



IN THE COURT OF APPEAL

AT NYERI

CORAM: NAMBUYE, KOOME & KIAGE, (JJA)

CRIMINAL APPEAL NO. 45 OF 2014

BETWEEN

PETER NJOROGE MURIITHI.....1ST APPELLANT

GEORGE MATHU KURIA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya Nyeri

(J. Wakiaga & A. Ombwayo, JJ) dated 22nd November, 2013

in

(H. C. Cr. A. No. 241 of 2010)

JUDGMENT OF THE COURT

1. The appellants herein **Peter Njoroge Murithi** and **George Mathu Kuria** were jointly arraigned in the Chief Magistrates Court at Nyeri charged with the offence of Robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that on the 11th day of August, 2009 at Ruring'u estate in Nyeri South District within Central Province they jointly robbed Joseph **Kiilu Mulwa** of (sic) mobile phone (sic) make USB valued at Kshs.4,800.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said **Joseph Kiilu Mulwa**.

2. The first appellant **Peter Njoroge Muriithi** faced alone an alternative count of handing stolen property contrary to **section 322(2)** of the Penal Code. The particulars read that **Peter Njoroge Muriithi** on same day and place other than in the course of stealing he handled the said mobile USB knowing or having reason to believe it to be stolen property.

3. The appellants denied the charges prompting the trial in which the prosecution called a total of seven (7) witnesses in support of its case, while the appellants were the sole witnesses for their defences. At the close of the trial **M. Nyakundi SRM** found them guilty of the main offence, convicted them and sentenced them to death.

4. The appellants were aggrieved by that decision and appealed separately to the High Court. The two appeals were consolidated and heard together resulting in the judgment of **J. Wakiaga** and **A. Ombwayo, JJ** of the 22nd day of November, 2013 impugned herein, in which the learned Judges dismissed them.

5. The appellants were aggrieved by that decision. They are now before us on a second appeal raising three (3) grounds of appeal each. On the date of the hearing, **Mr. Gathiga Mwangi** learned counsel appeared for both appellants while **Mr. J. Kaigai** the learned ADPP appeared for the State.

6. **Mr. Mwangi** raised a jurisdictional issue going to the root of the appeal before us. It is his argument that the 1st appellate court bench was not properly constituted and was therefore not competent as **Ombwayo, J**, substantively appointed as an Environment and Land Court Judge had no jurisdiction to hear and determine criminal appeals. **Mr. Mwangi** relied on the case of **Karisa Chengo & 2 others versus Republic** (2015) eKLR. A Bench of this Court sitting in Malindi held that a judge specifically appointed for specialized courts had no jurisdiction to sit on Criminal matters. In this regard, he invited us to politely down our tools, declare the decision of the said 1st appellate court a nullity and remit this matter to the High Court for the appellant's appeals to be reheard before another properly constituted High Court bench.

7. **Mr. J. Kaigai** fully associated himself with **Mr. Mwangi's** submission and asked us to oblige to that request as it was the correct position in law. He also relied on the same **Karisa Chengo case** and reminded us that this Court, differently constituted, has in **John Kabiro Kimonjo versus Republic Nyeri CRA 27 of 2014 (UR)** and **Euticus Muchemi Gatundu versus Republic Nyeri Criminal Appeal No.26 of 2014 (UR)** upheld the jurisdictional objection raised and declared the 1st appellate courts' decisions a nullity.

8. This being a jurisdictional issue we must decide it in limine. Jurisdiction is everything, as this Court and the Supreme Court have stated before, and a court downs its tools once it is satisfied that it has none. Nyarangi JA. famously put it thus:-

“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.

9. In **Karisa Chengo & 2 others versus Republic (Supra)** the Court 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. We find no need to reproduce these. In **John Kabiro Kimonjo versus Republic Nyeri CRA 27 of 2014 (UR)** this Court followed the same reasoning and that law 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. A criminal appeal where a specialized Court Judge had participated is a nullity and must be remitted to the High Court for re-hearing before a properly constituted bench.

10. Neither party has urged us to depart from the **Karisa Chengo** case nor have we reason not to. We endorse 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.”

11. 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.** We find no new circumstances that can compel us to revisit and re interrogate those same provisions.

12. For these reasons we agree with both counsel that the High Court bench was not constituted in accordance with the law. The hearing and disposal of the appeal was therefore a nullity which we cannot condone or perpetuate.

13. In the result, we uphold the jurisdictional objection and direct that the appellant’s appeals to the High Court be heard afresh expeditiously before any properly constituted bench excluding **A. Ombwayo, J.** Orders accordingly.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR