



IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & OKWENGU, JJA)

CRIMINAL APPEAL NO. 26 OF 2014

BETWEEN

EUTICUS MUCHEMI GATUNDU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Nyeri (Uogo & Abuodha JJ.) dated 6th February, 2014 in

(H. C. Cr. A. No.3of 2004)

JUDGMENT OF THE COURT

1.The appellant **Euticus Muchemi Gatundu** was arraigned before the Senior Principal Magistrate's Court at **Mukurweini** in Criminal Case No. 78 of 2012 on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code, one count of rape contrary to **Section 3(1) (a) (b) (3)** of the Sexual Offences Act No. 3 of 2006, one count of Sexual assault contrary to **Section (1) (1) (a) (1) (2)** of the Sexual Offences Act No 3 of 2006 and lastly one count of having in possession a firearm without a firearm certificate contrary to **Section 34(2)** of the Firearms Act Cap 114 Laws of Kenya.

2. The particulars of the charge in count 1 were that the appellant on the 12th day of January 2012 at **Witima Trading Centre of Karima** Location in **Nyeri** South District within Nyeri County jointly with others not before court while armed with offensive weapons namely iron bars robbed Grace Ruguru Ndirangu of one television set make Sonilex, one DVD make sony, one mobile phone make Nokia 1200 and cash Ksh.1620 all valued at Ksh.21,120/- and at or immediately before and immediately after the time of such robbery used personal violence to the said **Grace Ruguru Ndirangu**. In count 2 the particulars stated that on the same date month, and place the appellant jointly with others not before court while armed with offensive weapons namely iron bars robbed **B W N** of one mobile phone make Nokia 1986 valued at Ksh.4, 000/- and at or immediately before and immediately after the time of such robbery used personal violence to the said **Grace Ruguru Ndirangu** (sic). In count 3, the particulars were that on the same date, same month and at the same place the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **B N** without her consent. In count 4, the appellant on the same date same month and the same place intentionally and unlawfully used his fingers to penetrate the vagina of **B W N**. Lastly in count five (5) that the appellant on the same date, same month and place was found being

in possession of one Tokalev pistol with no serial number without a licence from the chief fire arm licensing officer, firearm bureau of the Republic of Kenya.

3. The appellant denied all the counts but was tried and convicted in count 1, 2 and 3. Aggrieved by that decision, he appealed to the High Court vide Criminal Appeal No. 3 of 2013, which was heard and decided by **Ougo** and **Aboudha JJ** on the 6th February 2014. The appeal was dismissed in its entirety. He now comes before us on a second appeal in which he put forward six (6) supplementary grounds of appeal in addition to his original memorandum of appeal.

4. The appeal was fully argued by learned counsel for the appellant, **Mr. H.K. Mahan** and a full response was equally made by learned ADPP **Mr. J. Kaigai**. The court however raised a jurisdictional issue and called on both counsel to make submissions on it and we must therefore decide that issue *in limine*. Simply put, the issue was that the appeal before the High Court was heard by two Judges, one of whom was Abuodha J. who, as is common ground, was a judge of the Employment and Labour Relations Court. Was the bench therefore, legally constituted to hear the first appeal?

5. **Mr. Mahan** had no doubt that there was no jurisdictional issue since both Judges who sat to hear the appeal had powers of the High Court to hear and determine it. On the other hand **Mr. Kaigai** argued that the first appellate court had no jurisdiction on account of participation by **Abuodha J.** in the proceedings. That was so because Abuodha J. was specifically appointed under the Constitution to handle Employment and Labour Relations cases, and not matters strictly reserved for the High Court. On that account **Mr. Kaigai** sought an order remanding the appeal to a properly constituted 1st appellate court for the rehearing of the appeal *denovo*.

5. As stated earlier, this is an issue we must decide on before we examine the merits of the appeal. Jurisdiction is everything, as this court and the Supreme Court have stated before, and the court downs its tools once it is satisfied that it has none.

“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 Judgment is given. See Owners of the Motor Vessel “Lillian S” vs. Caltex Oil Kenya Ltd. [1989] KLR 1 at page 14.

6. It is not the first time such an issue has arisen before this Court. In a recent decision of this Court. the case of **Karisa Chengo & 2 others versus Republic 2015 eKLR**, this Court differently constituted and sitting in Malindi under similar circumstances as presently before us had occasion 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 as approved by this Court in **John Kabiro Kimonjo versus Republic Nyeri CRA 27 of 2014 (UR)** will suffice. The Court in the **Karisa Chengo Case** (Supra) 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 in the **Karisa Chengo** case (supra) declared a criminal appeal trial 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.

7. As reasoned in the **John Kabiro Kimonjo** case (supra) we stand guided by the observations of **Sir Charles Newbold, P.** in **C.A. Dodhia vs. National & Grindlays Bank. Ltd [1970] EA 195** at page 199 paragraph D-I 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.”

8. The **Dodhia** case was affirmed by this Court in a five Judge bench decision in the case of **Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others [2007] eKLR**, as observed in the **John Kabiro Kimonjo** case (supra) that there is jurisdiction to depart from a previous decision of this Court whenever circumstances so dictate. The provisions of law we are confronted with and which we are enjoined to construe to resolve the jurisdictional issue the respondent herein agrees exists are the same as those recently construed by this Court in the **Karisa Chengo** case (supra) and as approved by this court in the **John Kabiro Kimonjo** case (supra). On the basis of the record before us we find no new circumstances that can compel us to revisit and re-interrogate those same provisions. Moreover as per information revealed in the **John Kabiro Kimonjo** case (supra) that the matter is currently before the Supreme Court for consideration, until the Supreme Court rules otherwise, we stand by the position previously taken by this Court in the above two mentioned cases.

9. For the reasons given above, we uphold the state’s view that the High Court Bench as constituted at the time it heard and determined the appellant’s appeal was not constituted in accordance with the law. The disposal of the appeal was therefore a mistrial if not a nullity. We find no reason to perpetuate a nullity, we fully adopt the stand taken in the case of **National Bank of Kenya Ltd. Vs. Ndolo Ayah [2009] KLR 762** thus:-

“It is good policy that Courts should enforce the law and avoid perpetuation of illegalities and nullities”

10. 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 before any properly constituted bench other than **Ougo** and **Abuodha JJ.** Orders accordingly.

Dated and Delivered at Nyeri this 16th day of December, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

H.M. OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR