



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Criminal Appeal 9 & 27 of 2002**

**DAVID NJAGI BOSCO ..... 1<sup>ST</sup> APPELLANT**

**JAMES MURIITHI MUNGATIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ) dated 13<sup>th</sup> September, 2001*

**In**

**H.C. Cr. Appeal Nos. 21 & 22 of 2000)**

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**JUDGMENT OF THE COURT**

The two appellants were convicted by the Senior Resident Magistrate Nkubu (Meru) of two counts, namely, robbery with violence contrary to **section 296 (2)** of the Penal Code for which they were sentenced to death and, assault causing actual bodily harm contrary to **section 251** of the Penal Code for which they were sentenced to 5 years imprisonment plus 2 strokes of the cane. They appealed to the High Court at Meru against conviction and sentence. Their appeals were heard by a bench of two Judges, Juma, J the Resident Judge High Court at Nyeri and Tuiyot, J, Resident Judge, Meru. The record shows that the superior court delivered a “judgment” on 13<sup>th</sup> September, 2001 wherein the appeal against conviction and sentence for Robbery with Violence was dismissed whilst the appeal against conviction and sentence for assault causing actual bodily harm, was allowed.

The appellants filed the present appeal in person. Thereafter the court appointed Mr. J. Macharia Advocate to act for the appellants in this appeal as is the practice where an appellant has been sentenced to death. Mr. Macharia filed a supplementary memorandum of appeal containing six grounds of appeal.

Before Macharia started his submissions in support of the appeal it came to light that what appears on the record as a judgment of the superior court is not signed by the two Judges of the superior court who heard the appeal. The “judgment” is only signed by Tuiyot, J but not by Juma, J. Mr. Orinda, the learned Principal State Counsel, has in the circumstances urged us to order a re-hearing of the appeal by the superior court. Mr. Macharia on his part lamented that the appellants have been in custody for a long time but left the matter to the discretion of the Court.

In **JOSPHEAT KIGORWE MURURU V. REPUBLIC** – Nyeri Criminal Appeal No. 97 of 2003 (unreported) a similar situation arose and this Court after referring to **Section 169 (1)** of Criminal

Procedure Code and emphasizing that a judgment must be signed and dated said:-

***“Thus Court can only hear and determine an appeal from a judgment or ruling of the superior court. There is no valid judgment of the High Court in the purported appeal before us and hence there is no valid appeal to us. We accordingly order that the appellants appeal to the High Court shall be heard De Novo. by a different bench of two Judges and a valid judgment i.e. one that is dated and signed be rendered by that court.”***

Indeed this Court has power under **section 361 (2)** Criminal Procedure Code to remit the appeal to the superior court for determination by rehearing of the appeal.

In this case, in the absence of a valid judgment of the superior court it follows that the appeal to the superior court has not been determined in accordance with the law. In respect of the count of robbery with violence the appellants were alleged to have killed the victim of the robbery and the Magistrate’s court convicted them. The offence is thus aggravated and it is in the interest of justice that the appeal by the appellants to the superior court should be determined in accordance with the law.

For the foregoing reasons we set aside the purported undated “judgment” of the superior court and like in the case of **JOSPAT KIGORWE MURURU** (supra) remit the appellants Criminal Appeal no. 21 of 2000 to the superior court for re-hearing de novo by a different bench of two judges.

We so order.

Dated and delivered at Nyeri this 31<sup>st</sup> day of October, 2008

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. ALUOCH**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR.