



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CRIMINAL APPEAL NOS. 370 & 372 OF 2010**

**BETWEEN**

**1. FERDINAND INDANGASI MUSEE**

**2. AGGREY RASTO WANDEI .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

***(An appeal from a judgment of the High Court of Kenya at Mombasa (Ibrahim & Odero, JJ.) dated 29<sup>th</sup> September, 2010***

**in**

**H.C.Cr.A. Nos. 249 & 250 of 2008)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellants were charged before the Chief Magistrate's Court, Mombasa with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars were that on 17<sup>th</sup> June, 2007 at Nyali Estate in Mombasa within the Coast Province, jointly with others not before court, while armed with unknown dangerous weapons and a toy pistol robbed **Wycliff Egesa Khaemba** one Honda generator serial number G.2009-22052 and one fridge make Samsung serial number 4AGW 70085X all valued at Kshs.60,000/= and at or immediately before or immediately after the time of such robbery wounded the said Wycliff Egesa Khaemba. The appellants both again faced a second charge of being in possession of imitation firearm to wit a toy pistol contrary to **section 34(1)** of the Firearms Act.

The appellants denied the charges and the case proceeded for hearing before T. Mwangi, Senior Resident Magistrate. A total of six witnesses were summoned by the prosecution in a bid to prove their case against the appellants namely PW1 **Wycliff Egesa Khaemba** (Wycliff), PW2 **Cliff Ian Bansley** (Cliff), PW3 **Musa Bwire Bwamama** (Musa), PW4 **Dr. Lawrence Ngove** (Dr. Lawrence), PW5 **Rotan Chakuza Chamina** (Rotan) and PW6 **No. 35652 Cpl. John Musyoki** (Cpl. John).

On their part, the appellants made an unsworn statements in their defence denying the charges and called no witnesses. At the conclusion of the trial the appellants were both found guilty on the first count and sentenced to suffer death. On the second count only the 1<sup>st</sup> appellant was found guilty but the sentence was not imposed. Instead it was kept in abeyance. Being dissatisfied with the conviction and sentence aforesaid the appellants separately and individually lodged appeals to the High Court. The two appeals were subsequently consolidated and heard by **Ibrahim J.** (as he then was) and **Odero, J.** The learned Judges on 29<sup>th</sup> September, 2010 however dismissed the appellants' appeals.

Undeterred, the appellants have now lodged the instant appeal raising similar grounds of appeal to the effect that the two courts below erred in convicting the appellants on a defective charge sheet, their identification was hollow, the case was not proved beyond reasonable doubts and that their defences were not given due consideration.

When the appeal came up before us for hearing, **Mr. Ole Kina**, learned counsel for the appellant pointed out from the outset that the judgment of the High Court had not been signed by the two Judges. That being the case the alleged judgment if at all was a nullity. That there was therefore no competent judgment upon which an appeal would have been mounted. The omission was fatal and this Court was on that basis alone even precluded from considering the merits of the appeal. Counsel urged us to refer the appeal back to the High Court for re-hearing. In support of his submission counsel referred us to the decision of this Court in the case of **Samson Matende v Republic, Criminal Appeal No. 526 of 2010 (UR)**.

**Mr. Tanui**, Senior Prosecution Counsel for the respondent conceded the appeal on that ground and similarly urged us to order, a re-hearing of the appeal.

We have considered the submissions proffered by the learned counsels. Similarly we have called for and perused the original record of the High Court and in particular the handwritten judgment. We note though that whereas the judgment was crafted by both Judges, it is only **Odero, J.** who signed it after delivering it. In the absence of the signature of the other Judge, it cannot be said that the judgment was regular or proper or valid for **section 169(1)** of the Criminal Procedure Code provides:

***“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, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”***

In the case of **Lokwachama v Republic [2005] KLR 379** this Court faced with similar situation and in declaring invalidity of such a judgment stated as follows:

***“The judgment of the High Court was not signed; hence there was no valid judgment. We are precluded from considering the merits and demerits of the judgment of the High Court.”***

The same position was taken by this Court though differently constituted in the case of **Samson Matende** (*supra*) when it held thus:

***“... 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.”***

By parity of reasoning, it is our considered opinion that in the absence of the signature of the second Judge in the instant case renders the alleged judgment if at all a nullity. The omission is not curable at all either by reference to **section 382** of the Criminal Procedure Code or **Article 159** of the Constitution of Kenya. Thus Mr. Tanui was right in conceding the appeal on that ground.

Accordingly we allow the appeal, quash the conviction and set aside the sentence imposed.

Both the appellant and respondent were in agreement that in the event we agreed with them and allowed the appeal on the singular ground aforesaid, we should order a re-hearing of the appeal in the High Court before a bench differently constituted from that which heard the appeal initially. In the 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 factors 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 addressing the issue of a retrial in the subordinate court, we believe that the same principles apply to the re-hearing of an appeal in the first appellate court.

We think that this is a proper case for the re-hearing of the appeal as the ends of justice demand it. The mistake, error or inadvertence that resulted in one Judge not signing the judgment can neither be blamed on the prosecution nor the appellants. It was entirely of the court's own making. 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 other than those who presided over the initial appeal. Before we conclude this judgment, we observe that this is perhaps the fourth or so appeal emanating from this same High Court, which we have been constrained to allow on the now familiar ground that the judgment of the High Court was not signed or was only signed by one out of the two Judges who presided over the first appeal. This cannot be merely coincidental. It appears that there is either a deliberate scheme to interfere with court records with a view to perverting the course of justice or extreme negligence on the part of the High Court Judges. We cannot imagine or fathom how a judgment crafted by two Judges can be delivered without being signed by both Judges. One can understand if this was a one off incident. However that is not the case. We would therefore again urge those concerned and in particular the Resident Judge of the High Court of Kenya at Mombasa to institute measures that will bring to an immediate halt this unfortunate situation. We would in particular again recommend that this judgment be brought to the attention of the Principle Judge of the High Court and the Resident Judge, High Court of Kenya at Mombasa for their appropriate intervention. In the meantime, the appellants shall remain in prison custody until they are produced before the High Court within fourteen (14) days from the date hereof so that a re-hearing date for their appeal is fixed.

***Dated and delivered at Mombasa this 15<sup>th</sup> day of November, 2013***

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**REGISTRAR**