



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A.)**

**CRIMINAL APPEAL NO. 100 OF 1990**

**1. JOHN NG’ANG’A KIMANI )**

**2. GEORGE GITWARA MACHARIA ) ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Nairobi(Justice Mbaluto) dated 23rd day of October, 1989**

**in**

**H.C.CR.A. NO. 204, 205 OF 1986)**

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**JUDGMENT OF THE COURT**

The two appellants, *John Ng’ang’a Kimani* and *George Gitwara Macharia* were convicted on two counts of robbery with violence contrary to section 296(2) of the Penal Code (*Cap. 63 Laws of Kenya*) and sentenced to suffer death as mandatorily provided by the law. The 1st appellant, (*John Ng’ang’a Kimani*) was convicted on two other counts relating to being in unlawful possession of a firearm and ammunition contrary to section 4(2)(a) of the Firearms Act (*Cap.114 Laws of Kenya*) for which he was sentenced to five years imprisonment on each count. It should be pointed out that the appellants were convicted and sentenced way back on *14th February 1986* by the then Senior Resident Magistrate, Mr. J.A. Mango (now deceased).

The appellants filed their appeals in the superior court which appeals were heard and, as we are informed by Mr. Okumu, the learned Deputy Chief State Counsel, dismissed by the superior court. The appellants have now come to this Court by way of second and final appeal. The appeals were filed in this Court in 1990 but to date these appeals have not been heard. Why? Because the judgment of the High Court cannot be traced. Concerted efforts were made in a bid to trace the judgment of the High Court but to no avail.

The issue before us now is what do we do with the appellants who were sentenced on *14th February, 1986* by the Senior Resident Magistrate, but up to now their appeal to this Court is yet to be determined?

Mr. Mogikoyo, appearing for both appellants, submitted that his clients have suffered sufficiently and for

that reason they should be acquitted. Mr. Mogikoyo suggested in the alternative that if his clients are not acquitted then the file be sent back for the rehearing of the appeal in the High Court. Mr. Okumu supported the option of sending the file back to the High Court for the rehearing of the appeal.

We have given this matter careful consideration and it cannot be said that the appellants were responsible for the disappearance of the judgment of the High Court. It has been submitted by appellants' counsel that his clients have suffered but sight should not be lost of the fact that the appellants were sentenced according to law by a court of competent jurisdiction. It has not been suggested anywhere that their trial before the learned Senior Resident Magistrate was a mistrial. We wish to point out that in **Criminal Appeal No. 58 of 1989** this Court did not acquit the appellants therein but set aside the conviction of the appellants. In that appeal this Court was dealing with a first appeal unlike the situation here where we are dealing with a second appeal.

In **Pius Olima & Another vs. Republic** - Criminal Appeal No. 110 of 1991 (unreported) this Court reviewed and dealt with principles that should be applied when considering whether a re-trial should be ordered or not – **see Ahmed Juma vs. Rep** [1964] E.A. 481, **Manji vs. Rep** (1966) E.A. 343, **Muyimba vs. Uganda** (1969) E.A. 433 and **Merali and Others vs. Rep** (1971) E.A. 221.

In the present appeal, it is the judgment of the High Court sitting as the first appellate court that is missing. That means this Court as a second and final appellate court has nothing to go by in determining the appellants' fate. We have the proceedings and the judgment of the trial court but not the judgment of the High Court. We have been told that the appellants' appeals to the High Court were dismissed, but we have been denied the advantage of what was said by the High Court when it dismissed the appellants' appeals. We think it is in interest of justice that the appellants appeal in the High Court be reheard. We would hasten to say that by sending the appeal back to the High Court we are not ordering the re-trial of the appellants. All that is to be done is for the High Court to re-evaluate and consider the evidence during the trial and come to its own conclusion. It is that conclusion (if the appeals are dismissed by the High Court) that will come to this Court by way of a second appeal. Since the re-hearing of the appeal in the High Court and a second appeal in this Court would not take a long time to bring to an end, we are satisfied that the appellants will not be prejudiced by our order.

In view of the foregoing and for the reasons stated therein, we now order that the two appellants' appeal in the High Court be re-heard. We further order that the said appeal be set down for hearing as a matter of priority.

**Dated and delivered at Nairobi this 20th day of February, 2004.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**