



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 50 OF 2015

BETWEEN

MWAMBEGA ALLAN MWAJIMBO.....APPELLANT

ND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala and Odero, JJ.)

dated 14th May 2010

in

H.C.C.R.A. No. 126 of 2004)

JUDGMENT OF THE COURT

In **LOKWACHARIA V. REPUBLIC** [2005] 2 KLR 379, this Court expressed itself as follows, regarding the consequence of a judgment of the High Court that is not signed by the presiding officer or both presiding officers where the appeal is heard by two judges:

“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 position has been reiterated in a number of subsequent decisions, among them **FERDINAND INDAGASI MUSEE & ANOTHER V. REPUBLIC**, CR. APP. NOS. 370 & 372 of 2010 (MSA) and **PETER MWANGI WAITHAKA V. REPUBLIC**, CR APP NO. 3 of 2013).

The judgment of the High Court at Mombasa (***Azangalala, J.***,) as he then was, and ***Odero, J.***) dated 14th May 2010 upon which the appeal before us is purportedly founded, is not signed by either of the judges. When we were about to embark on the hearing of the appeal, our attention was drawn to the irregularity. Upon calling for the original record, we confirmed that indeed the judgment was not signed.

Whatever it is worth, the background to this appeal may be summarized as follows. The appellant, Mwambega Alfán Mwajimbo was charged before the Senior Resident Magistrate's Court, Kwale jointly with his brother Chiguzo Alfán Mwajimbo with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 11th September 2003 at Chongomu Village, Kwale, while armed with *rungus* and stones, they robbed Charles Mwero Mwachi (PW1) of a bicycle and short trousers all valued at Kshs 4,500/-, and immediately before or immediately after the said robbery, they injured PW1.

The appellant was separately charged with an alternative count of handling stolen goods contrary to section 322(1) of the Penal Code. As regards that count, it was alleged that on 17th October 2003 at Kifyonzo village, Kwale, otherwise than in the course of stealing, the appellant dishonestly handled a pair of short trousers knowing or having reason to believe it to be the stolen property of PW1.

The rather straightforward prosecution case was that at about 8.30 pm on the material day, PW1 was riding his bicycle from Kinango to Bura. He was carrying on the bicycle his pair of short trousers. As he overtook two people on the road, he was suddenly hit hard on the head with a *rungu* and fell off the bicycle. One of the assailants got a hold of the bicycle and rode off into the night with his accomplice in hot pursuit on foot.

When PW1 recovered, he reported the incident at Kinango Police Station the same night, was issued with a P3 form and treated at Kinango Hospital. **Dr. Nyenge Immanuel Muindi, (PW4)** confirmed in court the injuries sustained by PW1, which he classified as harm and attributed to a blunt object.

Matters took a lull until 17th October 2003 when PW1 spotted **Juma Thomas (PW2)** riding his stolen bicycle. PW1 easily identified the bicycle from the pedals and chain, which he had repaired himself. He had also personally painted some parts of the bicycle and welded others. When confronted, PW2 stated that the bicycle belonged to the appellant's brother, who had given it to PW2 to get some cigarettes at Kinango. PW2 eventually led the police to the appellant's brother who in turn informed the police that the bicycle belonged to the appellant.

Thereafter the brother led the police to the appellant's house where the appellant, who was found wearing PW1's stolen trousers, claimed to have bought the bicycle from a person that he did not know. Upon searching his house, the police found handle bars which had been removed from PW1's bicycle.

Put on their defence, the appellant and his co-accused gave unsworn statements and called no witnesses. The appellant stated that he had bought the bicycle from a person who he did not disclose and that he had allowed his brother to use it. As for the short trousers, he also claimed to have bought them for Kshs 20/-. His co-accused explained that he had borrowed the bicycle from the appellant and had sent PW2 with it to buy cigarettes when he was arrested.

On 27th March 2004, the trial magistrate convicted the appellant for robbery with violence on the basis of the doctrine of recent possession. His co-accused was acquitted. Aggrieved by the judgment, the appellant lodged an appeal in the High Court, which was dismissed on 14th May 2010, leading to the purported appeal now before us.

Before we embarked on the hearing of the appeal, **Mr. Monda**, learned Assistant Director of Public Prosecutions, drew our attention to the fact that the judgment of the High Court was not signed. He urged us to order a re-hearing of the appeal by the High Court as there was no competent appeal before us. For his part, **Mr. Mayaka**, learned counsel for the appellant urged us not to order a re-hearing of the appeal because the appellant had been incarcerated for close to 13 years.

We have anxiously considered this matter. It is common ground that the unsigned judgment is a nullity on which no appeal can be founded. It is the signature(s) of the presiding judge(s), which authenticate(s) the judgment. The only issue here is whether we should order a re-hearing of the appeal. In **FERDINAND INDAGASI MUSEE & ANOTHER V. REPUBLIC**, (*supra*) this Court stated that the principles

applicable in determining whether or not to order a re-hearing of the appeal by the High Court are the same as those involved in a re-trial.

Whether or not to order a re-trial or a re-hearing of the appeal depends on the facts and circumstances of each case. A re-hearing will be order where the interests of justice so demand. Among the factors to be considered include whether a re-trial will occasion the appellant an injustice, whether there are illegalities or defects in the original trial, the length of time that has elapsed since the arrest and trial of the appellant, whether the mistake necessitating rearing was of the prosecution's making or of the courts, and availability of witnesses, among others.

In this case, the mistake necessitating a re-hearing was exclusively of the court's making. No witnesses will be required since a re-hearing in the High Court will entail re-evaluation and re-appraisal of the evidence recorded by the trial court. 13 years have elapsed since the trial began. The appellant was convicted of a capital offence whose prescribed sentence is death. *Prima facie* there are no obvious illegalities or irregularities in the trail, which stand out. In the circumstances of this case, a re-hearing commends itself.

Accordingly, we allow the appeal pursuant to **section 361(2)** of the Criminal Procedure Code and direct that a different bench of the High Court re-hears the appeal. 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 in light of the period that has so far elapsed.

Finally, the deputy registrar shall bring this judgment to the notice of the resident judges of the High Court in Mombasa and Malindi to ensure that from now henceforth, all judgments are duly dated and signed as required by **section 169** of the **Criminal Procedure Code**.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

