IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 528 OF 2010

BETWEEN

JEFFERSON KALOMA MLEWA ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Malindi (Omondi, J.) dated 23rd November, 2010

in

H.C.CR.A. NO.54 OF 2009)

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JUDGMENT OF THE COURT

The appellant, ***Jefferson Kalama Mlewa*** was charged with the offence of Robbery with Violence contrary to ***section 296(2)*** of the Penal Code. The particulars in the charge-sheet read to the appellant were that:-

> *"On the 19th day of April 2008 at Msabaha village in Malindi Location within Malindi District of Coast Province while armed with a dangerous weapon namely a knife robbed Nicholas Mweni John a motorcycle registration number KBB 261E make Hadjin valued at Kshs. 72,000/- and at or immediately after the time of such robbery threatened to use actual violence against the said Nicholas Mweni John."*

The appellant returned a plea of not guilty before the Senior Principal Magistrate at Malindi (***B.T. Jaden*** as she then was) and soon thereafter his trial commenced in earnest. The case for the prosecution was that on 19th April, 2008 at about midday, the complainant, ***Nicholas Mweni John (PW1)*** was operating ***boda boda*** business using motor-cycle registration ***Number KBB 261E***. A passenger who turned out to be the appellant approached him and requested to be ferried to ***Matsangoni*** area. The agreed fee was ***Kshs. 700/-***. They commenced the journey and as they approached ***Msabaha,*** the appellant asked him to divert into a minor road as he wanted to pick a message from his sister. The complainant complied. The complainant soon thereafter stopped to attend to a call of nature and also to read a message on his mobile phone. When done and as he turned back he saw the appellant armed with a knife who proceeded to demand that he hand to him the money and the mobile phone. When the complainant refused, the

appellant approached him menacingly with the knife. The complainant retreated giving the appellant opportunity to seize his motor-cycle and ride away. The complainant screamed for help as he pursued the appellant. The chase was unsuccessful however. Members of the public who came to his aid in response to the screams volunteered to take him to the home of the appellant as they knew him. They did not find him there though. The appellant then reported the incident to the area Assistant Chief, ***Joseph Kahindi (PW2)*** who in turn reported the matter to the police. Later that evening, the appellant went for a drink at a palm wine den with the motor cycle. He had previously taken drinks worth ***Kshs. 100/-*** at the same den but failed to pay. The owner of the den, ***Dama Sulubu (PW4)*** and other customers including ***Keshi Baya (PW5)*** and ***James Chai (PW6)*** insisted that he pays the previous debt before he could be served again. The appellant then left to look for the money leaving the the motor-cycle. He never came back. At about 6 p.m., ***PW4, 5, 6*** and other drinking mates took the motorcycle to PW2 who again contacted the Malindi police station. On 22nd April, 2008. ***P.C. Peter Karanja (PW7)*** in the company of the complainant went and collected the motorcycle which was subsequently positively identified by the complainant as well its registered owner, ***Kazungu Dadu Sirya (PW3)***. The appellant who had earlier been arrested by his relatives and taken to Malindi police station was upon completion of further investigations charged with the offence.

In his defence, the appellant stated that on 21st April, 2008 at about 2.30 p.m. he went to Malindi police station to report the loss of his identity card. The police officers then called him aside, accused him of being a thief, arrested and placed him in custody. He remained thereat for 3 days and was subsequently brought to court and charged.

On 15th May, 2009, the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence and thereafter sentenced him to death. Aggrieved by the conviction and sentence aforesaid the appellant lodged an appeal to the superior court. The superior court, (***Omondi***, and ***Odero, JJ***.), after hearing the appeal, dismissed it stating:-

> ***"The property in question was the motor-bike. There is evidence that it was stolen from the complainant on 19th April 2008 at about 12.00 noon. Barely four (4) hours later at 4.00 p.m. the appellant is seen pushing that very same motor-bike, which was positively identified by way of its log-book*** *Pexb2.* ***The appellant gave no reasonable explanation of how he came to have in his possession this stolen motor-bike so soon after it had been stolen. This leads to the inescapable conclusion that the appellant was an active participant in its theft from the complainant. With the positive identification by the complainant of the appellant as the man who robbed him the prosecution have a*** *'fait accompli'*. ***The statement made by the appellant in his defence amounts to a mere denial which in our view has no merit. We agree with the trial magistrate's dismissal of the same. The prosecution adduced enough evidence to prove a water-tight case against the appellant. His guilt in this matter is not in any doubt. We therefore readily confirm the conviction of the lower court.... The conviction and sentence by the lower court are hereby confirmed and upheld"***

The appellant was still dissatisfied with the decision of the trial court and of the first appellate court and hence this appeal premised on seven grounds in the Memorandum of Appeal filed on 3rd May, 2012 though the appellant "christened" them ***COURT OF APPEAL GROUNDS***. These are:-

> **"1. That the Hon. Superior court judges erred in Law in upholding my conviction and sentence without noticing that I the appellant proceeded to hear my case without statements of the prosecution witnesses and other evidence material which was contrary to section 77(2) of the old constitution and article 50(2) of the New constitution.**
>
> **2. That the learned Hon. Superior court judges erred in Law in failing to consider that the language used during plea after the charge sheet is not indicated and the same was a violation of section 198 of the C.P.C.**
>
> **3. That the learned Hon. Superior curt judges erred in Law in not considering that my arrest has got no connection with the matter in question given that:-**

i. My arresters never turned to testify thus violating section 150 of the C.P.C.

ii. 151 was adhered as P.W.5 was not sworn.

4. That the learned Hon. Superior court judges erred in (sic) by not considering that there was violation of section 137(d) IV of the C.P.C.

5. That the learned superior, court judges failed in Law by finding conviction on a charge which was insufficient to be admitted in Law as the section shown does not disclose the offence of robbery but it gives the punishment.

6. That the learned high court judges erred in Law in finding (sic) my conviction and sentence without seeing that section 169(1) of the C.P.C. Was contravened.

7. That the learned hon. Superior court judges erred in Law by dismissing my defence without noticing that the same had merit to cast out doubts upon the prosecution case..

When the appeal came before us for hearing on 19th June, 2013, ***Mr Oyiembo***, learned Assistant Director of Public Prosecutions readily conceded to the same on the ground that the judgment of the superior court had only been signed by one out of the two Judges who presided over the appeal. To that extent, counsel submitted the purported judgment was anullity. He urged us to allow the appeal on that ground but order for the re-hearing of the appeal. He was of the view that the evidence on record against the appellant was overwhelming. The offence was committed in broad day light and a re-hearing will be in the interest of justice in the circumstances.

Mr Mutiso, learned counsel who appeared for the appellant did not object to the appeal being allowed on the ground advanced by the state nor the request for the re-hearing of the appeal. The only rider being that the re-hearing be conducted expeditiously considering that the appellant had been in continuous custody since 21st April, 2008.

We have perused and considered the record of appeal both typed and original and we are in agreement with ***Mr Oyiembo***, that though the appeal was presided over and judgment crafted by both ***Omondi*** and ***Odero, JJ.***, the same was however only signed and delivered by ***Odero J***. on 23rd November, 2010. No reason(s) are apparent on record as to why ***Omondi, J***. did not sign though a space for her signature was provided. It is not as though she dissented. The judgment is crafted in plural meaning that she participated in crafting it. In any event, there is no room for a dissenting judgment in two Judge criminal appeals in the superior court. Indeed ***section 359*** of the Criminal Procedure Code provides:-

"Appeals from subordinate courts shall be herd by two judges of the High Court, except when in any particular case the Chef Justice, or a judge to whom the Chef Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court.

If on the hearing of an appeal the court is equally divided in opinion the appeal shall be re-heard before three judges."

In the premises, it appears to us that failure by ***Omondi, J***. to sign the judgment was not because the two Judges could not agree on the outcome of the appeal but perhaps was mere innocent omission or inadvertence on her part.

However, ***section 169(1)*** of the Criminal Procedure Code is emphatic that a judgment must be signed by the presiding officer(s) of the case. It is couched in mandatory terms and there can be no two ways about it. It provides ***inter-alia***:

"169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the

court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, *shall be dated and signed by the presiding officer in open court at the time of pronouncing it****." (emphasis provided)***

To drive this point home further, the issue was the subject of consideration by this Court in the case of ***Lokwachari v Republic (205) 2 KLR 379***. The facts of that case are on all fours with the facts herein. The court held:-

> ***"As the judgment of the High Court was dated but not signed by one of the two Judges, there was no valid judgment before the Court of Appeal … The Court of Appeal was therefore precluded from considering the merits or demerits of the judgment of the High Court."***

The same sentiments were re-echoed in the case of ***Paulina Amana vs Republic Eldoret Criminal Appeal No. 604 of 2010 (UR).*** The court delivered itself thus:-

"It is not contested that the judgment was not signed by the two Judges who heard the appeal. In another similar case of *Lokwachana v Republic (2005) KLR 379****, this Court held that a judgment of two Judges who heard the appeal and was not signed by the two judges was not valid judgment. While allowing the appeal, the Court pointed out that it was even precluded from deciding the merits or demerits of the judgment of the High Court which was a nullity. Being guided by the reasoning and approach illustrated in*** *Lokwacharia's* ***case (supra), it follows that the unsigned judgment is a nullity ..."***

It is our view that in the instant case there is no judgment to be considered. The lack of signature of the second Judge is incurable and cannot even be saved by the provisions of ***section 382*** of the Criminal Procedure Code.

Accordingly the learned counsel for the State was right in conceding the appeal on that ground. The appellant's appeal is allowed, conviction quashed and the sentence imposed set aside.

What next? This is a case where the complainant was brazenly and in broad daylight robbed of his means of livelihood by somebody whether the appellant or any other person. Justice must be done to this complainant and in accordance with the law. The appellant has been in confinement for about four or so years. We believe that the justice of the case demands that the appeal be re-heard in the superior court. In case of ***Muiruri v Republic [2003] KLR 552*** this Court observed:-

> ***"3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.***
>
> 4. ***It will only be made where the interest of justice required it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not ..."***

Although in this case the Court of Appeal was ordering for a retrial in the subordinate court, we believe the same principles apply to the re-hearing of an appeal in the first appellate court.

This to our mind therefore, is a proper case for the re-hearing of the appeal as the ends of justice demand it. We therefore pursuant to ***section 361(2)*** of the Criminal Procedure Code direct that the appeal be re-heard in the superior court before a different bench of two Judges excluding ***Omondi & Odero, JJ***. who presided over the initial appeal. In the meantime, the appellant shall remain in prison custody until he is presented before the superior court within fourteen (14) days from the date hereof so that a hearing date for his appeal is set. The hearing of the appeal should be expedited considering that the appellant has been in custody since 21st April, 2008.

Dated and delivered at Malindi this 26th day of June, 2013.

E. M. GITHINJI

….....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR