



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & OUKO, J.J.A)

CRIMINAL APPEAL NO. 9 OF 2016

BETWEEN

FRANCIS IRUNGU MUTHONI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An Appeal from a Judgment of the High Court of Kenya at Nairobi (Korir & Marete, JJ.) dated 17<sup>th</sup> June, 2014*

*in*

*H.C.C.R.A. NO. 705 OF 2010)*

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**JUDGMENT OF THE COURT**

The law is now settled by the Supreme Court in its decision made on 26<sup>th</sup> May, 2017 in the case of ***Republic v Karisa Chengo & 2 others [2017] eKLR*** in which it upheld this Court's decision that a Judge of the specialized courts of **Environment & Land (ELC)** and **Employment & Labour Relations (ELRC)** have no jurisdiction to hear and determine matters reserved for the High Court and *vice versa*. After extensive analysis of the law, the appointment and swearing in of Judges, the apex Court held:

***"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)".***

The matter before us is a second appeal which emanated from a trial of the appellant by Limuru Senior Principal Magistrate's Court on two counts of robbery with violence contrary to **Section 296(2)** and alternative counts of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. The

appellant was convicted on the two main counts and was sentenced to death in each of them. Aggrieved by that conviction and sentence he appealed to the High Court in Nairobi and the appeal was heard and determined by two Judges, namely: **R. LAGAT-KORIR** and **D. K. NJAGI MARETE**.

As observed by the Supreme Court in the **Karisa Chengo case** (supra):

***"The Criminal Procedure Code confers upon the High Court appellate jurisdiction to determine criminal appeals hence the wording of Section 347(1) that:***

***"(1) Save as is in this Part provided –***

***(a) a person convicted on a trial held by a subordinate Court of the first or second class may appeal to the High Court...";***

***and Section 359(1) of the same Act that:***

***"(1) Appeals from subordinate Courts shall be heard by two Judges of the High Court, except when in any particular case the Chief Justice, or a Judge to whom the Chief Justice has given authority in writing, directs that the appeals be heard by one Judge of the High Court."***

This has, of course changed with the amendment to **Section 359(1)** replacing two Judges with one Judge. See the schedule to the H.C. (Organization & Administration) Act, 2015.

The appellant's first appeal ought to have been heard and determined by the High Court under those provisions. We have established, however, that although Justice R. Lagat - Korir was appointed a Judge of the High Court and posted to the Criminal Division of that Court, the second Judge, D. K. Njagi Marete was appointed as a Judge of the ELRC and is still a serving Judge of that specialized court. They made their joint decision in the appeal on 17<sup>th</sup> June, 2014. It follows that only one Judge of the High Court validly sat and heard the appeal under **Section 359** of the Criminal Procedure Code. In those circumstances, it goes without saying that the empanelment of Justice D. K. Njagi Marete to sit and determine the criminal appeal in question, was unlawful and unconstitutional.

On that finding, we declare the decision made on 17<sup>th</sup> June, 2014 as null and void. We order that the matter be and is hereby remitted to the High Court in Nairobi for expeditious rehearing and determination of the appeal in accordance with the law by any Judges lawfully empanelled to do so, excepting **R. LAGAT - KORIR** and **D. K. NJAGI MARETE**.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2017. P. N. WAKI**

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**JUDGE OF APPEAL**

**ASIKE - MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**