



No. 2725

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO. 13 OF 2007

REPUBLICPROSECUTOR

-VERSUS-

JOSEPH OTIENO AYORAACCUSED

RULING

Having gone through the record and the prosecution case, it has come to my notice that the trial of this case initially commenced before **Gacheche J.** who took the evidence of PW1 and PW2. When the case next came up for hearing on 26th May, 2009, **Gacheche J.** had since left the station on transfer. The case was thus taken over by **Muchelule J.** he invoked section 200 of the Criminal Procedure Code and required the parties to inform him how they intended to proceed with the case before. The accused elected that the case proceeds from where **Gacheche J.** had stopped but wished that PW1 and PW2 be recalled. **Mr. Okemo**, the then Senior Principal State Counsel did not object to that election. Accordingly on that basis the case was set down for further hearing on 14th July, 2009. It is instructive that during the taking of directions aforesaid, there was no mention of the assessors. Indeed the record does not show that they were even present.

At the resumed hearing of the case, the record does not show that there were assessors present. Indeed it is silent. The only inference that can be drawn is that the trial proceeded with the aid of the assessors. **Muchelule J.** took the evidence of one witness, PW3. He was thereafter transferred from the station.

The case thereafter came before me on 8th June, 2010 for further directions. Again directions under section 201 (2) of the **Criminal Procedure Code** were taken. Parties agreed that I proceed with the case from where **Muchelule J.** had left and that previous witnesses who had testified should not be recalled. The proceedings were to be typed and availed to court so that further hearing of the case would

proceed. I made an order in those terms. It is instructive that as I was making this order, none of the parties drew my attention to the fact that the case had previously been heard with the aid of assessors. I thereafter proceeded to hear the testimony of three prosecution witnesses whereupon the prosecution closed their case.

As I sat down to ponder on ruling whether the accused had a case to answer, the aforesaid irregularity in the trial manifested itself.

The court of appeal has repeatedly held that a trial commenced with the aid of assessors must be seen through with the aid of such assessors the recent amendment to the criminal procedure code doing away with that such trials notwithstanding. See the case of **Peter Ngatia Ruga –vs- Republic, Criminal Appeal Number 42 of 2008 (UR)**. In that case a similar situation obtaining here arose. Hearing began with the aid of assessors but midstream they were abandoned but without any reasons being assigned for such action by the superior court. This is how the court of appeal delivered itself on the issue

“.....We have considered the record, the submissions and the law. In our view, the trial of the appellant was vitiated, and three grounds support our view. Firstly, the trial began with the aid of assessors and midstream, the court either dismissed the assessors but never said so or just forgot all about the assessors such that at the end, no summing up to the assessors was done and their opinions were not sought and recorded by the court, and not mention of that was made in the record. It is not easy to understand what happened but even if we were to accept that part of the hearing took place after the provisions for trial with the aid of assessors in the Criminal Procedure Code had been repealed through amendment by Act No. 7 of 2007, that did away with the assessors, still the law is clear that when the trial started on 14th October 2005, the provisions of the assessors was still part of the law and if the repeal of that law was carried out after the trial had began then the provisions of section 23 (3) (e) of the Interpretation and General purposes Act Chapter 2, Laws of Kenya were to be applied and trial should have continued with the aid of assessors to the end...”

It is apparent in the circumstances of this case that though the trial commenced with the aid of assessors, along the way they fizzled out and the trial proceeded without them which was irregular. In the circumstances I have no hesitation whatsoever in holding and declaring the trial so far to have been vitiated by that omission on the part of the trial judges. I therefore hold and declare those proceedings to be a mistrial let the case be heard afresh before court 2 without the aid of assessors.

Directions dated, signed and given at Kisii this 24th day of February, 2011.

ASIKE-MAKHANDIA

JUDGE