IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GACHUHI, OMOLO & AKIWUMI, JJ A

CRIMINAL APPEAL NO 68 OF 1994

BETWEEN

JOSEPH KUNGU MWAI………………….APPELLANT

AND

REPUBLIC…………………………………..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Lady Justice Nambuye) dated 25th March, 1994

in

H.C.CR.C. NO. 7 OF 1993

JUDGMENT

Joseph Kungu Mwai, the appellant herein, appeals to this court against the conviction and consequent sentence of death recorded against him by the High Court of Kenya at Nakuru (Nambuye, J.) on 25th February, 1994. The appellant had been tried on a charge of murder, wherein it had been alleged against him that during the night of 17th and 18th March, 1992, the appellant jointly with other persons not before the court, had murdered one Captain Edward Kipsoi Belsoi.

The appellant first appeared before the High Court on 26th April, 1993. The record of the court for that day shows that one Gathendu represented the Republic while a Miss Wekesa represented the appellant. The plea of the appellant was taken on that day and needless to say, the appellant pleaded not guilty. Thereafter, the case was fixed for hearing on 24th and 25th May, 1993. Mr. Kigano who argued the appeal before us at first appeared to think that the appellant's trial started on 26th April, 1993, when his plea was taken and that the assessors ought to have been present from that day. There is no legal basis for that contention and we think it would be unwise to have the assessors, assuming they have been empaneled, present in court at the time of plea. It is not unusual that during the taking of the plea, a plea of guilty is at first offered and then subsequently withdrawn and the trial takes place thereafter. Assessors are not lawyers and if a plea of guilty were to be offered and then withdrawn, they would find it very difficult, if not impossible, to get it out of their minds that the accused person had at one stage pleaded guilty to the charge. We think it would not be in the interest of an accused person to have the assessors present in court at the time of the taking of the plea. Mr. Kigano did not, rightly in our view press this contention to the end.

On 24th May, 1993, when the hearing was scheduled to begin the prosecution requested for an adjournment because none of their eighteen witnesses was available in court. The matter was adjourned to the following day and on that day it was again adjourned to 21st June, 1993, at 2.30 p.m. On that day, Mr. Onyango appeared for the Republic and Mr. Olando was for the appellant. It appears that nobody had summoned for selection as assessors but in spite of that Mr. Onyango started to make his opening address to the court. After some minutes into Mr. Onyango's address, the learned judge realized that she had no assessors and this realization led to her somewhat amusing exclamation: "Where are the assessors?" Of course, she had neither summoned nor empaneled them so the assessors could not have been there. She then adjourned the matter to 3.45 p.m. but the hearing resumed at 4.03 p.m. when a total of five persons were present for the selection as assessors. The judge selected three namely, Robert Ombachi, Johnson Mburu and Charles Amulani. After the assessors were empaneled, Mr. Onyango instead of starting afresh his opening remarks, is recorded as continuing with them. The first witness James Cheruiyot Belsoi (P.W. 1) was then called. He gave extensive evidence-in-chief, was extensively cross-examined and was eventually re-examined. Bearing in mind that the sitting started sometime after 4 p.m. the judge must have adjourned the matter after 7 p.m. if not later. We shall return to this aspect of the matter later on.

When the hearing resumed on 22nd June, 1993, one of the assessors, namely Robert Ombachi, was absent. The judge nevertheless decided to continue with the trial, that is permissible under Section 298 (1) of the Criminal Procedure Code "the Code" hereinafter. On that day, two witnesses namely Alice Cherutich (P.W. 2) and Jane Chepkurui (P.W. 3) gave evidence. The importance of the evidence of these two witnesses cannot be overstressed; indeed the case for the prosecution would fall or stand upon the evidence of P.W. 2. She gave her evidence in the absence of assessor Robert Ombachi. Robert Ombachi was present the following day and without much ado, the judge re-admitted him in the trial as though nothing had happened. The hearing thereafter proceeded until 25th June, 1993, when the case was adjourned and the hearing did not resume again until 18th August, 1993. This time around, assessor Johnson Mburu was absent. The judge nevertheless decided to continue and on that day several witnesses were heard. Some objection was taken to the admissibility of some statements and after hearing submissions on the objection, the judge reserved her ruling which she eventually delivered on 3rd September, 1993. On that day, all the three assessors were present. The defence and prosecution counsel's respective submissions on the evidence were concluded on 26th October, 1993,and at 12.54 p.m., the judge without any kind of summing up to the assessors dismissed them to go and consider their verdict. The court reconvened at 1.30 p.m. when each assessor told the judge they would leave the matter to the court. The judge then reserved her judgment to 3rd December, 1993, but she was unable to deliver the judgment until 25th February, 1994, when she found the appellant guilty of the charge, convicted and sentenced him to death.

We have found it necessary to enumerate these matters in great detail because we have unhesitatingly come to the conclusion that the learned judge's manner of handling the issue of assessors made the trial fatally defective and the present conviction cannot stand. The court recently dealt with a similar situation in the case of JOHN KIPKURUI ARAP LELEI VS REPUBLIC Criminal Appeal No. 45 of 1994 (Unreported) which was also a decision of the same judge and it is obvious to us that the learned judge has difficulties when it comes to handling trials with assessors. For her benefit and that of any judge of the High Court who may have similar difficulties, we shall set out the procedure to be followed.

The starting point is of course, the Code. All trials in the High Court must be with the aid of assessors (Section 262) and when the trial is to held with the aid of assessors, the assessors shall be three in number (section 263). Before every trial opens in the High Court, the judge must select three assessors and at the beginning of every trial, the assessors must be three. But if in the course of a trial, as it does happen that one assessor might, for some good cause, be unable to attend, he may absent himself as Robert Ombachi did in this case on 22nd June, 1992. If that happens and the judge decides to proceed with the remaining two assessors, that, as we said earlier, is permitted under Section 298 (1) of the Code. However, once the judge has taken the decision to proceed with the two remaining assessors, the one who absented himself, whatever may be his or her reason for being absent, must not be allowed back into the trial. The same Section 298 (1) requires that an assessor must attend throughout the trial. That is of course a matter of common sense. At the end of the trial, each assessor must be asked and his obliged to give his or her own

individual opinion. How can anyone expect an assessor to give a worthwhile opinion on a matter when he or she has not heard or seen all the witnesses testify in the case? The only time when assessors must be excluded from a trial is when the court is called upon to determine the admissibility or otherwise of a particular piece of evidence, for example when the court is to hold a trial within a trial to determine the admissibility of an alleged confession by the accused. The procedure to be followed in that kind of situation was well set out by this Court in the case of VINCENT MUNYI BONI KARUKENY AND OTHERS VS. REPUBLIC (1982-88) 1 KAR 540 and we need not add anything to it.

So that once the judge decided on 22nd June, 1993, that she would proceed with the trial with the two remaining assessors, then Robert Ombachi ought not to have been allowed to take any further part in the proceedings and in allowing him back on 23rd June, 1993, the learned judge made a grievous error which she ought not to have made.

On 18th August, 1993, Johnson Mburu who was one of the still legally available assessors was absent. What was the judge supposed to do? The answer is obvious; she ought to have adjourned the matter so as to secure the attendance of Mburu. If it was not possible to secure Mburu's attendance at all, then there was only one painful course to take, namely stay the proceedings and start a new trial with new assessors under Section 298 (2) of the Code. But in the circumstances of the present case, that drastic procedure would not have been necessary because Mburu was available during the next sitting and given the record of the judge does not show any attempts were made to get Mburu that day. We are unable to appreciate what hurry the learned judge was in to make her ignore these elementary requirements. The effect of the errors is that right from the very early stages of the proceedings, the learned judge had rendered the proceedings, the learned judge had rendered the proceedings before her incurably defective and on that score alone, the proceedings were bound to be declared a nullity.

But the learned judge's mistakes did not stop there. As we pointed out earlier, at the end of the evidence and submissions of both sides, she did not sum up the case for the assessors. Mr. Etyang argued before us that Section 322 (1) of the Code does not make it obligatory on the judge to sum up to the assessors. The words of the section, as far as is material, are that:-

> "…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."

We agree with Mr. Etyang that there are two mandatory requirements in that section, namely:-

i. the judge must ask each assessor to state his opinion and,

ii. the judge must record must record the opinion of each assessor.

However, we would repeat what the court said in LELEI's case, supra, to which we referred earlier. Dealing with the same point of failure to sum-up to the assessors, the court said in LELEI's case:-

> "The words of the section do not appear to impose mandatory 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 the legal issues particularly where the charge before the assessors is one of murder. 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."

Mr. Etyang referred us to the decision of the predecessor of this court in ANDREA S/O KULINGA AND OTHERS VS. R [1958] E.A. 684 where similar provisions in the then Tanganyika Criminal Procedure Code were considered. There, it appears that the trial judge had only "very briefly" summed-up to the assessors before asking them to give their opinion. The court on appeal held that

> "whilst under Section 283 (1) of the Criminal Procedure Code there is no obligation on the trial

judge in Tanganyika to sum-up the evidence for the assessors the court endorsed the view expressed in WASHINGTON S/O ODINDO VS. R. [1954] 21 EACA 392 that "it is very sound practice…to do so except in the very simplest cases."

Having held that the court nevertheless went on to say and we quote:-

> "It is true that under s. 283, sub-s. (1) of the Tanganyika Criminal Code a trial judge is not under a statutory obligation to sum up to assessors the court endorsed the view expressed in WASHINGTON S/O ODINGO VS. R. [1954] 21 EACA 392 following as it does the express words of s. 283 to the dictum in MILIGWA S/O MWINJE AND ANOTHER VS. R. [1953] 20 EACA 255, 256 that S. 283 (1) "requires the judge to sum-up the evidence to the assessors."

Nevertheless, we wish to endorse the view expressed by this Court in WASHINGTON S/O ODINGO VS. R. [1954] 21 EACA 392, that:-

> "It is a very sound practice…to do so except in the very simplest cases."

The court then proceeds to explain why it was necessary to sum-up to the assessors and the court delivered itself as follows:-

> "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 nay weight is to be attached to their opinions. The failure of the learned judge to sum-up largely negatived the value of the assessors."

This is a 1958 decision and it held that though there is no statutory obligation on the trial judge to sum-up to the assessors, yet it is a very sound practice to follow and as far as we are aware the practice has been consistently followed. We asked Mr. Etyang if during his long practice at the criminal bar he was aware of any case in which a trial judge has ever failed to sum-up to the assessors, however brief the summing-up may be. Mr. Etyang was not aware of any other case.

We would, for our part 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. That is what this court was saying in LELEI's case and we would add that the Practice is so well established that if a trial judge is to depart from it, then there must be special and compelling reason for doing so.

If ever there was a case which required that a trial judge ought to sum-up to the assessors, then this present case was such a one. The learned judge's analysis of the evidence runs to some thirty typed pages and at the end of it all she said as follows:-

> "As regards the assessors verdict had they analyzed the evidence on the lines this court has done, they would have arrived at the same conclusion as the court."

It was totally unreasonable of the judge to except these three laymen to analyze the evidence in the manner she did when she had wholly failed to give them any assistance by way of a summing-up. It is no wonder that the assessors were able to give her any useful assistance in the case and left it to her to decide.

What are we to make of the assessors opinions? The learned trial judge thought that by leaving the matter to her to decide, each of them was finding the appellant not guilty. We do not know the basis for that conclusion, but to us, it is obvious that the assessors were unable to decide the matter one way or the other.

In the context of the Code, the opinion which an assessor is required to give can only be "either guilty or

not guilty." We do not think that a judge is mandatorily required to hold a trial with the aid of assessors merely because the assessors are to give the judge companionship during the trial. The case of ANDREA supra, sets out, and in our view correctly so, the usefulness of having assessors in a trial. Where they are totally unable to give the judge their opinion, then it cannot be said that the trial has been conducted with the aid of assessors and the inevitable but sad conclusion must be that if they are unable to decide, then the judge must discharge them, empanel a new set of assessors and hold the trial afresh. Happily, as far as we are aware, such situations are very rare and this is the only case, to our knowledge, where the assessors were unable to give their opinions. When the assessors failed to give their opinions, Nambuye. Should have declared a mistrial and ordered a new trial for the appellant, preferably before another judge. On this basis too, the trial of this appellant was fatally defective.

What then, must we do with the appellant? Mr. Kigano asked us to acquit the appellant. Mr. Etyang asked us to order a retrial. This was really the main issue which was fought before us. Mr. Etyang contended that if we hold that the trial of the appellant as fatally defective, then we should order a retrial. Mr. Kigano, on the other hand, contended that we should acquit the appellant because to order a retrial would occasion an injustice to the appellant. Mr. Kigano strongly relied on then case of AHMED ALI DHARAMSI SUMAR VS. R. [1964]EA 481 in which the then Court of Appeal for East Africa held that:-

> "whether an order for a retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person."

We entirely agree with this proposition and can find nothing useful to add to it. The question then is: In what circumstances would a retrial be ordered?

There are numerous authorities on the issue and some of them to which we were referred are:-

1. FATEHALI MANJI VS. R. [1966] EA 343. Delivering the judgment of the Court, Sir Clement De Lestang Ag. P. stated at pg. 344 Letters G-H:-

> "…; in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of the insufficiency of the evidence of for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order of retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

This case closely follows the principles set out in AHMEDI's case to which we have referred and there one of the principles accepted was that a retrial should not be ordered unless the court was of opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result. This principle is derived from the case of:-

2. PASCAL CLEMENT BRAGANZA VS. R. (1957) 152 and the principle has been consistently followed since then. The High Court of Kenya (Trevelyan, J.) applied the principle in:-

3. GREYSON KIMBIO VS. R. (1979) KLR 132 where that learned judge held that a retrial is the proper order to be made where the accused has not had a satisfactory trial but that it should not be ordered unless the appellate court is of the opinion that a proper consideration of the potentially admissible evidence a conviction might result.

This court also applied the same principle in the case of :-

4. GEORGE KARANJA MWANGI AND OTHERS VS. R. (1982-88) 1 KAR 567 where the court held that a retrial will only be ordered if the appellant court is of the opinion that on a proper

consideration of the admissible or potentially admissible evidence a conviction might result. In the most recent case decided by this court on this point, namely:

5. PIUS OLIMA AND ANOTHER VS. R. (CRIMINAL APPEAL NO, 110/94) (Unreported) the court for the first time introduced the concept of a strong prima facie case but we think the court was saying no more than that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. It is to be noted that even in the OLIMA case, supra, the court specifically referred to the cases of AHMED SUMAR VS. R., MANTI VS. R. and so on.

How then do we apply these principles in this appeal? There can be no doubt on the material before us that the trial of this appellant was grossly defective, if not downright illegal. Mr. Kigano appeared to argue that because of the gross nature of the irregularities in the trial it would be unjust to the appellant to order a retrial. With respect to Mr. Kigano, we do not think that it is the correct way to view the matter. It is those self-same irregularities which rendered the trial of the appellant defective and it cannot be argued that because the trial was defective, a new trial would be unjust. We can, of course envisage a situation in which the very same reason rendering a trial defective may at the same time be a basis for holding that it would be unjust to the appellant to order a retrial. 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 since 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. The irregularities in this present appeal which render the original trial a nullity are not of such a nature and accordingly they cannot be used as a basis for refusing an order for a retrial.

Because of the view we have taken in this matter we really do not think it would be right for us to go into the merits or otherwise of the evidence. The case for the prosecution, as we said earlier, rested basically on the evidence of P.W. 2 who swore that she had known the appellant before as the appellant was in the habit of buying cattle from the home of the deceased. The appellant himself agreed he used to buy cattle from the deceased. She also mentioned certain persons whom she said were with her when she allegedly recognized the appellant. Those persons, such as P.W. 3, said that they were not with P.W. 2 at the spot where P.W. 2 allegedly saw the appellant and they certainly did not see the appellant. The question that would have to be answered at the end of the day must be whether, taking into account the totality of the evidence on record, P.W. 2 could be treated as a credible witness. The learned trial judge did not at all assist the assessors on these points and in this case it was vital to have the opinions of the assessors on the issue whether P.W. 2 could be believed. After all it is thought that the assessors are better judges of issues of facts such as whether a particular witness is truthful or not, than the judge. If the evidence of P.W. 2 were to be believed, then there would be some evidence upon which a conviction might result. In this appeal, we are not prepared to answer the question of whether P.W. 2 was or was not a credible witness. It is not to be forgotten that the learned judge who saw P.W. 2 give evidence before her thought she was credible. We shall leave that question to be decided on another forum. Will there be any other injustice to the appellant if we order a retrial?

The question if the prosecution being enabled through a retrial to fill in gaps in its evidence cannot arise. This was a murder trial and thee witnesses to be called, the nature of the evidence which they are likely to give are all known in advance. That is the purpose of committal proceedings. If the prosecution were to want to introduce new evidence not available in the committal bundles, they would have to seek leave of the High Court to do so and the witness or witnesses introducing such evidence would be faced with the question as to where they were during the first trial.

The appellant has been in custody since early 1992 but that fact must be weighed against the fact that another human being is alleged to have lost his life contrary to law and there cannot be any doubt that the charge against the appellant is a grave one. In these circumstances, we think the interests of justice require that the matter be reagitated afresh before another judge with new assessors.

Before we conclude our judgment, there is one other matter upon we feel obliged to comment. We earlier on referred to the fact that this trial opened before the learned judge at 4.03 p.m. and by the time the first

witness started to give evidence, it must have been around 4.30 p.m. or so. P.W. 1 gave extensive evidence, was extensively cross-examined and then re-examined and we suspect that by the time he completed his evidence it must have been around 7.00 p.m. or so. We totally fail to see the logic in starting an obviously long and complicated trial so late in the day and continuing with it even later into the evening. Again, it must be remembered that courts are open to the public as of right, subject of course, to good conduct and in a murder trial such as this one was, it is reasonable to expect that the relatives of an accused person would wish to attend and be present at the trial. We view with utter disfavour court sittings which may give to the public the impression that a particular trial is being conducted under some emergency. We hope that the learned judge would stop these late sittings.

Our final orders in the appeal shall be that we set aside the conviction and the sentence of death imposed on the appellant and we direct that he shall be retried at Nakuru before another judge sitting with new assessors. It is our hope that the High Court at Nakuru will fix hearing dates for the retrial on a priority basis. In the meantime, the appellant will remain in remand custody.

Those shall be our orders in this appeal.

Dated and delivered at Nairobi this 31st day of March 1995

J.M. GACHUHI

………………

JUDGE OF APPEAL

R.S.C. OMOLO

………………

JUDGE OF APPEAL

A.M. AKIWUMI

………………

JUDGE OF APPEAL