



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KARANJA & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 18 OF 2015

BETWEEN

DANIEL MAINA NDIRANGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the High Court of Kenya at Meru (J. Wakiaga & A. Ombwayo, JJ.) dated, signed and delivered on 13th November 2013

in

H.C.CR.A. NO. 212 OF 2007)

JUDGMENT OF THE COURT

1. The appellant herein was charged before the Senior Resident Magistrate's Court at Nyeri with the offence of robbery with violence contrary to **Section 296(2)** of the Penal code.
2. The particulars of the charge were that on the night of 22nd and 23rd day of November 2005 at Irima-ini village Othaya Division in Nyeri District of the Central Province jointly with others not before the court while armed with dangerous weapons namely metal rods robbed Monicah Wachinga Muchemi (deceased) of her mobile phone make Motorola C115 valued at Kshs. 4,999 and at or immediately before or immediately after the time of such robbery fatally wounded the deceased.
3. He faced an alternative charge of handling stolen goods contrary to **Section 322(2)** of the Penal Code, the particulars of which were that on the 24th day November 2005 at Kayole Estate Nairobi within Nairobi area province otherwise than in the course of stealing dishonestly assisted in the disposal of one mobile handset make Motorola C115 IMEI 353686004039334 knowing or having reason to believe it to be stolen or unlawfully obtained.
4. He pleaded not guilty on both counts and the matter proceeded to full hearing in which the prosecution called a total of 23 witnesses in support of its case with the appellant making an unsworn statement of defence in which he reiterated that he knew nothing about the charges levelled against him.
5. At the conclusion of the trial, the appellant was convicted and sentenced to death. Aggrieved, the appellant preferred an appeal to the High Court. The appeal was heard by Wakiaga, J., a Judge of the High Court and A. Ombwayo, J. a Judge appointed to the Environment and Land Court, a court of equal status as the High Court. The appeal was dismissed vide a judgment dated 13th November, 2013.
6. Unrelenting, the appellant is now before this Court attempting to take a second bite of the cherry. The appeal is premised on several grounds of appeal as appears on the face of the appellant's home-made grounds of appeal, supplementary grounds of appeal and further supplementary grounds of appeal as drafted by counsel. The grounds are *inter alia* that the learned Judge erred in law: in relying on the post-mortem report contrary to section 77 and 34(1)(a) of the Evidence Act; failing to consider that the prosecution failed to prove its case beyond reasonable doubt despite the fact that the defence evidence was compelling enough to cast doubt; and by hearing and determining the matter before it yet it lacked jurisdiction in the first instance.
7. During the plenary hearing of the appeal, Ms. Lucy Mwai, learned counsel appointed by the State, appeared for the appellant while Mr.

Ondimu Prosecution Counsel appeared for the State. The appeal proceeded through written submissions highlighted by the respective Counsel.

8. At the hearing, Ms Mwai abandoned the other grounds of appeal and proceeded to urge the ground on jurisdiction of the High Court as constituted to hear and determine the appeal before it. She contended that the first appellate court was not properly constituted as it included A. Obwayo, J. a Judge appointed as a Judge of the Environment and Land Court vide Gazette Notice No. 14346 of 1st October 2012. Placing reliance on this Court's decision in **George Muriithi Kari v. Republic, Nyeri Criminal Appeal No. 47 of 2015** she argued that the High Court lacked jurisdiction as it was not properly constituted and the entire proceedings and resultant judgment were a nullity.

9. The appeal was conceded by the learned State Counsel on the ground of deficiency of jurisdiction on the part of the High Court as constituted at the hearing of the appeal, as Ombwayo, J. was without a doubt a Judge of the Environment and Land Law.

10. With this in mind it is evident that the sole issue falling for this Court's determination is whether a Judge appointed to the Environment and Land Court (hereinafter 'ELC') has jurisdiction to hear and determine criminal matters and therefore, whether the High Court in the circumstances of this case lacked jurisdiction. This issue has been determined with finality and the law in this area is well settled.

11. Addressing this issue, the Supreme Court of Kenya in **Republic v. Karisa Chengo & 2 Others, Supreme Court Petition No. 5 of 2015** pronounced itself as follows: -

“[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. falling within the jurisdiction of the Courts contemplated in Article 162(2).”

[80] In this case, it therefore also follows that Angote, J., appointed as a Judge of the Environment and Land Court, and not of the High Court, had no jurisdiction to determine criminal appeals. Consequently, we concur with the Court of Appeal that Gazette Notice No. 13601 of 4th October, 2013, by which the former Chief Justice empanelled him to sit and determine the criminal appeals in question, was unlawful and unconstitutional.” (Emphasis supplied)

12. Further, this Court in application of the above decision and while faced with similar circumstances in **Inea Mugwanga v. Republic, Kisumu Criminal Appeal No. 23 of 2016** expressed itself as follows: -

*“This Court in **Benjamin Kemboi Kipkore vs. Republic [2018]** whilst applying the above jurisprudence held as follows:*

*‘Pursuant to the Judgment of the Supreme Court in the **Karisa Chengo** case, the court which heard and determined the appeal in the High Court that gave rise to the decision subject of the appeal now before us was not competent. And thus the proceedings and the judgment under appeal were a nullity.’*

In line with the above position, the 1st appellate court as constituted did not have the requisite jurisdiction to entertain the appeal as Wasilwa, J was a Judge of the ELRC. The proceedings therein were a nullity and we declare them as much.

Accordingly, we allow the appeal and order that it be remitted to the High court sitting in Kakamega for hearing of the appeal de novo by Judges of the Court other than Chitembwe, J. The matter shall be mentioned before the Resident Judge at Kakamega within fourteen (14) days hereof with a view to directions being given for its expedite re-hearing.” (See also: **James Lokoyen Etibor & 2 Others v. Republic, Eldoret Criminal Appeal No. 10 of 2017.**

13. We are satisfied that the concession of the appeal by learned counsel for the State is well grounded. The proceedings before the High Court were clearly a nullity and we so find. The same are hereby quashed in entirety.

14. The question that remains then is, what is the most appropriate remedy at this juncture? This Court in **Erupe Lokutan v. Republic, Eldoret Criminal Appeal No. 77 of 2015** expressed itself as follows: -

*“[3] We have considered this matter. In light of the Supreme Court decision in **Republic vs Karisa Chengo & 2 others**, it is evident that the hearing of the appellant's appeal in the first appellate court was a nullity as the Bench was not properly constituted. In the circumstances, the judgment delivered by the High Court dismissing the appellant's appeal was also a nullity.*

[4] In effect what this means is that the appellant's conviction and sentence by the magistrate's court still stands. The issue of an acquittal cannot arise as the appellant's appeal has not been properly heard.

[5] In the circumstances, the orders that commends itself to us is to allow this appeal to the extent of setting aside the proceedings and judgment of the 1st appellate court and direct that the appeal be re-heard before a competent Bench of the High Court and that the matter be given priority. Those shall be the orders of the Court.” (Emphasis supplied)

15. Although the learned State Counsel told the Court that the State would not insist on a retrial, it is clear that the quashing of the proceedings before the High Court leaves the decision of the trial court intact. It is therefore imperative that the matter be remitted to a court seized with jurisdiction to determine the appeal with finality.

16. In the circumstances, the orders that commend themselves to us to make are that the judgment of the High Court dated and delivered on 13th November, 2013 is hereby quashed. The matter is hereby remitted to the High Court for re-hearing of the appeal by a Judge with requisite jurisdiction pursuant to **Section 359** of the Criminal Procedure Code excluding Wakiaga J.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR