



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Tunoi, O’Kubasu JJ A & Onyango Otieno Ag JA)**

**CRIMINAL APPEAL NO 200 OF 2003**

**KATANA KITSAO NZINGO ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Mombasa (Tutui,

Commissioner of Assize) dated 1st August, 2003 in HCCr Appeal No 14 of 2003)

**JUDGEMENT**

The appellant, Katana Kitsao Nzingo, was arraigned before the Senior Resident Magistrate’s Court at Kilifi, charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 27th day of June, 2002 at about 7.45 am at Kwa Ngowa area in Kilifi district of the Coast province being armed with a dangerous weapon namely a knife, the appellant robbed Judy Mwenda of her handbag which contained one mobile telephone make Alcatel (0722220661), one hot pot, two keys and cash Shs 50/= all valued at Kshs 5,750/=.

The appellant was tried by the learned Senior Resident Magistrate (PM Mutani Esq) who convicted him on a lesser offence of stealing from the person contrary to section 297 (a) of the Penal Code and sentenced the appellant to five years imprisonment together with strokes of the cane. In reducing the charge of robbery with violence to the lesser charge of stealing from the person, the learned Senior Resident Magistrate stated:-

“From the evidence though some violence was used to snatch the bag, it amounts to more than a mere scare. I therefore find the accused guilty of the offence of stealing from the person contrary to section 279 (a) of the Penal Code and I convict him accordingly.”

The appellant preferred an appeal to the superior court where, it must be pointed out, he was unrepresented just as he was during the trial in the subordinate court. The State was represented by the Provincial State Counsel Mr Gumo. The appellant’s appeal in the superior court was heard and determined by the learned Commissioner of Assize, Mrs PM Tutui. When arguing his appeal in the superior court, the appellant is recorded to have stated as follows:-

“ I was given a heavy sentence and I am still young. I am 17 years of age. When I was arrested they also took a knife from house and the exhibits were all planted on me.

I pray for leniency. I have my submissions further in writing and I wish to hand them over to the Court. I have been punished enough and ready to change.”

The learned Principal State Counsel addressed that Court as follows: -

“I support conviction and sentence. He was convicted for the offence of stealing from a person. The incident occurred in broad daylight and he was traced to his house and all stolen items found in his house. He failed to give an adequate explanation as to how he came into possession. He was arrested same day and wore same clothes and no mistake on identification.

I pray conviction be sustained and appeal dismissed.” From the foregoing, we observe that while the appellant was asking for leniency the State was arguing the superior court to sustain the conviction of the appellant on a charge of stealing from the person contrary to section

279(a) of the Penal Code and confirmation of the sentence five years imprisonment and five strokes of the cane. The learned Commissioner of Assize having considered what was urged before her did not only dismiss the appellant’s appeal but reinstated the original charge of robbery with violence contrary to section 296(2) of the

Penal Code and proceeded to sentence the appellant to death.

It is as a result of the above that the appellant comes to this Court by way of second appeal. The learned Principal State Counsel, Mrs Mwangi in conceding the appeal submitted that the learned Commissioner of Assize had no jurisdiction to entertain the appeal and so she asked us to set aside the proceedings in the superior court and remit the appeal to that Court to be heard afresh. It must be pointed out that it was Mr Buti, counsel for the appellant, who filed supplementary grounds of appeal in which he raised the issue of jurisdiction. In our view, the ground of appeal as regards jurisdiction of the Commissioner of Assize cannot be resisted. Section

359 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya) provides:-

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

In the present appeal, we find that the learned Commissioner of Assize proceeded to hear the appeal as a single judge contrary to provisions of section 359(1) of the Criminal Procedure Code. There is no indication that there were directions from the Chief Justice giving her (the Commissioner of Assize) authority to hear the appeal sitting as a single judge.

Even if the learned Commissioner of Assize had jurisdiction to hear the appellant’s appeal, we are of the view that the procedure adopted was prejudicial to the appellant. It is now standard practice that an appellant who appeals against a judgement in a capital offence, such an appellant must be provided with legal representation. The appellant herein found himself in awkward situation. He was appealing against his conviction on a charge of theft from a person contrary to section 279(a) of the Penal Code on which he had been sentenced to five years imprisonment with five strokes of the cane. He pleaded for leniency before the superior court.

The State did not ask for enhancement of the sentence but like a thunderbolt from the sky, the appellant was hit by an order which did not only dismiss his appeal but handed him a death sentence. The worst he had expected was dismissal of his appeal. But he got a shock of his life when he was sentenced to death. Before the appeal commenced in the superior court, nobody warned the appellant that he was taking a risk by proceeding with his appeal.

In view of the foregoing, we are satisfied that the learned Commissioner of Assize had no jurisdiction to entertain the appellant's appeal. The proceedings in the superior court must be declared a nullity and we do so.

Consequently, the proceedings before the learned Commissioner of Assize are set aside and this matter is remitted to the High Court for the appellant's appeal to be determined according to the law by a court of a competent jurisdiction.

Dated and delivered at Mombasa this 30<sup>th</sup> day of January, 2004

**P.K.TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO-OTIENO**

.....

**Ag JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**