IN THE COURT OF APPEAl

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 27 OF 2014

BETWEEN

JOHN KABIRO KIMONJO …….....APPELLANT

AND

REPUBLIC..... ……RESPONDENT

(Appeal from the Conviction of the High Court of Kenya at Nyeri (Ougo & Abuodha, JJ.) Dated 19th December, 2013

In

H.C. Cr. C. NO. 107 OF 2011

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JUDGMENT OF THE COURT

1. The appellant **John Kabiro Kimonjo** was arraigned before the Senior Principal Magistrate's Court at **Murang'a** on three counts of the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The 1st count alleged that on the 9th day of May, 2010 at **Ngerene Thobotho** village **Kahuro** Sub location jointly with two others being armed with a *panga*, an axe and a *rungu* he attempted to rob **Anthony Macharia Kariuki** of money and at or immediately after the time of such act used actual violence to the said **Antony Macharia Kariuki**. In count 2, he faced a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code, in that on the same date and place he assaulted **Simon Mwangi Kariuki** thereby occasioning him actual bodily harm. In count 3, the offence was being in possession of cannabis contrary to **section 3(i) (ii)** of the Narcotic Drug and Psychotropic Substance Control Act No. 4 of 1994, in that on the same date at **Kiumba Village** in **Murang'a** District within Central Province he was found in possession of one roll of cannabis.
2. The evidence tendered was that on the material date and time PW1 **Antony Macharia Kariuki (Antony)** and PW2 **Simon Mwangi Kariuki (Simon**) who were brothers were asleep in their respective houses but in the same compound about 50 meters apart. At about 3.00 am **Antony** heard a commotion. He raised an alarm. **Simon** responded. **Simon** left for the brother's house armed with a *jembe* handle. He met the appellant armed with an axe, a *panga* and a torch. **Simon** hit the torch and axe which fell. He then grabbed the appellant wrestled him down and disarmed him. He then called out for **Antony** who came armed with a *rungu* according to

Antony, unarmed according to **Simon.** The two struggled with the appellant, subdued and tied him on an electric pole. Neighbours responded immediately according to **Antony,** but according to **Simon**, they came the following morning. PW4 **Mathew Manyeki Mwangi** the Area Assistant Chief received the report of the attempted robbery through a mobile phone and immediately relayed the report to the Area Police Station. PW5 **Muthee Mbui** a Police Officer in the company of others left for the scene and on arrival they found the appellant at the scene with injuries. The appellant led them to his house where they recovered one roll of cannabis the subject of count 3. He also led them to the arrest of the other co-accused who were released after trial. When put to his defence the appellant pleaded his innocence alleging that the two brothers had invited him for a drink at their local market bar which extended to their home. It turned sour when he declined to sign a sale of land agreement in their favour hence the fabrication of the charges against him.

3. The trial magistrate **E. J. Osoro (SRM)** believed the prosecution version of the story, dismissed the appellants defence, found him guilty on all the three counts, convicted him and sentenced him to death on count 1, two (2) years imprisonment on count 2 and two (2) months imprisonment on count 3. The last two sentences were suspended on account of the first sentence which carried the death penalty.
4. The appellant was aggrieved by that conviction and sentences and he appealed to the High Court which in its judgment of 19th December. 2013 (**Ougo, Abuodha JJ**) dismissed the said appeal. He is now before us as a second appeal Court raising four (4) supplementary grounds of appeal one of which was abandoned. He complains that the 1st appellate Court erred in law:-

    in upholding the conviction of the appellant without first critically examining and evaluating the evidence adduced before the trial Court and arriving to its own conclusion.

    in not finding that the prosecution had not proved its case beyond reasonable doubt.

    in not finding that it lacked jurisdiction to hear the matter as one of the Judges was at the time an Industrial Court Judge.

5. In his submissions, Mr. **Muchiri Wa Gathoni** learned counsel for the appellant argued the third and most profound of those grounds asserting that the 1st appellate Court had no jurisdiction to dispose of the appeal as it was not properly constituted for the reason that one of the Judges forming that bench, having been appointed as an Industrial Court Judge, had no mandate to hear and determine an appeal arising from criminal proceedings. Although learned counsel fully argued the appeal on other grounds, we think it is prudent to dispose of the jurisdictional ground in *limine*.
6. "**By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court of tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing, and Jurisdiction must be acquired before Judgement is given. See Owners of the Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd.** [1989] KLR 1 at page 14.

7. In view of the above principle, it is imperative for us to determine whether the High Court Bench that heard the appeal, which comprised an undisputed constitutionally appointed Industrial Court Judge, was properly seized of that appeal. This is not the first time such issue has arisen. In a

recent decision of this Court, differently constituted, the case of **Karisa Chengo & 2 others vs. Republic** 2015 eKLR, the Court of Appeal sitting in Malindi was invited under similar circumstances as presently before us to construe and interpret **Articles 161(2), 162(1)(2)(b), 165(3)(5) 166** and **259** of the Constitution on the one hand, and section **359(1)** of the Criminal Procedure Code, **section 4** and **12** of the Industrial Court Act and then **section 43** of the Interpretation and General Provisions Act Cap 2 Laws of Kenya. The Court carried out an in depth analysis of the above provisions. We find no need to reproduce these. A summary of the highlights of that analysis will suffice. The Court found that Courts are creatures of the Constitution; the same Constitution has provided for the appointment of Judges and their qualifications; that a reading of the relevant Constitutional provisions leaves no doubt that the qualifications for the Superior Court Judges are almost the same; and the Constitution envisaged that there would be Superior Court Judges who would possess different professional experiences. As for the specialized Courts, the Court found that Parliament envisaged that Judges in those Courts would have additional qualifications in terms of experience which Judges of the High Court do not necessarily need to have; the general rule is that what Parliament has enacted in a long process should be deemed to be constitutional unless proved and declared otherwise; the law therefore, envisages that Judges of the specialized Courts should be different from the Judges of the High Court with different jurisdictions though having the same status; and that where a Judge of a specialized Court is appointed to such a Court that is where his/her jurisdiction lies. On the basis of the above reasoning among others, the Court declared a criminal appeal wherein a Judge of a specialized Court had participated, as a nullity and re-routed the matter back to the High Court for re-hearing before a properly constituted High Court bench.

8. The question we have to ask ourselves is whether we should follow the reasoning in that appeal or, as we are entitled to do, take a different route. **Sir Charles NewBold, P**. in the decision in **C.A. Dodhia vs. National & Grindlays Bank. Ltd** [1970] EA 195 at page 199 paragraph D-I observed as follows:

> **"I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the Courts were free to arrive at a decision without reference to any previous decisions**
>
> **…**
>
> **"For these reasons I am satisfied that as a matter of judicial policy this Court … while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course, exercise, this power only after careful consideration of the consequences of doing so and the circumstances of the particular case, but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the Court at the time it comes up for consideration."**

9. The **Dodhia** case was affirmed by this Court in a five Judge bench decision in the case of **Jas Bir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others** [2007] eKLR. There is jurisdiction therefore to depart from a previous decision of this Court whenever circumstances so dictate. The provisions of law we are enjoined to construe herein to resolve the above jurisdictional issue are the same as those recently construed by this Court in the above cited decision. No new circumstances have been pointed out to us in the appeal before us to compel us to revisit and re interrogate afresh those same provisions. Our information is that the matter is currently before the Supreme Court for consideration and we shall leave it at that.
10. For the reasons given above, we uphold the appellant's objection that the High Court Bench as constituted at the time it heard and determined his appeal was not in accordance with the law. We find no reason to perpetuate a nullity, for, as stated in the case of **National Bank of Kenya Ltd. Vs. Ndolo Ayah** [2009] KLR 762.

> "**It is good policy that Courts should enforce the law and avoid perpetuation of**

illegalities and nullities"

11. The above being the position we have no jurisdiction to interrogate issues raised on the merits of the appeal since in reality it is non existent. We down our tools, declare the decision of the High Court giving rise to the purported appeal before us a mistrial. We direct that the appellant's appeal to the High Court be heard afresh expeditiously any properly constituted bench other than **Ougo** and **Abuodha JJ**. Orders accordingly.

Dated and Delivered at Nyeri this 15th day of July, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR