



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 17 OF 2017

BETWEEN

BENJAMIN KEMBOI KIPKORE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale, (Karanja, J.) dated the 19th day of November, 2013

in

HCCRA NO. 97 OF 2010)

JUDGMENT OF THE COURT

[1] The appellant was convicted by the Principal Magistrate, Kapenguria of two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code** and was sentenced to death in the first count. The sentence in the second count was left in abeyance.

[2] He appealed to the High Court against the conviction and sentence. The appeal was heard by J. R. Karanja and E. Obaga, JJ on 18th October, 2013 and on 19th November, 2013 the court dismissed the appeal giving rise to the present appeal.

[3] **Ntenga Marube**, learned counsel for the appellant, has raised one ground of appeal in the supplementary memorandum of appeal which states that the proceedings before the High Court were a nullity.

In support of that ground, counsel submitted that E. Obaga, J. was appointed as a judge of the Environment and Land Court and not as a judge of the High Court. He further submitted that **section 359** of the **Criminal Procedure Code** provides, amongst other things, that appeals from subordinate courts shall be heard by two judges of the High Court.

He relied on the decision of the Supreme Court in **Republic vs Karisa Chengo & 2 Others [2017] eKLR** (*Karisa Chengo*), where the Supreme Court held in essence that the jurisdiction of the judges appointed to the Environment and Land Court is limited to the matters provided in the Environment and Land Court Act and hence they have no jurisdiction to determine criminal appeals. He asked the court to quash the conviction, set aside the sentence and set the appellant free.

[4] The **Karisa Chengo** judgment, shows in paragraph 3 the circumstances in which the judges of the Environment and Land Court including E. Obaga, J. heard criminal appeals in the High Court. The Chief Justice by Gazette Notice No.13601 dated 4th October, 2013 had empanelled judges of ELC and the ELRC to sit with judges of the High Court to hear and determine criminal appeals in the “*judicial service week*”. The Supreme Court declared the said Gazette notice as unlawful and unconstitutional.

[5] Mr. Mulati, the Senior Prosecuting Counsel, agrees with submissions of the appellant’s counsel but requested that the appeal be remitted to the High Court for re-hearing.

[6] 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.

[7] The appellant was convicted for robbery with violence where a large sum of money was stolen and AK 47 rifles were involved. In the circumstances, justice will be served by remitting the appeal to the High Court for re-hearing.

Accordingly, the appeal is allowed, the judgment of the High Court dated 19th November, 2013 is set aside. The appeal is remitted to the High Court for re-hearing by a court constituted only of the Judges of the High Court.

Dated and delivered at Eldoret this 14th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.