



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM): MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 110 OF 2008**

**BETWEEN**

**JAMES OCHOMO ODIONYI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from judgment of the High Court of Kenya at Busia (GBM Kariuki, (as he then was) and Ombija, JJ) and delivered by Mbogholi Msaga J on dated 2nd July 2008,*

*in*

*H.C.C.R.A No. 28 & 190 of 2007)*

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**JUDGMENT OF THE COURT**

***The appellant, James Ochom Odiony, and his co accused Lawrence Emjong Ikapel*** were charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of the offence are that on the night of 18th and 19th November 2001 at Adungosi area in Teso district within the former Western Province while armed with an AK 47 assault rifle and clubs, jointly with others not before the court robbed Charles Opemi Oyala of Kshs. 3,855/- one jacket, open shoes and t-shirt all valued at Kshs. 5,205/- and before or after such robbery used actual violence to ***Charles Opemy Oyala PW1 (Charles)***.

The appellant and co accused pleaded not guilty.

Upon consideration of the entire evidence, the learned trial magistrate having found the charges against the appellant and co accused were proved to the required standard, convicted and sentenced them to death as by law prescribed.

The appellant and co accused were aggrieved by the trial court's decision and filed an appeal in the High Court against both the conviction and sentence.

The appeal in the High Court was heard by GBM Kariuki (as he then was) and Ombija, JJ, who dismissed

the appeals and upheld the conviction and sentence.

The appellant was further aggrieved by the decision of the High Court and lodged this appeal which is before us on various grounds, which we need not determine at this juncture. This is for reasons that, though it was not canvassed as one of the grounds of appeal, it cannot be overlooked that the judgment of the High Court was neither dated nor signed by the judges that wrote the judgment nor by the judge that pronounced the decision.

This is contrary to the specific requirements of **Section 169 (1)** of the **Criminal Procedure Code** that stipulates;

***“Every such Judgment shall, except as otherwise expressly provided by this Code, be written under the direction of the presiding officer of the court in the language of the court, and shall contain point or points for determination, the decision thereon and the reason for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.” (emphasis ours)***

Of significance is that the provision is couched in mandatory terms, and more particularly the requirement that, the judgment be dated and signed by the presiding officer that pronounced it. As such without this pre requisite of the judgment being fulfilled, we are of the view that the judgment appealed from herein is rendered a nullity.

As to whether to order a retrial, in the case of ***Ekimat vs Republic (2005) 1 KLR, 182*** this Court stated;

***“A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”***

Without going into the merits or circumstances of the case, we think it necessary to order that, in the interest of justice, the appeal be referred back to the High Court for hearing de novo. We direct that it be heard on a priority basis. The appellant shall in the meanwhile remain in custody.

Orders accordingly.

***Dated and delivered at Kisumu this 16<sup>th</sup> day of December, 2016.***

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is  
a true copy of the original

**DEPUTY REGISTRAR**