**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE NO. 9 OF 2005**

REPUBLIC.....PROSECUTOR

**VERSUS**

GEOFFREY MWANGI KARUNGU.....ACCUSED

**RULING**

In its Judgment dated and delivered on 21st December 2012 *(in Court of Appeal at Nakuru, Criminal Appeal No. 162 of 2009, Geoffrey Mwangi vs. Republic)*, the Court of Appeal found that the trial of the Appellant, which had been commenced with the aid of assessors, had been continued and determined without the aid of assessors. The court therefore declared the trial a nullity, and allowed the appeal. It however ordered a retrial of the Appellant before a different judge. In ordering a retrial, the court relied on its decision in **MUIRURI VS. REPUBLIC [2003] KLR 552** where it held -

> ***"... where the interests of justice require it and it is unlikely to cause injustice to the Appellant some factors to consider would include but are not limited to illegalities or defects in the original trial, the length of time which has elapsed since the arrest and arraignment of the appellant, [and], whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's inability or the court's."***

2. In this case, a retrial was ordered, not because of the prosecution's inability, but an error of the court. In Black's Law Dictionary, 8th Edn. "New Trial" or trial *de novo* means -

> ***".. a new trial of an action that has already been tried, that is a new trial on the entire case, that is on both questions of fact and issues of law – conducted as if there had been no trial in the first instance."***

3. On the question of law, the offence of murder remains in existence under Section 203 of the Penal Code *(Cap. 63, Laws of Kenya)* and the punishment therefor is still provided for in Section 204 of the Penal Code. There is therefore no issue on the question of law, both the offence and punishment therefor exist in the statute book.

4. The situation is different on the question fact, hence this Ruling. When this matter first came before me for hearing on 27th June 2014, PW1, *(Chief Inspector Oyugi)*, testified that he had only managed to get one witness out of the seven witnesses who had previously testified. The other witness too was a brother of the one he had traced. Both are sons of the deceased. The totality of their evidence was that they identified the body of their father, the deceased. PW1 was of the view that the trial should proceed and reliance be placed under Section 34 of the Evidence Act, *(Cap. 80, Laws of Kenya)*.

5. Mr. Maragia Counsel for the Appellant *(now accused)* however opposed the application of Section 34

of the Evidence Act in light of the appeal court's decision which declared the previous trial a nullity, and that Section 34 would be of no avail to the prosecution. With this challenge Mr. Nombi, learned Prosecution Counsel sought an adjournment till 2nd July 2014. When the matter was called up for hearing on that date, learned prosecution counsel informed the court that the prosecution wished to close its case and sought to rely on Section 34 of the Evidence Act.

6. This approach was however vehemently opposed by Mr. Maragia, that Section 34 was inapplicable, and he relied on the Court of Appeal decision in **HARON KIPNGETICH NGENO VS. REPUBLIC** in which that court found though the trial was not vitiated though it was commenced with the aid of assessors and was concluded without their opinion being sought, and that since it was not a border line case, the trial judge had been correct in rejecting the Appellant's unconvincing unsworn statement and dismissed the appeal as being without merit.

7. In this case, Counsel argued, though also commenced with the aid of assessors but concluded and determined without their opinion, the court found it was a borderline case, and believed the opinion of assessors *(though not binding upon the judge)* ought to have been sought. The court consequently ordered a retrial. The prosecution could not however rely on Section 34 of the Evidence Act.

8. In order to do full justice to both the prosecution and defence counsel, I set out in full the particulars of Section 34 of the Evidence Act -

> ***"34.(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceedings, for the purpose of proving the facts it states, in the following circumstances -***
>
> ***(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable..***
>
> and where in the case of subsequent proceedings -
>
> ***(b) the proceeding is between the same parties or their representatives, and***
>
> ***(c) the adverse party in the first proceeding had the right and opportunity to cross-examine, and***
>
> ***(d) the questions in issue were substantially the same in the first and subsequent proceeding.***
>
> ***(2) For the purposes of this Section -***
>
> ***(a) The expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and***
>
> ***(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.***

9. This was a criminal trial. ***It*** was conducted throughout, including, the defence case, with the aid of assessors. However before the judgment was delivered Section 322(1) of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* was amended by the Statute Law *(Miscellaneous Amendments)* Act, 2007 *(No. 7 of 2007)* which came into force on 15th October, 2007, the trial court did not deem it necessary to sum up and seek the opinion of the assessors though it was not binding on him.

10. The Appellate court was however of the view that this being a borderline case, the opinion of the

assessors was necessary and the lack of it was fatal to the trial. This is unlike the case **Haron Kipngetich Ngeno vs. Republic** ***(Criminal Appeal No. 175 of 2009)*** where the same court on the same day, declined to find proceedings a nullity where the trial judge had similarly conducted a trial with the aid of assessors, but at the end failed to sum up the case for the assessors opinion. The same bench stated that failure to sum up to and obtain the opinion of the assessors did not render the trial a nullity, and it was merely an irregularity which would normally result on an order for a re-trial. The learned judges however continued that a re-trial would not bestow any rights on an appellant because the same would be held without the aid of assessors as the law currently provides. There were two reasons stated in the judgment for coming to this conclusion **firstly**, that the Appellant had begged the court not to order a re-trial, **secondly,** that was a borderline case, **thirdly**, that if the opinion of the assessors would have influenced the trial court to acquit the appellant, the court would have allowed an appeal against such an appeal, **fourthly**, that the omission did not cause any prejudice to that appellant, and that it was curable under Section 382 of the Criminal Procedure Code. The **fifth** reason was that the prosecution evidence was overwhelming.

11. To my mind, other than the finding that this case was a borderline case where the opinion of the assessors was not necessary, the opinion of the assessors was even more necessary where the evidence was said to be overwhelming. In either case, the law as set out in Sections 23(3)(e) of the Interpretation and General Provisions Act, *(Cap. 2, Laws of Kenya)* was given a wide path. The said Sections provide -

> ***"S. 23 (1)***
>
> ***(2)***
>
> ***(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -***
>
> ***(a) – (d)***
>
> ***(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation legal proceeding or remedy or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."***

12. What this provision entails is clear. A repealing law, unless it otherwise expressly says so, does not render actions performed under the repealed law illegal or a nullity. In the Illustrated Oxford Dictionary, 2006 Edn., the word *"null"* and its noun *"nullity"* mean *"invalid, not binding, or non existent amounting to nothing"* and the phrase *"null and void"* is a common redundancy or tautology.

13. So a proceeding which has been declared *"a nullity"* that is, having no binding effect in law cannot be relied upon.

14. Having declared the entire trial of the Appellant a nullity, it means that any orders made, proceedings taken are equally a nullity. Such proceedings cannot be revived by another declaration of court however desirable and convenient that might be particularly for the prosecution which says it cannot trace its witnesses except those who identified the body of the deceased in the mortuary. The accused is entitled to a fair trial, which means the availability of his accusers, within a reasonable time.

15. As noted above, the entire recording of evidence was conducted in the presence of the assessors. The trial court omitted one but important step knowingly, but mistakenly believing that with the repeal of the provision for trial with the aid of assessors, it was no longer a legal requirement to sum up the evidence and direct the assessors to consider the evidence so as to give their opinion. This process is one seamless whole, and not severable. The court cannot say since the evidence was recorded in the presence of the assessors, it is in order to adopt for purposes of re-trial of the Appellant, and sever the part

where the court failed to sum up and obtain the opinion of the assessors.

16. In the circumstances of this case therefore, I must find **firstly** that the prosecution has no witness and therefore evidence upon which to indict or lay fresh information of murder against the accused. **Secondly** I must also find and hold in terms of Section 306(1) of the Criminal Procedure Code that the prosecution has failed to produce any evidence against the accused Geoffrey Mwangi Karungu, and I therefore acquit and discharge him of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. I order that unless otherwise lawfully held, the accused be released and set free forthwith. It is so ordered.

**Dated, signed and delivered at Nakuru this 17th day of October, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**