



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)**

**CRIMINAL APPEAL NO. 21 OF 2015**

**BETWEEN**

**FRANCIS MUSEE OMURWA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Mombasa (Odero and Muya, JJ.) dated 10<sup>th</sup> November 2014*

*in*

*H.C.C.R.A. No. 70 of 2013)*

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**JUDGMENT OF THE COURT**

This is yet another appeal which is vitiated by the failure of judges of the High Court to sign their judgments, contrary to the express requirements of **section 169** of the **Criminal Procedure Code**. Indeed this is the third such judgment that we have encountered in the last one week alone. We wish to draw the attention of the resident judges of the High Court in Malindi and Mombasa, to in turn draw the attention of the other judges, to the fact that a judgment, which is not signed as required by the Criminal Procedure Code, is a nullity. It occasions unnecessary delay and expense, inconveniences the appellants and compromises their rights and ultimately undermines the principles of judicial authority set out in **Article 159** of the **Constitution**. We hope that we are seeing the last of this inexcusable lapse.

The appellant, **Francis Musee Omurwa** filed his appeal before this Court seeking to overturn the judgment of the High Court (**Odero and Muya, JJ.**) dated 10<sup>th</sup> November 2014, which upheld his conviction and sentence of death by the Principal Magistrate’s Court, Kwale, for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The appeal was based on two main grounds, namely whether the identification of the appellant was safe and reliable and whether the trial and the first appellate courts had misapplied the doctrine of recent possession.

The particulars of the offence were that on 10<sup>th</sup> April 2012, at Diani in Kwale County, the appellant, while armed with a dangerous weapon, namely a knife, robbed **Peter Mwalimu Charo (PW1)** of a Nokia mobile phone, valued at Kshs 2,800/- and cash Kshs 400/- and at or immediately before or

immediately after the robbery threatened to use actual violence on the said victim. He also faced an alternative charge of handling stolen goods contrary to **section 322(2)** of the Penal Code, it being alleged that on the same date and place, otherwise than in the course of stealing, he dishonestly received PW1's Nokia phone knowing or having reason to believe that it was stolen property.

The evidence that was adduced by the prosecution in support of the charge was as follows. On the material day at about 10.30 pm, PW1 was working in his employer's bakery when the appellant knocked on the door. Assuming that it was a customer, PW1 opened and welcomed him in. The two had previously been employed at the bakery and had worked together for 3 months. As PW1 turned to wash his hands, the appellant suddenly drew a knife and after threatening him, tied up PW1 with a rope. The appellant then robbed PW1 of his phone and Kshs 400/-. As he started packing bread and soda in a bag, PW1 raised an alarm, forcing the appellant to flee with the phone and cash.

It was PW1's evidence that the appellant had attempted a disguise by wearing a coat, a cap and a pair of goggles (shades), that nevertheless PW1 easily recognized him, having worked together previously; and that the bakery was well lit. **PW2, John Shavanga Mbengi**, the owner of the bakery, confirmed that he knew the appellant and that he had employed him together with PW1. Indeed it was PW2 who led the police to the appellant's house next day where PW1's mobile phone was recovered bearing the appellant's sim card.

Put on his defence, the appellant gave an unsworn statement and denied committing the offence. His evidence was that the police, in the company of PW1 and PW2, arrested him the day after the robbery while sleeping at his house in Ukunda. He further claimed that PW2 owed him Kshs 9,000/- and when he went to collect it, PW2 refused to pay him and instead threatened him. As far as he was concerned, the case was fabricated so that PW2 could avoid paying him the money due to him. As regards the phone, the appellant claimed that it was his.

Although the trial court was not satisfied that PW1 had proved beyond reasonable doubt that he owned the phone, nevertheless the court was satisfied that he had properly recognized the appellant with the aid of the lights in the bakery and the fact that the two had worked together in the same bakery for a period of three months.

As we embarked on hearing this appeal, our attention was drawn to the fact that the judgment of the High Court was not signed. We called for the original record and confirmed that it was signed by only one of the two judges who heard the appeal in the High Court. When we invited Mr. Kimani, learned counsel for the appellant and Mr. Monda, learned counsel for the respondent, both proposed that in the circumstances of this appeal we should consider remitting the appeal to the High Court for re-hearing.

We have anxiously considered this appeal. This Court has consistently held that a judgment of the High Court, which is not signed by the presiding judge or both presiding judges where the appeal is heard by two judges, is a nullity. In **LOKWACHARIA V. REPUBLIC [2005] 2 KLR 379**, where, like in the present case the judgment was not signed by one of the judges who heard the appeal, this Court stated:

***“The judgment of the High Court appealed from was dated but not signed by one of the two judges of the High Court. That means there was no valid judgment of the superior court before us. We are therefore, precluded from considering the merits or demerits of the said judgment of the superior court. That being the position, we order that the appellant's appeal to this Court be and is hereby allowed and we further order and direct that the appellant's appeal to the High Court be heard de novo before a different bench of two judges of that court.”***

(See also **FERDINAND INDAGASI MUSEE & ANOTHER V. REPUBLIC, CR. APP. NOS. 370 & 372 of 2010 (MSA)**; **JEFFERSON KALOMA MLEWA V. REPUBLIC, CR. APP. NO. 528 of 2010 (MSA)**; **PAULINA AMANA V. REPUBLIC, CR. APP. NO. 640 of 2010 (ELD)** and **PETER MWANGI WAITHAKA V. REPUBLIC, CR APP NO. 3 of 2013**).

The appellant was convicted on 26<sup>th</sup> April 2013 about three years ago. In the circumstances of this

appeal, we agree with counsel for the parties that the most appropriate order to make is for a re-hearing of the appeal pursuant to **section 361(2)** of the Criminal Procedure Code. Accordingly, we allow the appeal and direct that a different bench of the High Court re-hears the same. In the meantime, we order that the appellant shall remain in prison custody until he is presented before the High Court within fourteen (14) days from the date hereof, so that a date for the re-hearing of his appeal is set. The re-hearing of the appeal should be expedited and prioritized. The deputy registrar shall bring this judgment to the attention of the resident judges of the High Court in Malindi and Mombasa. It is so ordered.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of April, 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**