



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Ojwang & Lenaola, JJ.)

CRIMINAL APPEAL NOS. 62 & 63 OF 2004

(CONSOLIDATED)

BETWEEN

JOSHUA LESINKO NDEIYA.....1ST APPELLANT

PETER MATUNGE KOLIAN.....2ND APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. H.N. Ndung'u dated 29th January, 2004 in Criminal Case No. 673 of 2002 at Kajiado Law Courts)

JUDGEMENT OF THE COURT

The appellants herein were charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellants, on the night of 26th July 2002 at Mawenzi Lodge, Loitokitok in Kajiado District, Rift Valley Province, jointly and while armed with a dangerous weapon, namely a G3 rifle, serial No. 388843, robbed **Veronicah Wacera Kiarie** of cash, in the sum of Kshs.99,900, and a title deed, and at, or immediately before, or immediately after the time of such robbery threatened to use actual violence upon the said **Veronicah Wacera Kiarie**.

PW1 testified that she had been at the TV hall at Mawenzi Lodge in Loitokitok, on the material night, at about 10.00 pm, when suddenly there was an electric power interruption. When the lights went out, PW1 heard the commotion of people approaching, and an unknown voice shouted at this point: "Close the door." One **Godson**, who had been in the TV room with PW1, rose to go and close the door; but intruders broke the door from the outside. Two men entered, and ordered PW1 and **Godson** to lie down. One of the intruders started battering PW1, even as the other gave **Godson** like treatment. A torch flashed at PW1 and **Godson**, just before they lay down, showed the bearer to be wielding a firearm. PW1 was soon ordered to rise. She was held by the hair, and pushed, along with **Godson**, to the room where she used to sleep. The man who held PW1 ordered her to open the drawer in the bedroom; she did, and he grabbed the money kept in that drawer, and took off. Some of this money was kept in an envelope, and the rest in a purse – and it amounted to Kshs.99,900/=. Also kept in the said envelope was a title deed, and motor vehicle ownership documents – belonging to PW1's employer.

PW1 was not able to identify the robbers at the *locus in quo*. She telephoned the Police, who came along

and arrested both **Godson** and a watchman by the name **Godwin**.

PW1 recorded a statement with the Police on 30th July, 2002. She was told that the robbers had been arrested, and shown recovered cash. She did not know how the appellants herein came to be arrested.

On the day when the robbery took place, 2nd appellant had come to the lodge during daytime, and had spent some time watching video films. The 2nd appellant had a familiarity with the lodge, and knew where PW1 used to sleep – a room that was easily sighted from the seating position in the video room.

Following the robbery, the watchman, **Godwin**, emerged and came inside the lodge. Although he heard PW1 complain that a robbery had just taken place, he asked no question; but he said he was the one who had shouted to PW1 and **Godson** to close the door, ahead of the break-in by the robbers.

On cross-examination, PW1 said she was unable to see who was battering her during the robbery, as the lights were off. Although she had heard footsteps, just before the robbery incident, PW1 did not know how many people were in the gang. The interruption to lighting had been occasioned by switching off some distance away, at the reception to the lodge.

PW2, **Godwin Claude Maya**, the lodge-watchman, testified that he had known 2nd appellant before the robbery incident. The 2nd appellant was a brother to **Godson**, who worked at the lodge, and he would come now and again, to visit **Godson**.

At about 5.00 p.m. on the material date, 2nd appellant came to the lodge, and went to drink from the tap which PW2 was using to clean a motor vehicle, and he (2nd appellant) went away thereafter. PW2 commenced duty a little later, at 6.00 p.m., and stayed around the lodge until 9.00 p.m., on the material day. While he was at the gate, two men came along; they ordered him to face one direction, and not to stare at them. These men had a gun, a G3 rifle, and they pointed it at PW2. The electric lights were on, and PW2 saw that the gun was a “big” one – a rifle. The intruders had covered their faces with coats. One of them held PW2 by the shoulder, and pulled him along. When they got to the lodge-office, the man holding PW2 ordered him to call his colleagues – **Wacera** and **Godson** – from the TV room. Leaving the intruders outside, PW2 walked across to call his colleagues; but, in the meantime, the electric lights were put off. This sent to PW2 the message that he was dealing with thieves; and so he entered the TV room and asked **Godson** to close the door. The two intruders immediately broke into the TV room. As they entered the hall, PW2 escaped into the kitchen, even as **Wacera** and **Godson** were being ordered by the intruders to hand over all the money. PW2 heard them enter a room, but did not know which room they entered, and he soon heard them departing. When PW2 came out of the kitchen, he heard **Wacera** saying she had been robbed of money.

Wacera informed the Police, who came and arrested both **Godwin** (PW2) and **Godson**. While the two were held at the Police station, 1st appellant herein was brought into the Police cells. PW2 did not see 2nd appellant. He later recorded a statement with the Police.

On cross-examination, PW2 said **Godson's** responsibility at the lodge had been to show the rooms to customers. **Godson** used to work together with one **Ali**, and, at the TV room on the material night, he had found three people – **Wacera**, **Godson** and **Ali**. He was, however, not able to see these three, as the lights had been switched off. Since the two intruders had concealed their faces, PW2 could not tell if they were the ones arraigned before the trial Court.

PW2 testified that apart from 1st appellant's appearance at the lodge at 5.00 p.m., when he drank water from the tap, 1st appellant had returned at 9.00 p.m., when he took a bath, and went away.

PW2 testified that he had no torch, on the material night, and that he did not raise the alarm after it became clear thieves had invaded the lodge. He denied the possibility that **Ali** is the one who switched off the lights, in aid of the robbery attack. He denied that he and **Godson** and **Ali** had planned the theft. He

went on to say:

“No, we are not the thieves. That is not why I did not scream. I could not scream because I feared [being] beaten. I had seen the gangsters with a gun.”

PW3, **Said Roba Mudo**, the proprietor of Maasai Hotel in Loitokitok, testified that the two appellants herein were known to him as his customers, and 1st appellant in particular used to frequent his hotel. At no time, prior to the said robbery incident, did 1st appellant ever seek from PW3 safe-custody for money; but on 28th July, 2002 at 10.00 pm, 1st appellant, after taking a meal at the hotel, informed PW3 that he had some money which he wanted to have kept for him – he said this was Kshs.60,000/=, but when it was counted, it was found to be Kshs.59,900/=. It was in note form; and 1st appellant said he would come to collect it the following day. PW3 did not ask to know the source of the money. The 1st appellant said he would collect the money in the morning, but did not specify the time. PW3 took the money and kept it for 1st appellant. He did not, however, come back to collect the money as he promised; and on the appointed morning, PW3 received the news that Mawenzi Lodge had been robbed several days earlier. He later (on the same day) heard that 1st appellant had been arrested – but without knowing the reason for the arrest. When PW3 checked with the CID at Loitokitok, he learned that 1st appellant had been arrested in connection with the Mawenzi Lodge robbery; and he now disclosed that he was holding Shs.59,900/= kept with him the previous day, by 1st appellant. PW3 recorded a statement, and on the following day he handed over the money to 1st appellant accompanied by Police officers. PW3 had no information regarding 1st appellant’s employment or occupational history. PW3 had known 2nd appellant as a Police officer.

On cross-examination, PW3 testified that he had known 2nd appellant for some eight months, but he was not aware of 2nd appellant’s current employment.

PW4, Police Force No. 82486 **Inspector of Police Robert Chumo**, testified that 2nd appellant was known to him, and was an Administration Police Constable – Force No. 9402935, **A.P. Constable Peter Matunge**. It was PW4’s testimony that an armoury was maintained at the DO’s office, and any gun movement therefrom, was recorded in a register; in the words of the witness:

“We indicate the date the weapon is taken out; the number of the officer taking the weapon; his rank and name; the type of weapon taken; the serial number and the calibre of ammunition or bullet taken, and the [quantity] of ammunition given out. We also record the duty he is going out to do with the weapon, and he signs. After completing duty the officer returns the weapon, and indicates the date of return, and I sign. I also confirm if all the ammunition or bullets are back.”

On 21st July, 2002 PW4 had assigned 2nd appellant escort duty up to Emali. On that night, 2nd appellant collected a G3 rifle No. 388843 and 40 rounds of ammunition. PW4 identified the said G3 rifle, together with the ammunition, before the Court. Accompanying the gun were two magazines containing 40 rounds of 7.62 calibre ammunition. The 2nd appellant remained on the assigned escort duty upto 27th July, 2002 and then returned the firearm and ammunition, none of which had been used.

On 26th July, 2002, PW4 was informed that a robbery had taken place at Mawenzi Lodge; and the investigating Police officers wanted to question 2nd appellant in connection therewith. PW4 summoned 2nd appellant, asked him to hand over the rifle, and availed him for investigations.

On cross-examination, PW4, said 2nd appellant had complied with normal procedure, when he took out the firearm and ammunition. He performed the assigned escort duty, the whole week, and returned the firearm and ammunition intact. PW4 did not know how the gun and ammunition in question could be connected to the robbery.

PW5, Police Force No. 217366 **Inspector of Police Festus Kiambi**, of Loitokitok CID office, testified

that he was at his office when 2nd appellant, an Administration Police officer attached to DO's office, Loitokitok, was brought along for the purpose of taking a statement under inquiry. The 2nd appellant had been charged with the offence of robbery with violence, which had occurred at Mawenzi Lodge in Loitokitok. PW5 testified that he had informed 2nd appellant he was not obliged to respond to the charge, unless he wished to do so; and 2nd appellant elected to make a statement – which PW5 recorded in English. He read over the statement to 2nd appellant, who made no changes, but signed against the same. It was PW5's testimony that, in securing 2nd appellant's statement, he had applied no inducement or threat; and 2nd appellant raised no complaints about the statement.

PW6, Police Force No. 217923 **Inspector of Police Hansend Kaloki**, of Kajiado CID office, on 30th July, 2002 received a call from one of his officers, that a robbery had taken place at Mawenzi Lodge in Loitokitok, and that one of the suspects was an Administration Police officer who had entrusted some money to the local District Education Officer to take to the suspect's mother. PW6 summoned the said District Education Officer, as part of the investigations into the matter. The said DEO, **Andrew Nlelekoiten**, confirmed to PW6 2nd appellant had entrusted to him Kshs.8000/=; he did not at the time know that 2nd appellant was an Administration Police officer. PW6 found that the sum of Kshs.2000/= had already been handed over to the 2nd appellant's mother, and only Kshs.6,000/= was left – and this was then handed over to **Inspector of Police Festus Kiambi** of CID Loitokitok.

On cross-examination by learned counsel **Mrs. Pareno**, PW6 said he would not know if the money entrusted to him by 2nd appellant had been part of the money stolen at Mawenzi Lodge on the material night.

PW7, Police Force No. 64065 **Police Constable Lomanant Esekon** who worked at the Loitokitok CID office at the material time, received a telephone call from Mawenzi Lodge on 26th July, 2002; this was from PW1, who said she had been attacked and robbed by two men, one of them armed with a *rifle*. PW1 had reported that she had been robbed of *Kshs.99,900/=*, as well as a title deed for land parcel No. Loitokitok/Ngama/1439. PW7 and his fellow officers found that the robbers had been masked at the material time, and had switched off the lights before invading and robbing the lodge attendants who were watching television. PW7 and his fellow-officers arrested 1st appellant, after learning that this appellant had appeared at the lodge just before the robbery incident. During interrogation, 1st appellant had informed PW7 and his fellow officers that he had met 2nd appellant before the incident, and that part of the money involved in the robbery had been entrusted to PW3 for safe custody. PW7 and his colleagues went to PW3 and recovered *Kshs.59,900/=*. The 1st appellant had volunteered to take PW7 and his colleagues to 2nd appellant. When learned counsel **Ms. Gatui** objected to this line of evidence-in-chief, the prosecutor urged that a confession which leads to the recovery of an item was admissible; and the learned Magistrate upheld this:

“The line of evidence did lead to some recovery. The same is admissible.”

PW7 and his fellow Police officers, after arresting 2nd appellant, found that he was an Administration Police officer attached to the DO's office at Loitokitok. PW7 learned thereafter, that 2nd appellant had been issued with a G3 rifle on 21st July, 2002 for the purpose of escorting a passenger mini-bus to Emali. The 2nd appellant disclosed that he had shared the money with 1st appellant; he got Kshs.8000/= which he entrusted to DEO Kajiado, to pass on to his (2nd appellant's) parents. PW7 and his fellow officers recovered Shs.59,900/= thereout, from the said DEO, through the DCIO Kajiado (PW6). PW7 recovered a total of Kshs.65,900/=, as well as the stolen property title deed, which was found trapped in the fence of Loitokitok Secondary School – being led by 1st appellant herein. The balance of the money was not recovered. PW7 testified that, whereas 2nd appellant was an Administration Police officer, 1st appellant was unemployed.

On cross-examination by 2nd appellant herein, PW7 testified that this appellant was *not on official duty*

on 26th July, 2002 at the material time; only later, at 1.00 a.m. of the same night, was this appellant on escort duty outside Loitokitok.

On cross-examination by learned counsel *Mrs. Gachui*, for 1st appellant, PW7 testified that this appellant had been arrested in connection with the material robbery, because he had been around the *locus in quo* just before the robbery took place. PW7 said 2nd appellant had informed him that he and 1st appellant had already spent the difference between Kshs.99,500/= which had been stolen, and Shs.65,500/= which remained unspent and which was recovered. It was PW7's testimony that 1st appellant engaged in no known activity, for a living.

On the question why an identification parade was not held for the appellants herein, PW7 said he thought it unnecessary, since they had not been identified while they were at the *locus in quo*.

On the foregoing evidence, the learned Magistrate put the appellants herein to their defence, whereupon 2nd appellant made an unsworn defence. He said he had a special assignment given by his superiors, on 21st July, 2002 and he continued with it during the material night, when he was not in Loitokitok, but was *en route* to Emali. He only returned to Loitokitok on 27th July, 2002 at 11.00 a.m., and thereupon, returned his gun to the armoury. He said he knew nothing about the theft which took place on the night of 26th July, 2002.

The 1st appellant too, gave an unsworn defence. He denied having participated in the robbery which is the subject of the charge, on the material night. He had a witness, *John Sarjory Komol*, who said he had the custody of 1st appellant's cattle, and that on 23rd July, 2002 (three days prior to the material date) 1st appellant took back his four bulls, which he went to sell at Kimana Market. It was not known to the witness if the said bulls were actually sold. A little later, on 3rd August, 2002 the witness heard that 1st appellant had been arrested. On cross-examination, the witness said he did not know where 1st appellant was on the material night.

The relevant part of the learned Magistrate's assessment of the evidence runs as follows:

“The next important question for the Court to decide is whether the accused persons had the opportunity to commit this offence. As far as [2nd appellant] is concerned...the Court has been told that he was an AP constable attached to Loitokitok DO's office. Between 21st – 27th July he had been allocated duties to escort a vehicle known as ‘Secret Admirer’ between Loitokitok and Emali. According to PW4...[2nd appellant] had been issued with a G3 rifle and.....40 rounds of ammunition for the purpose of that duty. According to PW7... investigations revealed that the bus ‘Secret Admirer’ was escorted from 1.00 a.m. Between 6.00 p.m. and 1.00 a.m. the [2nd appellant] was, therefore, a free man with lots of opportunity to do other things.

“As for [1st appellant] ...evidence is on record that he told the Police officers that he had no employment. He was a free man also with lots of opportunity for all kinds of mischief and is on record [as having] spent this particular day frequenting the premises in issue. According to PW1, at midday [1st appellant] had been watching video at the lodge. According to PW2 ...[1st appellant] had also been at the lodge at 5.00 p.m., when he drank water and left. The same witness also told the Court during cross-examination that even at [9.00 p.m.] [1st appellant] had been at the lodge, when he had bathed and gone away. The implication is that [1st appellant] was generally idling about the lodge that day, and he ...had lots of opportunity for mischief. [It also shows] that [1st appellant] was very familiar with this lodge and had spent [much time] there.”

The learned Magistrate noted that the two robbers had concealed their faces, and the only notable attribute

of them, at that time, was that “one of them had a visible firearm, with which he pointed at witnesses.”

The learned Magistrate held that *circumstantial evidence* was the only reliable method, in the circumstances, for identifying the robbers of the material night.

The 1st appellant’s extended loitering around the lodge on the material day, had been the basis for his arrest as a suspect. There was the evidence of PW7, which bordered on confession by 1st appellant, and the learned Magistrate thus treated it:

“According to PW7...[1st appellant] was questioned after arrest, and told the CID officers that he had planned the robbery with [2nd appellant] and they had shared the money...[and] he had taken his share to one businessman (PW3) for safe custody. I caution myself that this piece of evidence borders on a confession, and also tends to incriminate the co-accused [2nd appellant]. However, a confession that leads to a recovery as in this case, is admissible in evidence.”

PW3 who had held custody of Kshs.59,900/= from 1st appellant, in mixed notes, handed over this money to the Police authorities, following 1st appellant’s arrest in connection with the robbery. In respect of 2nd appellant too, monies which he admitted to having passed on to the DEO, was recovered in substance.

From the foregoing facts as set out, the learned Magistrate went on to make certain factual inferences:

“Two Things emerge...; not only was the firearm used in the robbery similar to the one issued to [2nd appellant]..., but also, money was recovered which he [was forwarding to his home]. He pleaded that this was part of his salary...but it wasn’t yet the end of the month and he can’t claim to have been paid his salary... Although [2nd appellant] was mentioned by his co-accused, [this] evidence is corroborated, because it turned out that a rifle similar to the one issued to him for normal duty, was seen during the robbery; and it turned out he had a rather unusual amount of money which he had forwarded to his parents at an odd time of the [month].”

With regard to 1st appellant, the learned Magistrate approached his finding as follows:

“[He] too had money although it is said he did not do business. He had handed it to [PW3] for safe custody, thinking it was Kshs.60,000/=. When, however, they counted it...it strangely turned out to be Kshs.59,900/=. It will be recalled that the cash robbed from PW1 was, according to her, Kshs.99,900/=. The presence of Kshs.900/= confirms it was the same amount robbed from PW1...Although he claimed to have been a cattle businessman, I did not believe him. All the evidence points to the guilt of each of the accused.”

As already noted, the charges brought against the appellants herein were of robbery with violence under s.296(2) of the Penal Code, punishable by mandatory death sentence. It is strange, however, that the trial Court after pronouncing guilt, *from the evidence* adduced, invoked some *discretion* of uncertain origin, stating as follows:

“However, as none of the victims [was] injured, I exercise my discretion and reduce the charge from robbery with violence contrary to s.296(2) of the Penal Code to simple robbery contrary to s.296(1) of the Penal Code. I find each of the two accused guilty of the offence of robbery contrary to s.296(1) of the Penal Code and convict each, as by law provided.”

We are surprised that the foregoing point, which touches on *legality* in sentencing, did not at all feature in the preparations of the *respondent’s counsel*, in this matter. On sentencing, the learned Magistrate proceeded as follows:

“I note that the accused are first offenders. I also note the mitigating factors. However, the offence is indeed grave. Each offender is sentenced to serve seven (7) years’ imprisonment, with hard labour. Thereafter [they shall] be subject to the mandatory five (5) year-period of Police supervision.”

The grounds of appeal taken up by learned counsel **Mr. Konya** are:

- a. *that, the learned Magistrate erred and misdirected herself in law and fact in failing to take into account the apparent contradictions and weaknesses in the evidence adduced by the prosecution;*
- b. *that, the learned Magistrate erred in law in convicting the appellants for the offence of robbery, on the basis of insufficient evidence;*
- c. *that, the learned Magistrate misdirected herself in law and fact, by failing to make findings on the issues raised in the defence.*

The crisp point of defence, which learned counsel **Mr. Konya** brought into this appeal, was the question of *alibi*: that both appellants had strenuously denied that they were anywhere near the *locus in quo*, at the time of the robbery. Secondly, counsel challenged the conviction of the appellants herein, for being based purely on *circumstantial evidence*. The tenor and effect of his contention was that the circumstantial evidence did not *point irresistibly to the guilt of the appellants* herein, and so they should not have been convicted.

Counsel submitted that the trial Court had improperly relied on confessional statements which it had already rejected after conducting a trial-within-a-trial.

Learned respondent’s counsel, **Mr. Wang’ondy** submitted that PW1’s testimony regarding the robbery had been corroborated by PW2, and that the trial Court had properly determined that an opportunity had existed for the appellants herein to commit the offence. The offence had taken place while 2nd appellant was still within the vicinity, having been provided with a gun, and PW1 had seen in the hands of one of the robbers a “big gun”, while PW2 was clear what the robbers had was a G3 rifle – which is precisely the gun which had been given to 2nd appellant at the armoury, by PW4.

Mr. Wang’ondy submitted that the alibis raised by the appellants were not helpful to them, as these did not place the two outside the environs of the *locus in quo*; and the alibis came up only belatedly, and as an afterthought.

Of the confessional statements made by the appellants, counsel urged that these be treated as retracted confessions which led to the recovery of items forming material evidence.

We have carefully considered all the evidence, as an appellate Court is required by law to do. Certain matters have become to us quite clear, and, when they are assessed together, they reveal the role of the appellants in the offence charged. While it is true that no witness directly saw the perpetrators as they committed the robbery, there are circumstantial scenarios which, we believe, show clearly who the two robbers were.

The 1st appellant was a *frequent visitor* to the lodge, though there is no evidence of any serious purpose that so repeatedly brought him there. Indeed, on the material day he came to the lodge as many as *three times*; the second time ? to drink from the lodge’s water tap; the third time – just before the robbery – to bathe in the lodge’s water. We do not consider these to have been innocent visits; and it is relevant in this regard, that 1st appellant says his brother **Godson** worked at the lodge and he would come “to visit” him, yet **Godson** was with the complainant at the television room on the material night, but there is no evidence 1st appellant openly came where **Godson** was. Idling around the lodge created a clear *opportunity for theft*; and it was PW1’s testimony that the appellant frequently spent his time at the television room, from which one could easily sight the room from which the money was stolen, on the

material night. In our judgement, taking *judicial notice* of ordinary human behaviour, we would conclude that 1st appellant's three-time appearance at Mawenzi Lodge on the material day, was by design, and the purpose intended was *not innocent*. This fact, taken in the context of 1st appellant's familiarity with the Lodge's private areas, and with the fact that he was hovering around the Lodge hardly an hour before the robbery took place, are, in our opinion, probative circumstances which rule out others but 1st appellant, as a robber at the Lodge on the material night. This evidence is then substantially *corroborated* by the ascertained fact that this unemployed appellant, only a short while after the robbery, entrusted to PW3 Kshs.59,900/=, a figure that so uncannily echoed the sums of the stolen money, namely Kshs.99,900/=.

There is reliable evidence that the robbery was executed by *two men*, and we see clear proof by circumstantial evidence, that one of them was 1st appellant. One of the two robbers had a *rifle*. Cogent circumstantial evidence shows 2nd appellant to have been possessed of a *G3 rifle* for nearly a week, and *that for several hours before the robbery took place, this appellant was somewhere in Loitokitok, with the said gun*. Is he the gunman who accompanied 1st appellant, in the robbery attack, at Mawenzi Lodge? The circumstances show that, indeed, it was 2nd appellant who accompanied 1st appellant as the two executed the robbery at the Lodge. Firstly, 2nd appellant could not have given true testimony when he said he was possessed of salary-payment, and that he had entrusted the sum of Kshs.8000/= to the local District Education Officer to deliver to his parents. He had *not yet earned his salary*, as it was not month-end. So, why is 2nd appellant so questionably attempting to explain the *source* of the money? The only answer would be that the said money was *improperly obtained* and, more specifically, that it was part of the proceeds of the robbery. Though 2nd appellant had masked himself at the time of the robbery, there are identifiable items that connect him to the robbery: the *G3 rifle*, and the sum of 8000/=, the origin of which is not honestly explained. On these facts, we hold that 2nd appellant was one of the two robbers at Mawenzi Lodge, on the material night.

All the evidence adduced in the trial established circumstances that point clearly to the *appellants* herein as the robbers of the material night. We have found nothing in those circumstances to exculpate the appellants from criminal liability; and consequently, we hold them to have been properly found guilty.

The facts of this case fit it into the category of *robbery with violence*, in the terms of s.296(2) of the Penal Code (Cap.63), which stipulates:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

Although it is obvious that the trial Court, thus, made a fundamental error of law, the responsible State Counsel took no action to *seek a rectification*. This is precisely what **Mr. Wang'ondu** asked of this Court:

“I oppose the appeal. It be dismissed. The sentence be confirmed.”

Is it right that this Court should be confirming an *illegal sentence*? We must say, **No**.

Therefore, we declare the appeal hearing that took place before us a *mistrial*. We order that the proceedings in this appeal, and our Judgement herein, shall be brought before the Attorney-General, to consider the matter and to move the Court appropriately, in accordance with the law.

In the meantime, the appellants shall remain in prison custody. The Registry shall schedule a mention date before a two-Judge Bench.

Orders accordingly.

DATED and **DELIVERED** at Machakos this 14th day of April, 2008.

J.B. OJWANG

I. LENAOLA

JUDGE

JUDGE

Coram: Ojwang & Lenaola, JJ.

Court Clerk: Mueni

For the Appellants: Mr. Konya

For the Respondent: Mr. Wang'ond