



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 494 OF 2010

BETWEEN

SILAS KARIUKI NGARE.....1<sup>ST</sup> APPELLANT

STEPHEN MAINA MURIITHI.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated 22<sup>nd</sup> September 2010*

*in*

*H.C.C.R.A. No. 278 of 2006)*

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JUDGMENT OF THE COURT

The two appellants, **Silas Kariuki Ngare** (1<sup>st</sup> appellant) and **Stephen Maina Muriithi** (2<sup>nd</sup> appellant) were jointly charged, together with one **Stephen Mwaniki Ndungu** before the Chief Magistrates Court, Mombasa, with robbery with violence contrary to **section 296(2)** of the **Penal Code**. The three also faced an alternative count of handling stolen property contrary to **section 322(2)** of the Penal Code. Separately, the 2<sup>nd</sup> appellant and the said Stephen Mwaniki Ndungu were charged with one count each of failing to apply to be registered contrary to **section 14 (1)(g)** of the **Registration of Persons Act**.

As regards the offence of robbery with violence, the particulars were that on 14<sup>th</sup> June 2005 at Tudor, Mombasa, and while armed with dangerous weapons, namely pistols and a knife, the three jointly robbed **Stephen Onyango Ochola (the complainant)** of a compressor machine, bicycle, wrist watch, a spanner, bunch of keys and cash Kshs. 425/- all valued at Kshs 21,125 and at or immediately before or immediately after the time of the said robbery threatened to use actual violence on the complainant. On the offence of handling stolen property, the particulars stated that on 18<sup>th</sup> June 2005, at Kiziwi, Mombasa, otherwise than in the course of stealing, the three jointly and dishonestly retained a compressor machine knowing or having reason to believe it to have been stolen.

The prosecution called 5 witnesses in an endeavour to prove its case. The gist of that case was that on 14<sup>th</sup> June 2005, at about 3.30 pm, the complainant was riding a bicycle on his way home. On the bicycle he was carrying a compressor machine, which he had borrowed from **Peter Okemo Okumu (PW2)**, for spray painting. Near Tudor Day Secondary, he was overtaken by a pick-up vehicle, which stopped suddenly and out jumped the two appellants, one armed with a pistol and the other a knife. They proceeded to rob him of the property particularized in the charge sheet before loading the same in the vehicle and driving off. The complainant reported the robbery at Makupa Police Station.

Barely 4 days later, on 18<sup>th</sup> June 2005, the appellants hired their co-accused, a handcart pusher, to transport a compressor machine to a garage owned by **Joseph Odhiambo Wamdai (PW4)** to whom they offered the same for sale at Kshs 15,000. Unknown to the appellants, PW4 was a friend of the complainant; was familiar with the compressor; and was aware that it had been stolen from the complainant. He feigned interest in purchasing it, but instead sent for the police who arrested the appellants at his garage. The complainant was able to identify the two appellants in an identification parade, but not the co-accused.

Put on their defence, the appellants gave unsworn statements of defence and denied committing the offence, while their co-accused gave sworn evidence and stated that he had been hired by the appellants to transport the compressor for them and was arrested whilst he waited to be paid for his labour. The co-accused was cross-examined by the prosecutor, but not by the two appellants, although his defence had incriminated them.

On 11<sup>th</sup> October 2006, the trial magistrate acquitted the co-accused but convicted the appellants of robbery with violence and sentenced them to death. The charge under the Registration of Persons Act was dismissed.

Aggrieved by the judgment, the appellants filed an appeal in the High Court, which was heard and dismissed, by **Azangalala, J.** (as he then was) and **Odero, J.** on 22<sup>nd</sup> September 2010, thus precipitating this second appeal.

Although the appellants' supplementary grounds of appeal filed by their learned counsel, **Mr. Obaga** on 22<sup>nd</sup> October 2015 raise 5 issues, the only issue that we find necessary to address in this appeal is the failure by the two judges of the High Court to sign their judgment. When this issue came to our notice in the course of hearing the appeal, we called for the original handwritten record and confirmed that the judgment was signed only by Azangalala, J. Odero, J. did not sign the same.

Both Mr. Obaga and **Mr. Monda**, learned Assistant Director of Public Prosecutions, were in agreement that an unsigned judgment is a nullity and cannot therefore form the basis of a competent appeal. They suggested that in the circumstances the best cause of action is to order a re-hearing of the appeal.

We reiterate that this Court has in a long line of consistent decisions held that a judgment, which is not signed by the presiding judge or judges as required by **section 169(1)** of the **Criminal Procedure Code**, is a nullity and an appeal cannot be based on it. In **LOKWACHARIA V. REPUBLIC [2005] 2 KLR 379**, in an appeal similar to the present one, this Court stated as follows:

***“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.”***

The same conclusion was reached in **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.*** In our view, the signing of a judgment is not a mere formality. It is the signature(s) of the judge or judges, which authenticates the judgment. And it is for that precise reason that section 169(1) of the Criminal Procedure Code has been interpreted as a mandatory requirement.

In ***FERDINAND INDAGASI MUSEE & ANOTHER V. REPUBLIC, (supra)*** the Court explained 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 retrial. The Court concluded:

***“We think that this is a proper case for the re-hearing of the appeal as the ends of justice demand it. The mistake, error or inadvertence that resulted in one Judge not signing the judgment can neither be blamed on the prosecution nor the appellants. It was entirely of the court's own making.***

Having duly considered the issue, the order that best commends itself to us, in the circumstances of this appeal, is to allow the appeal and direct, pursuant to **section 361(2)** of the Criminal Procedure Code, that the appeal be re-heard in the High Court by a different bench of two judges. We further order that in the meantime, the appellants shall remain in prison custody until they are presented before the High Court within fourteen (14) days from the date hereof, so that a date for the re-hearing of their appeal is set. In view of the fact that the trial court convicted the appellants in October 2006, the re-hearing of their appeal must 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 so that they may ensure that henceforth all judgments are signed and dated as by law required. 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**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**