



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 71 OF 2003

BETWEEN

MOSES GITONGA WAIRAGU

SAMWEL KINYUA KARIUKI

CHARLES MWANGI GITAU APPELLANTS

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The magistrate had tried the appellants on a charge of robbery with violence under section 296 (2) of the Penal Code but in the judgment the appellants were convicted of the offence of simple robbery under section 296 (1) of the Penal Code. They appealed to High Court against the conviction and sentence and when admitting the appeal to hearing, Rimita, J, as he then was, directed that the appeals be heard by a single Judge. That was obviously because the appellants had been convicted of the lesser charge of simple robbery under section 296(1) of the Penal Code. The practice of the High Court, based on the provisions of section 359 (1) of the Criminal Procedure Code is that appeals by persons convicted under section 296 (2) are heard by two Judges. We think Mr Justice Visram was not justified, sitting all by himself, in changing the conviction from section 296 (1) to one under section 296 (2) of the Penal Code. If Visram, J, thought he was going to do so, he ought to have asked another Judge of the High Court to sit with him and then to warn the appellants of the possible consequences of their proceeding with the appeals. We accordingly allow the appeals, set aside the conviction and sentence of death and remit the appeals to the High Court for a rehearing by two judges. The appellants shall remain in prison and continue to serve the sentences imposed by the magistrate. Those shall be our orders.

Dated and delivered at Nakuru this 21st day of September, 2004.

R. S. C. OMOLO

JUDGE OF APPEAL

E. O. O’KUBASU

JUDGE OF APPEAL

E. M. GITHINJI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR