



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: AKIWUMI, TUNOI & SHAH, J.J.A.)**  
**CRIMINAL APPEAL NO. 10 OF 1994**  
**BETWEEN**  
**ELIZABETH NGELELE**  
**JOHN MULI MUNYAO**  
**KIOKO MBULA**

SAA MUSYOKA KILONZO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Machakos (Justice Osiemo) dated 8th December, 1993

in

H.C.CR.C. NO. 7 OF 1992)

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**JUDGMENT OF THE COURT**

There is one aspect of the trial which renders it defective. The summing up by the learned trial judge in 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 or the law. As was said in **Washington s/o Odindo v Republic (1954) 21 EACA 392**, the assessors did not have the "benefit of a careful summing up". The role of the assessors so defined by section 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 nugatory 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. See Kenya **Kaingu Mweni, Kamisi Katanga and Karisa Chengo v Republic** 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 1st 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 1st 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 he had "no hesitation in finding them guilty" rather farcical.

In the result, considering the summing up of the learned judge which was no summing up at all, and his conclusions 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 cannot support the convictions of the Appellants. The convictions against each of the 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 at Nairobi this 13th 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 REGISTRA.