IN THE COURT OF APPEAL
AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU,

JJ.A.) CRIMINAL APPEAL NO. 163 OF 2020

BETWEEN

BENARD IGUNZA MWENESI.....1ST APPELLANT
DAVID LIBABU KEVOYE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Kakamega (Chitembwe & Wasilwa, JJ.) dated 11th December, 2013

in

HCCRA Nos. 204 & 205 of 2011)
****

JUDGMENT OF THE

COURT

1. The appellants herein, Benard Ingunza Mwenesi and David Libabu Kevoye were jointly arraigned before the Senior Resident Magistrates Court at Vihiga charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the night of 25th and 26th June, 2009 at Kivagala District within Western Province jointly with others not before court while

armed with offensive

weapons namely pangas, rungus and sharp torches robbed Joyce Iminza of her mobile phone make Motorolla C118, one sony radio cassette, one sonitec radio, one tv set make greatwall, one DVD make Royal Tech, 15 CDs, one car battery, five hens and Kshs. 3,000/= all valued at Kshs 22,450/= and immediately before or immediately after the time of such robbery used actual violence against the said Joyce Iminza.

2. On count II, the appellants were charged with gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence were that on the night of 25th and 26th June, 2009 at Kivagala District within Western Province, willfully and unlawfully gang raped Joyce Iminza by causing penetration of their genital organs into the genital organ of Joyce Iminza.

3. The appellants denied the charges prompting the trial in which the prosecution called a total of (5) witnesses in support of its case, while the appellants were the sole witnesses for their defences. At the close of the trial, the magistrate found them guilty of the main offence, convicted

them and sentenced them to death.

4. The appellants were aggrieved by that decision and appealed to the High Court. The appeal was heard resulting in the judgment of (Chitembwe and Wasilwa, JJ.) on the 11th day of December, 2013, in which the learned Judges dismissed the appeal.

5. The appellants were aggrieved by that decision, and are now before this Court on a second appeal raising a jurisdictional issue going to the root of the appeal. Learned Counsel Mr. Ogenga, appearing for the appellants argues that the 1st appellate court had an improperly constituted bench, and was therefore not competent. This is due to the fact that Wasilwa J, substantively appointed as an Employment and Labour Relations Court Judge had no jurisdiction to hear and determine criminal appeals. In support, Mr Ogenga relied on the case of ***Karisa Chengo & 2 others vs. Republic (2015) eKLR*** in which this Court sitting in Malindi held that a judge specifically appointed for specialized courts had no jurisdiction to sit on Criminal matters. In this regard, he invited the Court allow the appeal; set aside the judgment dated 11th December, 2013; and set the appellant at liberty, or in the

alternative, remit the matter to the High Court for rehearing of their appeal.

6. Mr. Kilambyo learned prosecution counsel fully associated himself with Mr. Ogenga's submission and urged the Court to allow that request as it was the correct position in law. He too referred to the ***Karisa Chengo case (supra).***

7. This being a jurisdictional issue the Court must decide it *in limine*. Jurisdiction is everything, as this Court and the Supreme Court have stated before, and a court downs its tools once it is satisfied that it has none. Nyarangi JA. famously put it thus:

> "***By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court of tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a***

Court takes it upon itself to exercise a

jurisdiction which it does not possess, its decision amounts to nothing, and Jurisdiction must be acquired before Judgment is given."

See ***Owners of the Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd. [1989] KLR 1 at page 14.***

8. In ***Karisa Chengo & 2 others vs. Republic (Supra)*** the Court had occasion to construe and interpret Articles 161(2), 162(1)(2)(b), 165(3)(5) 166 and 259 of the Constitution on the one hand, and section 359(1) of the Criminal Procedure Code, section 4 and 12 of the Employment and Labour Relations Court Act and then section 43 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya.

9. Similarly, in ***John Kabiro Kimonjo vs. Republic [2015] KECA 531 (KLR)*** this Court followed the same reasoning that the law envisages that Judges of the specialized Courts should be different from the Judges of the High Court, with different jurisdictions though having the same status; and that where a Judge of a specialized Court is appointed to such a Court, that is where his/her jurisdiction lies. A criminal appeal where a specialized Court Judge had participated is a nullity and must

be remitted to the High Court for re-hearing before a properly constituted bench.

10. In the instant appeal, neither party has urged the Court to depart from the ***Karisa Chengo*** case thus, there is no reason not to. We echo Sir Charles Newbold, P. in C.A. ***Dodhia vs. National & Grindlays Bank. Ltd [1970] EA 195*** at page 199 stated as follows:

> ***"I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the Courts were free to arrive at a decision without reference to any previous decisions.***
>
> ***…***
>
> ***"For these reasons I am satisfied that as a matter of judicial policy this Court … while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course, exercise, this power only after careful consideration of the consequences of doing so and the circumstances of the particular case, but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the Court at the time it comes up for consideration."***

11. In the instant appeal, there are no new circumstances that

can compel the Court to revisit and interrogate those same

provisions. The upshot is that the High Court bench was not constituted in accordance with the law. The hearing and disposal of the appeal was therefore a nullity which this Court cannot condone or perpetuate. Taking into consideration the period the appellants have been incarcerated, we find that rehearing of the appeal at the High Court would be oppressive and an injustice to the appellants. The appeal is merited and is allowed, the conviction and sentence quashed. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR