



REPUBLIC OF KENYA



KENYA LAW
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**Lentrangoi v Republic (Criminal Appeal 9 of 2014)
[2023] KECA 158 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 158 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 9 OF 2014
FA OCHIENG, LA ACHODE & WK KORIR, JJA
FEBRUARY 17, 2023**

BETWEEN

MPAYO LENTRANGOI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (R.V.P.Wendoh, J. and L.N. Waithaka, J.) delivered on 10th December, 2013 In HC Criminal Appeal No. 259 “B” of 2011)

JUDGMENT

1. Mpayo Lentrangoi is before us on a second appeal challenging the judgment of the High Court delivered on December 10, 2013 in respect to his first appeal. The appellant was charged with another before the Senior Resident Magistrate’s Court at Maralal with four counts of robbery with violence contrary to section 296(2) of the *Penal Code*. The appellant additionally faced a fifth count of being in possession of a firearm without a firearm certificate contrary to section 89(1) of the *Penal Code* and a sixth count of being in possession of ammunition without a firearm certificate contrary to Section 26(1) as read together with section 26(2) of the *Firearms Act*. The appellant was also faced with the alternative charge of handling stolen goods contrary to Section 322(2) of the *Penal Code*.
2. The appellant was convicted in respect of the 1st, 2nd and 3rd counts relating to the offence of robbery with violence as well as the 5th and 6th counts regarding illegal possession of a firearm and ammunition. The trial court subsequently sentenced him to death on the three counts of robbery with violence while the sentences for 5th and 6th counts were held in abeyance.
3. Dissatisfied with the conviction and sentence of the trial court, the appellant lodged an appeal to the High Court. His appeal was heard by two judges as required by the law then in place. The first appellate court in its judgment upheld the trial court’s findings on the 1st, 2nd, 3rd, 5th and 6th counts and entered



an acquittal on the 4th count observing that the trial court did not make a finding on this particular count in its judgment.

4. The appellant is now before us on a second appeal on the grounds that the first appellate court erred in upholding the judgment of the trial court regardless of a defective charge sheet; that his identification was not proved; that the identification parade was not conducted in line with the police standing orders; that the evidence of the prosecution was contradictory; that the ballistic report was produced by an unqualified person; that his alibi defence was not considered; that the mandatory death sentence imposed on him was unconstitutional; and, that the arresting officer was not called to testify.
5. When this matter came before us for hearing, the parties sought to rely on their written submissions. We need not advert to the finer details of the positions of the parties on the substantive appeal for the reason that shall shortly emerge. A cursory look at the record of the first appellate court discloses that RVP Wendoh, and LN Waithaka, JJ made up the panel of judges that disposed the appellant's appeal. Even though neither the appellant nor the respondent addressed us on the issue of jurisdiction of the first appellate court, we find it prudent to address our minds to the jurisdiction of the first appellate court as our findings on the issue will determine the fate of this appeal.
6. That the issue of jurisdiction can be raised by the court suo moto has been confirmed in several decisions. For instance, in *Isaak Alianza v Samuel Kazuaki* [2021] eKLR, this Court (RN Nambuye, JA) held that:

“In light of the above exposition, I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.”
7. Time and again it has been stated that jurisdiction in judicial proceedings is everything and any proceedings conducted without jurisdiction are always a nullity. It therefore follows that if we find that the first appellate court lacked jurisdiction, then this appeal will have been addressed without going into the merits of its decision. It is on this backdrop that we have opted to assess whether the first appellate court as constituted was clothed with jurisdiction to hear and determine the appellant's appeal.
8. We take judicial notice of the fact that RVP Wendoh, J is a judge of the High Court whereas LN Waithaka, J is a judge of the Environment and Land Court. We also observe from the record that LN Waithaka, J sat on the appeal from October 15, 2013 up to the time of the delivery of the judgment. We take judicial notice of the fact that pursuant to Kenya Gazette Notice No 13601 published on October 4, 2013 the then the Chief Justice, Dr Willy Mutunga, gazetted judges of the High Court, Environment and Land Court, and the Employment and Labour Relations Court to hear criminal appeals in a move aimed at reducing backlog and decongesting prisons. The Gazette Notice later became a subject of litigation and the matter went all the way to the Supreme Court.
9. In a judgment delivered in *Republic v Karisa Chengo & 2 others* [2017] eKLR in regard to the stated Gazette Notice, the Supreme Court held that:

“(111) In the above context, in the matter before us, as we have found, the bench constituted by Meoli, J and Angote, J had no jurisdiction to determine the appeals. Their decisions were consequently a nullity ab initio. With that finding, we once again ask: does such constitutional impropriety annul the hearings that took place? Do the respondents whose guilt was upheld at those



hearings, and who for several years have been serving sentence, have to be subjected to fresh hearings at the High Court?

112. In answering the above questions, it should be noted that in this case, the question to be determined is not whether a decision of this Court declaring an action to be unconstitutional should have retrospective effect or not. Neither is it a question as to whether a decision of this Court should have retrospective effect on earlier decisions of this Court or other superior Courts unrelated to this appeal. In the comparative cases we have referred to above, the Courts therein were called upon to determine either of those two questions, while the case before us on the other hand, is a live appeal that has come all the way from the Magistrate's Court. We have already held, in concurrence with the Court of Appeal, that the "High Court" bench, which affirmed the convictions of the respondents herein, was unconstitutionally empaneled by the retired Chief Justice. The convictions of the respondents could therefore neither be affirmed nor overturned by such a bench. All that was done by the said bench is a nullity and no question of retrospectivity should therefore arise.

113. It therefore follows that, in the light of the terms of Article 2(4) of the Constitution, despite the drawback our decision will have on the backlog of cases in our Courts, we have no choice but to accede to the respondents' plea that their appeals at the High Court level be re-heard. Our decision must of necessity have a similar effect on all the appeals that were determined by similarly empaneled High Court Benches." (Emphasis Ours)

10. The decision of the Supreme Court was clear that all the appeals that had been heard by the unconstitutionally empaneled benches were a nullity and those appeals were to be re-heard at the High Court level. It looks like the appellant's appeal slipped through the cracks and was not returned to the High Court by this Court. The parties also appear to have missed the order of the Supreme Court. It is unfortunate that the appellant has waited for almost nine years for his appeal to be heard. The delay is unfortunate because we do not have before us a valid judgment that can be tested against the grounds of appeal the appellant has raised. The judgment the appellant seeks to overturn was declared a nullity by the Supreme Court. The panel of RVP Wendoh and LN Waithaka, JJ had no jurisdiction to entertain the appellant's appeal considering that LN Waithaka, J being a judge of the Environment and Land Court has no jurisdiction to hear and determine criminal appeals. The proceedings and judgment in Nakuru High Court Criminal Appeal No. 259 "B" of 2011 are therefore null and void. In the circumstances, we really have no option but to subject the appeal before us to the remedy prescribed by the Supreme Court.

11. Having rendered ourselves as above the only way forward is to remit this matter to the High Court for re-hearing of the appellant's appeal before a competent judge. We are cognizant of the fact that the appellant was sentenced to death and it is in the interest of justice that his appeal be determined by a court seized of jurisdiction to hear the matter. In this case, we also find that the passage of time is not really an issue in determining whether a re-hearing is necessary as the record is available and the sentence of death imposed is yet to be served. On this, we are again guided by the Supreme Court in Karisa Chengo (*supra*) that:

"We have no doubt at all that the mistake or omission was not deliberate but made in good faith and with noble intentions. A re-hearing of an appeal can be ordered where the interest



of justice cry for it. It will also be ordered when the resultant proceedings were defective, illegal or manifested mistakes of the court for which the prosecution is not to blame.”

12. In the circumstances, and in compliance with the decision of the Supreme Court in *Karisa Chengo* (*supra*) we make the following orders;
- (i.) The proceedings and judgment in Nakuru High Court Criminal Appeal No 259 “B” of 2011 are hereby quashed;
 - (ii.) The appellant’s appeal before the High Court be heard afresh by a judge of that Court excluding Hon RVP Wendoh, J;
 - (iii.) The High Court file be placed before the Presiding Judge of the High Court at Nakuru within 14 days from the date of the delivery of this decision for directions and further orders in light of order number (ii) above.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023.

F OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

