending criminal appeals from Subordinate Courts and also consider reviews of sentences as provided for under the Criminal Procedure Code, for purposes of decongesting prisons.
4. The Appellant has objected to the hearing of his Appeal by Angote J, sitting with Meoli J, thus this Ruling.

**Appellant's submissions:**

5. Mr. Ole Kina, counsel for Appellant, relied on his written submissions filed on 16<sup>th</sup> October, 2013 while arguing his oral Application.
6. According to the learned counsel, the hearing of the Appeal herein by Angote J, a Judge in the Environment and Land Court, is unlawful by reason of the fact that the said Judge may not have the necessary legal capacity to sit and try cases of a criminal nature.
7. It was the Appellant's counsel's submissions that while interpreting the Constitution, the Environment and Land Court Act and the Industrial Court Act to determine if the Judges in the Environment and Land Court and the Industrial Court can hear criminal appeals, a purposeful and harmonized approach has to be applied in order to give effect to the intention of the specific pieces

- of legislation.
8. The Appellant's counsel submitted that the Chief Justice cannot purport to confer jurisdiction upon any officer of the Judiciary as he did vide gazette notice number 13601 of 4<sup>th</sup> October, 2013.
  9. Counsel submitted that Article 162 of the Constitution establishes systems of courts and that in compliance with the said Article, Parliament enacted the Environment and Land Court Act and the Industrial Court Act. Consequently, it was argued, a Judge of the High Court can only exercise the jurisdiction conferred upon him/her by the Constitution and the Judicature Act and that the Judge of the High Court cannot exercise the jurisdiction of the Environment and Land Court Judge or the jurisdiction of the Industrial Court Judge.
  10. Conversely, it was submitted, the Judge of the Environment and Land Court cannot exercise the jurisdiction conferred by Article 165 of the Constitution and section 347 of the Criminal Procedure Code upon the High Court Judge.
  11. According to the Appellant's Counsel, the jurisdiction of Angote J is derived from the Constitution and the Environment and Land Court Act having been employed as such by the Judicial Service Commission pursuant to the advertisement dated 5<sup>th</sup> March, 2012. Counsel submitted that the advertisement specifically advertised vacancies for the office of the Judge of the Environment and Land Court and that the Judges who applied for those positions were employed and sworn to office as Judges of the Environment and Land Court pursuant to the provisions of Article 162(2) of the Constitution and the Environment and Land Court Act. The Judges having been so employed, it was submitted, the Chief Justice cannot move them to the High Court because that would amount to a gross violation of sections 43, 44 and 45 of the Interpretation and General Provisions Act Cap 2.
  12. The Appellant's counsel further submitted that a court is an organ of the state created for the purpose of adjudication of disputes and that it is properly constituted only when it is "manned" by a competent person duly appointed in accordance with the law. To qualify as a court, it was submitted, the place has to be designated as such and the judicial officer "manning" it must be appointed as such by a competent authority. The appointment of each Judge, it was submitted, is based on his or her application, vetting based on the skill base sought and the recommendation of the Judicial Service Commission for appointment by the President.
  13. A Judge, it was submitted, is appointed by the President to serve either in the High Court, Environment and Land Court, Industrial Court, Court of Appeal or Supreme Court. Unless specifically appointed by the President to sit in any of those courts, it was urged, the proceedings and judgement of such a court would be a nullity. Counsel relied on the decision by the Supreme Court in Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & Two Others(2012)eKLR where it was held as follows:-

**"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

14. The Appellant's counsel finally submitted that it is regrettable that the zeal with which the Chief Justice has approached the realization of the object of providing the Appellant with an opportunity to be heard has resulted in the expansion of the jurisdiction of the Judges of the Industrial Court and the Environment and Land Court which, according to counsel, in an illegality.

### **Respondent's Submissions**

15. In response, Mr. Oyiembo, the learned state Counsel representing the Director of Public Prosecution submitted that the Criminal Appeal before the Court was filed by the Appellant pursuant to the provisions of Section 347 of the Criminal Procedure Code which provides that an appeal from the Subordinate Court should be heard by the High Court.
16. Counsel submitted that the Judicature Act has defined a Judge as a person appointed under Article 166 of the Constitution. According to the state Counsel, the Judicature Act does not create special

judges and that the distinction of Judges as argued by the Appellant is unreal; that the Appellant's arguments would have been relevant if the dispute was either a land matter or employment and labour relations matter and that the distinction of the Judges is not relevant in determining the jurisdiction conferred on the High court.

17. The state Counsel finally submitted that according to the provisions of Article 259 of the Constitution, the Constitution should always be interpreted to promote its values. He urged the court to dismiss the Appellant's preliminary objection.

### **Analysis and findings**

18. The only issue that is before us for determination is whether a Judge who has been appointed to hear and determine disputes in the Environment and Land Court can also hear and determine matters reserved for the High Court.

19. It is not in dispute that pursuant to the provisions of section 347 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, all criminal appeals emanating from the Subordinate Courts should be heard by the High Court. The High Court in the repealed Constitution was established pursuant to the provisions of section 60. In the repealed Constitution, the High Court was a superior court of record, and had unlimited original jurisdiction in civil and criminal matters.

20. Under section 60 (2) of the repealed Constitution, the Judges of the High Court consisted of the Chief Justice and such number of Judges, as may be prescribed by Parliament. Section 65 of the repealed Constitution mandated Parliament to establish courts subordinate to the High Court and Court – Martials which were supervised by the High Court.

21. Other than the Court of Appeal whose jurisdiction was to hear and determine appeals from the High Court, the High Court was the only superior court before the promulgation of the current Constitution. However, the position of the High Court being the only superior court under the repealed Constitution changed with the promulgation of the Constitution, 2010 (hereinafter referred to as the Constitution).

22. The discussion which culminated in the creation of other courts with the same status as that of the High Court was long and protracted. According to the final report of the Committee of Experts on Constitutional Review, the Committee of Experts refused to support the Parliamentary Service Commission's recommendation that the specialized courts on employment, and land and environment should be removed from the draft constitution and instead be replaced with a broad grant of authority of Parliament to establish other courts with such jurisdiction, functions and status as Parliament may determine.

23. The Committee of Experts argued that such a provision would give Parliament a blank cheque to establish courts whose level and jurisdiction might supplant that of the superior courts established in the Constitution. Further, it was argued, such a provision would not signal the establishment of specialized courts on employment, land and environment and would not solve the competing jurisdictional issues that had historically existed between the High Court and the Industrial Court.

24. Consequently, the Committee of Experts reinstated the provision allowing Parliament to establish, by legislation, employment, land and environment courts with the status equivalent to that of the High Court. That provision is Article 162 (2) (a) and (b) which reads as follows:

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-**

**(a) employment and labour relations and**

**(b) the environment and the use and occupation of, and title to land.**

25. Article 162 (2) which establishes the two specialized courts and Article 165 (5) which establishes the High Court ought therefore to be construed positively as intended to place the “the specialized” courts at par with the High Court. This position has been clarified further by Article 165 (6) of Constitution which provides as follows:

**“The High Court has supervisory jurisdiction over the subordinate courts and over**

**any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”**

26. Article 162(3) of the Constitution mandates Parliament to determine the jurisdiction and functions of the specialized courts contemplated in clause 2 (a) and (b). The jurisdiction of the two specialized superior courts is set out in the Industrial Court Act and the Environment and Land Court Act respectively.
27. The first group of Judges to hear and determine disputes in the Environment and Land Court was appointed by the President pursuant to the provisions of Article 166(1) of the Constitution as read together with sections 2 and 7 (1) of the Environment and Land Court Act on 3<sup>rd</sup> October, 2012 vide gazette notice number 14346 of 5<sup>th</sup> October, 2012. One of the Judges was Angote J.
28. The question that arises and which has been posed by the Appellant is whether Angote J, having been appointed by the President as a Judge in the Environment and Land Court is competent to hear and determine matters reserved for the High Court and specifically criminal appeals emanating from subordinate courts.
29. The Environment and Land Court was established pursuant to the provisions of Article 162(2) (b) of the Constitution and section 4 of the Environment and Land Court Act. The Constitution does not state how the Judges in the Environment and Land Court are to be appointed, other than stating that the court shall have the status of the High Court. Section 30 of the Judicial Service Act and the First Schedule of the Act does not distinguish how the Judicial Service Commission is supposed to appoint the Judges of the Environment and Land Court Act viz a viz the High Court Judges.
30. Section 2 of The Judicature Act has defined “Judge” to mean the Chief Justice or a judge appointed under Article 166(5) of the Constitution or a judge of the Court of Appeal appointed under Article 166 (4) of the Constitution. The Act does not provide a different definition of a judge to be appointed in the two specialized superior courts.
31. Section 5 of the Environment and Land Court Act provides that the court shall consist of the Principal Judge and such other number of Judges as may be necessary for the efficient and effective discharge of the functions of the Court.
32. Section 2 of the Act has defined “Judge” to mean a person appointed in accordance with the provisions of Article 166(1) (b) of the Constitution. This definition is critical because a person who is appointed by the President as a Judge to hear and determine matters under the Act pursuant to the provisions of Article 166 (1) (b) must meet the qualifications set out in Article 166(2) (b) of the Constitution.
33. Article 166 (2) (b) of the Constitution provides the qualifications that one must have to be appointed a Judge of a superior court by the President. Article 162(1) of the Constitution has identified the superior courts as the Supreme Court, Court of Appeal, the High Court, the Industrial Court and the Environment and Land Court.
34. The professional experience that is required for one to be appointed a Judge of the Supreme Court is provided for under Article 166(3) of the Constitution while the required professional experience for one to be appointed a Judge of the Court of Appeal is provided for under Article 166(4) of the Constitution. The professional experience required of a High Court Judge is provided for under Article 166(5) of the Constitution.
35. All the Judges of the five superior courts, that is, the Supreme Court, the Court of Appeal, the High Court, the Industrial Court and the Environment and Land Court must, firstly, hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess equivalent qualifications in a common-law jurisdiction and secondly, possess the experience required under Article 162 clauses 3 to 6 (*sic*) of the Constitution.
36. A plain reading of Article 166 (2) (a) of the Constitution clearly shows that all the Judges of the superior courts have the same qualifications. However, for one to be appointed a Judge in the Supreme Court, the Court of Appeal and the High Court, one must have the experience stipulated in Articles 166 (3), 166(4) and 166(5) of the Constitution respectively.
37. Although the Constitution at Article 166(2) (b) states that each Judge of the superior court must possess the experience required under clauses (3) to (6), the Constitution does not have clause (6)! The experience required of the Judges of the superior courts runs from clauses (3) to (5), with clause (5) providing the experience that is required for one to be appointed a Judge of the High

Court.

38. The question that we pose is this: was it the intention of the drafters of the Constitution that the missing clause (6) of Article 166, which has been specifically mentioned in Article 166 (2) (b) should have provided the experience that is required of persons to be appointed as Judges of the Industrial Court and the Environment and Land Court? Is that the perceived lacuna that was filled by Section 7 (1) of the Environment and Land Court Act?
39. The only Article in the Constitution that provides for the appointment of Judges of the superior courts by the President is Article 166. In view of the fact that the Industrial Court and the Environment and Land Court have the same status as the High Court, and in the absence of a clause in the Constitution stipulating the experience that is required of a person to be appointed a Judge in the two specialized courts, we are of the view that the experience required of a Judge of the High Court is the same experience that is required of the person to be appointed in the two specialized courts.
40. As we have discussed above, the qualifications that are required for Judges of all the five superior courts are the same, that is, one must hold a law degree from a recognised university or is an advocate of the High Court of Kenya, or possess an equivalent qualification in a common law jurisdiction. Such a Judge must also demonstrate a high moral character, integrity and impartiality.
41. It is true, as argued by the appellant's counsel, that the High Court is established under Article 165 of the Constitution while the Environment and Land Court is established pursuant to the provisions of Article 162(2) (b) of the Constitution as read together with section 4 of the Environment and Land Court Act No. However, all Judges of the superior courts are appointed pursuant to the provisions of Article 166 of the Constitution.
42. In view of the fact that the Environment and Land Court and the Industrial Court are courts of the same status with the High Court and therefore have concurrent jurisdiction, a judge who has been appointed to serve in the two specialized courts can hear and determine matters reserved for the High Court.
43. We say so because the Constitution has not distinguished how the Judge of the High Court and the two specialized courts should be appointed for one to argue that the Judge in the specialized courts is not competent to handle matters preserved for the High Court.
44. Jurisdiction has been defined by the **Black's Law Dictionary, 9<sup>th</sup> Edition**, as the power of the court to decide a case or issue a decree. The jurisdiction of the court is always conferred on a court by statute or the Constitution. Jurisdiction always goes to the issue of the competence of the court to hear and determine a matter before it and by extension the competence of the concerned judicial officer.
45. We have already found and held that the minimum qualifications and experience of a High Court Judge as provided for in the Constitution are the same minimum qualifications and experience that are required of a judge who is appointed to hear disputes relating to the Environment and the use and occupation of and title to land.
46. Indeed, section 7 (1) (a) of the Environment and Land Court Act states that for one to be qualified for appointment as Judge of the Environment and Land Court, the person must meet the requirements of Article 166 (2) (a) and (5) of the Constitution. These are the same qualifications and experience that must be held by a Judge of the High Court. Consequently, a Judge who has been appointed in the Environment and Land Court can competently handle matters reserved for the High Court because, firstly, the Judges sitting in the two courts are required to have the same minimum qualifications and secondly, the Environment and the High Court are Courts of the same status. The Environment and Land Court is not an inferior court. The two courts have concurrent jurisdiction, which is jurisdiction that may be exercised simultaneously by more than one court over the same subject matter and within the same territory (**see Black's Law Dictionary, 9<sup>th</sup> Edition**).
47. The limits of the authority of a court are always imposed by the law itself, and if no restriction is imposed, the jurisdiction is said to be unlimited. The Appellant has not informed us how the jurisdiction of Angote J is limited viz-a-viz hearing an appeal of a criminal nature in view of the fact that the said Judge was appointed pursuant to the provisions of Article 166 of the Constitution.
48. Indeed, it should be appreciated that when the Criminal Procedure Code Cap 75 was enacted, the

- only superior court that could deal with appeals from the subordinate courts was the High Court. This was way before the promulgation of the new Constitution. The Judicature Act was also enacted before the promulgation of the Constitution and it only refers to the Judges of the High Court and not of the other two specialized courts notwithstanding the fact that the definition of a “Judge” was amended vide Act No. 10A of 2012.
49. There are also other pieces of legislation which deal with the Environment and Land matters which still stipulate that all appeals, whether of a civil or criminal nature should be lodged with the High Court. In view of such existing pieces of legislation, can one rightly argue that it is only a Judge sitting in the High Court who can handle all the appeals because the statutes have always stated so? We do not think so.
  50. Section 7 of the sixth schedule of the Constitution provides that all laws in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.
  51. The provisions of section 347 of the Criminal Procedure Code which provides that all the appeals from the subordinate must be heard by the High Court should be construed with the necessary alterations in view of the fact that other than the High Court, there are other two courts which have the same status with that of the High Court. The Judges of those courts, in addition to the specialized matters that they hear and determine have the same minimum constitutional qualifications and experience as that of the Judges of the High Court. They can therefore hear criminal appeals pursuant to the provision of section 347 of the Criminal Procedure Code.
  52. To hold otherwise, in our view, constitutes a rigid approach with consequences that Judges of the High Court and the two specialized courts are embedded in permanent silos upon the appointment. This is an absurdity. The second absurdity is that such construction appears to constrain the authority of the Chief Justice under Article 161 of the Constitution and the Judicial Service Act in the administration of justice, the exigencies of work notwithstanding.
  53. Article 259 of the Constitution provides that the Constitution should be interpreted in a manner that promotes its purpose, values and principles and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights. The same Article also provides that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires by a person holding such an office.
  54. While empanelling this bench, the Chief Justice, as the head of the Judiciary, issued a gazette notice number 13601 of 4<sup>th</sup> October, 2013 and stated that he was concerned with the curtailment of the fundamental rights and freedoms of citizens incarcerated pursuant to the sentences imposed by the subordinate courts in respect of which the appeals were filed, but which could not be expeditiously heard on the account of the concentration by the Judiciary on Election Petition hearings.
  55. The Chief Justice further noted in the said gazette notice the constitutional imprimatur as to the right to an expeditious and fair hearing of the criminal appeals before a duly constituted bench.
  56. The sentiments of the Chief Justice in the empanelling of this bench shows that the Chief Justice was performing his judicial and administrative functions as the occasion required. The inclusion of the Judges of the Environment and Land Court and the Industrial Court to hear the pending criminal appeals was intended to promoting the values and principles of the Constitution which includes the advancement of the rule of law, expeditious and fair hearing of cases, social justice and the enforcement of the Bill of Rights as a whole. It cannot therefore not be said that the gazette notice by the Chief Justice was without authority.
  57. In the circumstances, and for the reasons we have given above, we find and hold that this court is properly constituted to hear the criminal appeal before it. The Appellant’s preliminary objection is dismissed with no orders as to costs.
  58. This Ruling shall also apply to Criminal Appeal No.126 of 2009.

Dated and delivered in Malindi this 27<sup>th</sup> day of **November**, 2013 in the presence of Mr. **Ole Kina** for the Appellant and **Mr. Nyongesa** holding brief for Mr. Oyiembo for the State.

**C. W. Meoli**

**Judge**

**O. A. Angote**

**Judge**