IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL 188 & 189 OF 2003

SILAS GITUMA
DAVID NJILITHIA ……....APPELLANTS
AND
REPUBLIC ……...RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ.) dated 14th Febraury, 2002
in
H.C.CR.A. NOS. 168 & 135 OF 2000)
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JUDGMENT OF THE COURT

Silas Gituma and ***David Njilithia***, the appellants in Criminal Appeal Nos.188 and 189 of 2003 before us, were charged together with the other two persons before Chief Magistrate's Court at Meru with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code in that the four of them:-

"On the 6th day of January 1999 in Meru North District within the Eastern Province, jointly with others not before court, being armed with dangerous or offensive weapons namely rifle, pangas and rungus robbed J.K. of cash Ksh.6,300/=, three pairs of sheets, three pairs of suit, eight dresses, four skirts, three pullovers, a wall clock, two wrist watches make Seiko five, two sets of table clothes, one lamp, three dishes, three dozen of cups, and two thermos flasks all valued at Ksh.50,000/= and at or immediately before of immediately after the time of such robbery used actual violence to the said J.K."

David Njilithia and another were each separately charged further with the offence of rape contrary to ***section 140*** of the Penal Code. The particulars of that charge as related to David Njilithia were that:-

"On the 6th January 1999 in Meru District within the Eastern Province, had carnal knowledge of J.K without her consent."

They all pleaded not guilty but after full hearing, the learned Senior Resident Magistrate (P. M. Ndungu), acquitted one of them, but convicted the two appellants together with another of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The second appellant in this appeal David Njilithia, was also convicted of the offence of rape. They were sentenced to death in respect of the robbery charge and Njilithia together with the other not before us were each further sentenced to imprisonment for a term of fourteen years.
They were not satisfied with the conviction and sentences imposed upon them. They each appealed to the superior court vide Criminal Appeal Nos. 135, 136 and 168 all of 2000. At the hearing those appeals were consolidated and heard together. In a judgment purportedly delivered by Juma and Tuiyot JJ., the appeal by one appellant i.e. Criminal Appeal No. 136 of 2000 was allowed and he was set free. The appeal by the two appellants before us were dismissed and hence these second appeals.
In the further supplementary memorandum of appeal filed by M/s Sichangi & Co. Advocates for both appellants, two grounds of appeal were set out, but before us, one ground was argued by Mr. Lompo, the learned counsel for the appellants. That ground was:-

2. That, the judgment of the learned Judge is not a valid judgment the same having not been signed and the same is not dated."

We were referred to the purported handwritten judgment of the superior court and the typed copies of the same judgment. None of them was signed and none was dated. Mr. Lompo, submitted that in law that document cannot be treated as a judgment for all purposes and so the proceedings before the superior court are a nullity. He asked us to release the appellants on that score or order rehearing of the appeals that were in the superior court. Mr. Kaigai, the Principal State Counsel conceded that the purported judgment of the superior court was for all purposes not a valid judgment as it was neither signed nor dated. He, however, asked us to order rehearing of the appeals in the High Court afresh and direct the same to be heard on priority basis.
We have on our own called for and thoroughly perused the file in respect of the appeals that were before the superior court from which these appeals arose. On our own finding, we agree with Mr. Lompo and Mr. Kaigai, that indeed the purported judgment of the superior court was neither signed nor dated.
Section 169 (1) of the Criminal Procedure Code provides for what is, in law required to be in the contents of judgment. It states as follows:-

"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.
(underlining supplied)

This provision is an Act of Parliament and is mandatory as the word *"shall"* is used to ensure that the presiding officer of the court has no option but to date and sign a judgment on its delivery. This was not done in this case. The effect is that there is no valid judgment before us and like this Court stated in the case of ***Simon Lokwachania v Republic*** ***Criminal Appeal No 156 of 2004,*** (unreported) we are precluded from considering the merits or demerits of the alleged judgment of the superior court. The appellants' appeal must be allowed and we so order.

What next? Mr Lompo says we can release the appellants as they have suffered in prison for over ten (10) years. He refers us to the decision of this Court in the case of ***Francis Kimani Muthoko & Another vs republic, Criminal Appeal No. 331 of 2006*****.** We have perused and considered that decision. With respect, we find it clearly distinguishable from the present case. First in that case, as Mr. Kaigai rightly points out, the issue of non-dating of the judgment delivered by the learned Principal Magistrate, was but only one of the matters that necessitated the appeal being allowed. There were other matters that were considered which necessitated allowing the appeal and releasing the appellant. This is brought out clearly in the concluding remarks of the Court where it stated:-

"In conclusion, the cumulative effect of all the above is that this appeal must be allowed without any need for a retrial which in any case was not sought."

Secondly, in that case, the court was faced with whether to order a retrial which was not asked for and which would have taken a considerably long time to mount at it would have been fresh trial in the Magistrate's Court, whereas in this case, what is asked for is a rehearing of the appeal that was in the superior court which would take a very short time. In our view, considering the entire matter as we must do, and accepting that each case must be treated on its own facts and circumstances and considering the offence with which the appellants were charged and convicted in the Magistrate's Court and what was alleged in that court, what commends itself is an order for rehearing of the appeal that was before the High Court. That hearing will be confined to ***Criminal Appeal No. 168 of*** **2000, *Silas Gituma vs Republic*** and ***Criminal Appeal No. 135 of 2000 David Njilithia vs Republic***. As the appellant in ***Criminal Appeal No. 136 of 2000*** in the superior court had been released, that appeal will not be subjected to a retrial.

For clarity the two consolidated appeals in this case are hereby allowed to the extent, and we order and direct, that, the appellants' appeals to the High Court be heard *de novo* before a different bench of two judges of that court on priority basis.

Dated and delivered at Nyeri this 4th day of November., 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL