



IN THE COURT OF APPEAL

AT KISUMU

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

J. MOHAMMED, JJA.

CRIMINAL APPEAL NO. 23 OF 2014

BETWEEN

PATRICK OPONDO OCHOLA.....1ST APPELLANT

AUGUSTINE JUMA MUYANGE.....2ND APPELLANT

FREDRICK ODUOR.....3RD APPELLANT

USSEIN MOBUTU KHALASI.....4TH APPELLANT

GEORGE OMOLLO ODUOR..... 5TH APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Busia (Tuiyot & Kibunja, JJ.) dated 13th November, 2011

in

HCCR NO. 76 OF 2012)

JUDGMENT OF THE COURT

The five appellants now before us were all jointly tried and convicted by the Chief Magistrate's Court at Busia of four (4) counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. They were each sentenced to suffer death in regard to the first count.

Being aggrieved, the five (5) appellants all appealed to the High Court. Their appeals were consolidated and heard by a Bench of two (2) Judges who dismissed the appeals.

The appellants are now before us in a second appeal. One of the issues taken by the appellants in this appeal is that one of the two (2) Judges who heard their appeal in the first appellate court was a Judge of the Environment and Land Court and therefore not competent to hear the criminal appeal.

Mr. Mule, Senior Assistant Director of Public Prosecutions has availed a copy of the Supreme Court Decision in the **Republic vs Karisa Chengo and 2 others, Petition No. 5 of 2015**. **Ms Wafula** of the Office of the Director of Public Prosecution concedes the appeal on the ground that the Judge of the Environment and Land Court was not competent to hear the first appeal. We concur that that is the position as Mr. Justice Kibunja who heard this appeal with Mr. Justice Tuiyot was employed as a Judge in the Environment and Land Court.

In the circumstances, the proceedings in the first appellate court were a nullity and there is no proper judgment upon which the appeal before

us can be based.

Accordingly, we remit this appeal back to the High Court for the first appeal to be re-heard by Judges of the High Court of competent jurisdiction.

Those shall be the orders of the Court.

This judgment is signed by two (2) Judges under **Rule 32(2)** of the Court of Appeal Rules.

DATED at Kisumu this 13th November, 2018

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR