



IN THE COURT OF APPEAL

AT NAKURU

(CORAM:AKIWUMI, TUNOI & SHAH, JJ A

CRIMINAL APPEAL NO 45 OF 1994

BETWEEN

JOHN KIPKURUI ARAP LELEI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Mr. Justice R.N. Nambuye) dated 9th December, 1993)

in

H.C.CR.C. NO. 18 OF 1992

JUDGMENT

There are two aspects of the trial in this serious matter that render the trial defective and it is not surprising that the learned Counsel for the respondent has conceded the appeal.

The first matter is that after the conclusion of submissions by Counsel at the trial, the two assessors who were present that day retired to deliberate on their verdict, without the learned judge having summed up to them. They returned about an hour later and expressed their opinion that the appellant was guilty as charged of the offence of murder. The learned judge reserved judgment which was delivered a month and a half later and in which the appellant was found guilty of murder. Section 322(1) of the Criminal Procedure Code provides as follows:-

“When, in a case tried with assessors the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each assessor to relate his opinion orally, and shall read that opinion.”

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 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 assessors in our view, makes the proceedings fatally defective.

The second matter arose out of the irregular attendance of the assessors at the trial. Section 298 (1) of

Criminal Procedure Code provides that in the course of a trial with assessors and before the opinion of the assessors are obtained, the trial shall proceed with the aid of the other assessors if one of the three is "from any sufficient cause," prevented from attending throughout the trial or absents himself. At the beginning of the trial in question three assessors Osongo, Ongelo and Nyanjage were duly selected. At the next hearing, only Osongo and Nyanjage attended the trial. No sufficient cause was given for the absence of Ongelo. At this hearing, the evidence was concluded and the trial adjourned for submissions from counsel to be heard on 27th October, 1993. On this day, Osongo attended the trial. So also Ongelo who had missed the previous hearing when the hearing of the evidence was concluded. Nyanjage did not attend the trial and no sufficient cause was given for this. What next occurred was that, without the judge summing up to Osongo who had attended all sittings of the Court and Nyanjage who had attended only the first sitting of the court, these two assessors were ordered to give their opinion which as already observed they did, to the effect that the appellant was guilty of murder. It is impossible to take the opinion of Nyanjage seriously, neither can it be said that the trial had been carried out with the aid of assessors as required by Sections 262, 263 and 298 (1) of the Criminal Procedure Code. For those reasons also, the trial was fatally defective.

The appeal will therefore be allowed, the conviction quashed, and sentence set aside. We are, however, of the view, that having regard to the defects that we have identified and which culminated in there not having being a satisfactory trial of the appellant, there shall be a re-trial of the appellant before a court of competent jurisdiction as expeditiously as possible. In the meantime, the appellant shall be treated as a remand prisoner.

Dated and delivered at Nakuru this 28th day of February, 1995

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