



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Criminal Appeal 102 of 2006

JOSEPH KINYANJUI WAINAINA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng', JJ) dated
10th May, 2005**

in

H.C. Cr. Appeal No. 697 of 2001)

JUDGMENT OF THE COURT

The appellant in this appeal, **Joseph Kinyanjui Wainaina**, was charged in the Chief Magistrate's Court at Makadara Criminal Case No. 21037 of 2000 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 26th day of October 2000 at Karindundu village within the Nairobi area, jointly with others not before court, while armed with a pistol robbed Harrison Mwangi Kimotho of Ksh.2,610/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Harrison Mwangi Kimotho.”

It is not clear as to whether he pleaded guilty to the charge or whether he did not plead guilty to that charge but whatever happened, after several appearances in court, the hearing of his case commenced and the record shows that before the hearing proper commenced, he was reminded of the charge in Kiswahili language. After four witnesses were heard, the prosecution closed its case against him and he was properly put to his defence and the provisions of **section 211** of the Criminal Procedure Code were complied with by the trial court. He gave his defence and called one witness. At the end of the full trial, the appellant was found guilty of the offence as charged, convicted and sentenced to death.

The appellant was not satisfied with that conviction and sentence. He appealed to the superior court vide High Court of Kenya at Nairobi Criminal Appeal No. 697 of 2001. That appeal was dismissed on 10th May, 2005 and hence this appeal before us in which he filed a memorandum of appeal in person on 19th May 2005 but later when an advocate was assigned to him by the Court, a firm of advocates, Betty Rashid & Co. Advocates, filed, on behalf of the appellant, a supplementary memorandum of appeal

containing five grounds. For what will soon be apparent in this judgment, we will reproduce the fifth ground of appeal only. It reads:

“That the learned Judge erred in permitting Justice Ochieng to participate in writing the judgment when the appeal was conducted by Justice Lesiit and Justice Mutungi.”

Mrs. Rashid, learned counsel for the appellant, in her address to us on that ground stated that the judgment of the superior court was signed by Mutungi and Ochieng JJ. whereas the latter (Ochieng J) did not hear the case and so should not have participated in preparing the judgment. That the record shows, he (Ochieng J) participated in the preparation of the judgment is irregular and renders the same judgment invalid. Mrs. Murungi, learned Principal State Counsel, conceded the appeal on the same ground but sought an order either that the appeal be heard *de novo* or that the Judges who heard the appeal be directed to prepare judgment afresh.

The record before us shows that the High Court (Nairobi) Criminal Appeal No. 697 of 2001 first came up before the superior court (Ochieng J) on 20th January 2005. On that day, the following entry was made.

“Court:

As the Hon. Osiemo J is handling murder trials today, this appeal cannot be dealt with today. New dates to be fixed on priority basis.

F.A. Ochieng

Judge”

On 7th April 2005, the appeal came up for hearing before Lesiit and Mutungi JJ. On that day, the hearing of the appeal proceeded. The appellant submitted written submissions on which he said he would rely entirely. Mrs. Toigat, State Counsel then made submissions opposing the appeal and supporting conviction and sentence. The appellant thereafter replied to the State Counsel’s submission and judgment was reserved to be delivered on 10th May 2005. On 10th May 2005, judgment was delivered in which the superior court rejected all the grounds of appeal and dismissed the appeal and confirmed both the conviction and sentence. That judgment was signed by O.K. Mutungi J. and F.A Ochieng J. There is no explanation in the record before us as to why the judgment was not signed by Lady Justice Lesiit who, together with Justice Mutungi, heard the appeal fully on 7th April 2005 and reserved judgment to be delivered on 10th May 2005, neither are any circumstances stated giving rise to the judgment being signed by a judge who never heard the appeal and not being signed by one of the judges who heard the appeal.

Section 169(1) of the Criminal Procedure Code states:

“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.”

That provision is a provision of general application relating to all criminal matters under **Part IV** of the Code. It does however direct in general what action the judge or judges who hear an appeal in the superior court are required to take. As we have stated, it is not easy to decipher from the record as to why Hon. Justice Ochieng who never heard the appeal signed the judgment nor why Hon. Lady Justice Lesiit who heard the appeal together with Mutungi J. did not sign it. We think the appellant cannot be faulted when he complains that one of the judges who dismissed his appeal never heard the appeal and had no basis for dismissing the appeal. On the same reasons, his complaint that a judge who heard his appeal did not prepare judgment or did not apparently participate in preparing the judgment in his appeal would be

sound and not frivolous. Whatever reason necessitated what happened in the superior court concerning the preparation of the judgment in the appellant's appeal, that the judgment delivered was not signed by one of the Judges who heard the appeal and was signed by a judge who never heard the appeal was irregular. In our view, the superior court's judgment was rendered invalid.

Having said the above, we will not discuss other matters raised on the entire case as we feel the same will be addressed at the hearing of the appeal which will proceed *de novo* before the superior court.

This appeal is allowed. The superior court judgment dated 10th May 2005 dismissing the appeal from the subordinate court is set aside. The High Court Criminal Appeal Number 697 of 2001 is remitted to the superior court for hearing *de novo* before a bench which shall exclude **Lesiit, Ochieng and Mutungi, JJ.** Judgment accordingly.

Dated and delivered at Nairobi this 16th day of March, 2007.

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR