REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA
CRIMINAL APPEAL NO. 42 OF 1997

1. KENGA KAINGU MWENI

2. HAMISI KATANA

3. KARISA CHENGO ..... APPELLANTS

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from a conviction and sentence of the High Court
of Kenya at Mombasa (Hon. Miss Justice Ang'awa)
dated 14th February, 1997,
in
H.C.CR.C. NO.26 OF 1995)
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JUDGMENT OF THE COURT

This appeal must be allowed partly because of the terrible state of the record of appeal which makes the trial defective and also because of the elementary legal errors committed by the learned trial judge, Ang'awa J.

The appellants have appealed against the conviction and consequent sentences of death passed upon them on 14th February, 1997, by the learned trial judge of the High Court on a charge of murder that they jointly with others not before the court, had murdered an old woman, one Masika Kiti. It is true that the record of proceedings contain several typographical mistakes, but apart from these, there occur in the evidence of the alleged eyewitnesses to the killing of Masika Kiti, many incomplete and meaningless sentences and passages and serious misdescriptions of persons which can only be blamed on the learned judge, and which render the evidence of these eyewitnesses worthless. This was also due to the fact, and this can also be blamed on the learned judge, that the evidence of two important eye witnesses namely the first and third witnesses for the prosecution who were respectively the daughter-in-law and grand daughter of the deceased, and which evidence was given in Swahili, was not interpreted. It was when they had finished giving their evidence on 1st October, 1996, and when the trial for no good reason, had been adjourned for hearing over a month later to 6th November, 1996, that the following note which clearly shows that what had gone on before had not been interpreted, was made by the learned judge:

"Sworn interpreter made available."

Who this 'sworn interpreter' is, was never disclosed and does not appear to have also interpreted the evidence of three later witnesses two of whom gave their evidence in Swahili and one, in the Duruma language, into English which according to section 198 of the Criminal Procedure Code, is the official language of the High Court. What happened to the second prosecution witness as shown from the following excerpt from the record of proceedings, defies any sensible explanation: "PW2 in Swahili My name is Juma. I do not know Kiswahili well. I am a... Witness stopped and taken out of court."

The irrationality on the part of the learned judge can only be deplored. The learned judge also appears to have been more concerned with matters irrelevant to the trial namely, the meticulous recording at the end of each day's hearing, that the assessors be paid their travelling and subsistence allowances, rather than with the real issues of facts and law in the trial before her.

Apart from the lack of interpretation of evidence already referred to, the learned judge disregarded the law in other respects. This occurred when it came to the turn of the appellants to give evidence in their defence. It is not at all clear from the record of proceedings exactly which of the appellants' witness he was, but when one Chengo described as "DW4" began to give evidence after that of the second appellant had been completed, the following happened as witnessed by the record of proceedings:

> "DW4: My name is Chengo. It is true I was seated in court. Order: Witness disqualified as he was seated in court as evidence by prosecution was being given."

This of course, was an impermissible act on the part of the learned judge. The fact that the prospective witness had been in court whilst others gave evidence is no reason to roughly disqualify him as a witness especially for the defence. The fact that such a prospective witness had heard what other witnesses had said, only goes to the credibility or weight that may be given to his evidence. Here again, was yet another example of the disregard of the law by the learned judge.

What next happened, and we regret very much to have to say it, illustrates the learned judge's disregard or inability to appreciate and to apply the elementary principles of the criminal law. After the conclusion of evidence by the prosecution and the defence, the learned judge in what she called a 'Summary of the case' purported to sum up the evidence to the assessors in a manner that, having regard to the fact that the appellants were on trial charged with the most serious crime of murder, can only be described as irresponsible. The learned judge did not even bother to explain to the assessors the law relating to the offence with which the appellants had been charged and how the evidence given at the trial could be applied to that offence. She did not again bother to instruct the assessors on the most important and elementary principle of the criminal law system that the assessors could only convict the appellants if they were satisfied that the evidence adduced against them by the prosecution, had established the guilt of the appellants beyond all reasonable doubt. The learned judge's summing up as can be seen from her 'Summary of the Case' reproduced here under, was not only, one sided but also utterly useless: "Summary of the case.

> The deceased lived with the accused No.1. She was suspected of being a witch and taken to the chief. She was told to dig up her witchcraft. Unable to do that a tyre was placed on her neck and she was burnt completely.
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> Her body was removed to the mortuary where it was. The defence stated that on the evidence of Pw7 they came to an agreement with the deceased that she would pay for another witch doctor to exhume any ills. This though had to be done before the chief. On the way the crowd became rowdy. The 2nd accused had left and 1st accused had ran back home. The 3rd accused was not at the scene.
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> The state counsel objected to the defence of alibi being raised at this stage by the 3rd accused. The PW7 stated the deceased said she was not a witch but as she was requested to spit on the person who was ill she objected."

We must now consider the requirements of the law with regard to summing up. On this issue,

section 322(1) of the Criminal Procedure Code provides as far as is material, as follows:

> "... the judge may sum-up the evidence of the prosecution and the defence and shall then require each of the assessors to state his opinion orally and shall record that opinion."

Whilst it is true that a judge may not be required to sum up to the assessors, good sense and indeed, the authorities have laid down not only, that this must be done but also, how it should be done. In the case of John Kipkurui Arap Lelei v. Republic Criminal Appeal No.45 of 1994 (unreported) this court made the following pertinent observation:

> "The words of the section do not appear to impose a mandatory duty on the learned judge to sum-up to the assessors. However, in view of the fact that the judge shall then require the assessors to give their opinions, implies that the summing up should have taken place before then. In any case, good sense dictates that laymen who act as assessors require the guidance of the judge on legal issues particularly where the charge before the assessors is one of murder. The failure of the learned judge to sum-up to the assessor in our view, makes the proceedings fatally defective."

This court again in the case of Joseph Mwai Kungu v. Republic Criminal Appeal No.68 of 1994 (unreported) endorsed the views expressed in the case of Washington S/O Odindo v. R. (1954) 21 EACA 392 about summing up to assessors in this way:

> "The opinions of assessors can be of great value and assistance to a trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinions is correspondingly reduced. The instant case was essentially one where the assessors should have had the benefit of a careful summing-up if any weight is to attached to their opinions. The failure of the learned judge to sum-up largely negatived the value of the assessors."
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> This court in Kungu's case then concluded: "We would, for our part, now emphatically assert that the practice of summing-up to the assessors is a thoroughly sound one and has been followed for so long that it has acquired the force of law."

What the learned judge called a 'Summary of the case' is a farce and cannot, because of its serious defects already adverted to, be regarded as any summing-up worth its name. The learned judge completely failed to give the assessors, who were laymen, any guidance whatsoever, as to the facts or the law. As was put in the Washington S/O Odindo case, the assessors did not have the "benefit of a careful summing up". The role of the assessors as 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 rendered nugatory by the learned judge's unhelpful summing up.

In fact, it cannot be said that she summed up at all to the assessors and that also makes the trial defective

. Mr. Gacivih for the respondent has agrued that if the trial is defective and a nullity then a retrial should be ordered. The question when a retrial should be ordered where the trial has been found to be fatally defective and a nullity, was considered at length by this court in the Kungu case. In setting out the circumstances in which a retrial would not be ordered, this court in the Kungu case had this to say:

> "For example, if during the defective trial an accused person had wanted to call a material witness and the request to do so was for some reason turned down, then in such a situation it may well be unjust to order a retrial to enable such an accused person to call the witness as in such a case the accused would be put through a second trial which could have been avoided

in the first place by allowing him to call the witness."

Among the irregularities shown in the present appeal which render the original trial a nullity, is the illegal disqualification by the learned judge of the defence witness, Juma, from giving evidence. This alone apart from the devastating cummulative effect of these irregularities, will make it unjust to order a retrial.

We have found it necessary to dwell at some length on the flagrant errors of the learned judge because it seems to us that the learned judge does not seem to see the need to follow established principles in the administratiom of justice. Justice must be administered according to law and not according to the whims or caprices of a particular judicial officer. This, of necessity, implies that each judge must be acquainted with the elementary principles of the law. For the benefit of the learned judge we hereby order that a copy of this judgment should be served upon her.

As we said at the beginning of this judgment, this appeal must be allowed and it is hereby allowed. The pity of it all, is that the appellants had, in the mean time, been unjustifiably and needlessly incarcerated. The three assessors advised the learned Judge that the appellants were not guilty of the charge brought against them. The learned judge, however, did not even find it worth her while to state why she disagreed with the assessors. We quash the conviction recorded against each appellant, set aside the sentence imposed on each of them and order that they be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 17th day of July, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR