



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

**Criminal Appeal 10 of 1994**

**ELIZABETH NGELELE & OTHERS.....  
.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

There is one aspect of the trial which renders it defective. The summing up by the learned trial judge on this trial where all the appellants were charged with the serious crime of murder after a lengthy trial, occupies only a page. The summing up was a farce. It did not give the assessors who were laymen, any guidance whatsoever as to the facts of the law. As was said in Washington s/o Odindo v R (1954) 21 EACA 392, the assessors did not have the "benefit of a careful summing up" The role of the assessors so fined by S.262 of the Criminal Procedure Code namely, that:

"All trials before the High Court shall be with the aid of assessors"

was in this case rendered negatory by the learned judge's unhelpful summing up. In fact it can be said that he did not sum up at all to the assessors which makes the trial fatally defective. Se Kenge Kaingu Mweni, Kamisi Katanga and Karisa Chengo v. R Criminal Appeal No. 42 of 1997 (unreported).

Apart from this, the learned judge's own judgment leaves much to be desired. He gave scant consideration to the defence of the 1<sup>st</sup> Appellant, the wife of the deceased to whom she had been married for more than forty years and with whom she had had many children, and found no motive to support his finding that she had masterminded the murder of her husband. What is worse, the learned judge relied on the retracted confession of the appellant Saa Kilonzo, without warning himself as to the danger of convicting the 1<sup>st</sup> Appellant on the uncorroborated evidence of a co-accused. As regards the other appellants the learned judge gave really no consideration of their defence which in the circumstances also makes his judgment that had "no hesitation in finding them guilty" rather farinical.

In the result, considering the summing up of the learned judge which was no summing up at all, and his conclusion on the fact which was reached without a proper consideration of the evidence of the appellants as alluded to, we on our part, have also no hesitation in agreeing with learned counsel for the Respondent's concession that she could support the witnesses of the Appellants. The conviction against each of Appellants are hereby quashed and the sentence of death passed on each of them is hereby set aside. The appellants, unless otherwise lawfully held in custody, are hereby set at liberty forthwith.

Dated and delivered this 13<sup>th</sup> day of May, 1998.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**