IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuhi JJA & Masime Ag JA)

CRIMINAL APPEAL NO 108 OF 1987

BETWEEN

KINUTHIA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from a Conviction and Sentence of the High Court at Nairobi, O'Connor J)

January 14, 1988, **Platt, Gachuhi JJA & Masime Ag JA** delivered the following Judgment.

The Appellant was charged with murder, but was convicted of manslaughter and sentenced to 4 years' imprisonment.

It was found that on 22nd December 1985 the witness Waititu Ngage (PW3) fell into a quarrel with the Appellant. The latter knocked him down, kicked and hit him. The nephew of Waititu, Ndungu Kangethe, came up to them and asked the Appellant why he was killing "his father." Ndungu separated them by getting hold of them. The Appellant then went some distance, picked up a stone, came back and hit Ndungu on the head with it, by throwing it. In fact the Appellant threw two stones. When Ndungu was hit, he fell down motionless and the Appellant ran away. The Appellant was chased by Daniel Njoroge Kibe (PW7), and threw stones at this witness. The scene was also observed by Paul Kinuthia (PW5) who came out of his bar, the Mugunda Bar and found, like Daniel, that Ndungu was lying on the ground, and that Daniel Njoroge Kibe was chasing the Appellant. But the latter was not apprehended at that time.

There was some difficulty in locating the stone used by the Appellant.

The stone thought to have been involved had no blood on it, according to the Government Analyst. There was also some difficulty whether it had been at first submitted to the Analyst. But a stone such as the one produced could have caused the fracture of the Deceased's skull. A fall from some three feet six inches if violent could have caused the injury. The depressed fracture on the side of the head had caused intra-cranial haemorrhage which in turn had caused death.

The defence in short was that on this Sunday 22nd December, 1985, the Appellant had been drinking with friends. He left them and went to the trading centre and entered the Bar of Paul (PW5) and found Waititu (PW3) and Ndungu, the Deceased. The Appellant bought them beer. Somebody called Njenga came and told Waititu that he would like Waititu, a barber by trade, to cut his hair. Waititu said he was too drunk to

do so. The Appellant wanted to leave, but the others insisted that he buy them more beer at Mugunda Bar. They went on to the verandah which is raised one and a half feet above the ground. Ndungu, the Deceased started to pull Waititu. The latter fell down and Ndungu fell off the verandah, and landed on stones which were there. The Appellant picked up Waititu and the deceased got up himself. They went to an open space in the centre of the village and Waititu and Ndungu started pulling the Appellant to Mugunda Bar to buy more beer. The Appeallant released himself and Ndungu fell again. He did not get up, but was surrounded. The Appellant was accused of killing Ndungu. He was assaulted by Njoroge and escaped. He was chased by Njoroge and Kaguru who threw stones at the Appellant. The latter was later arrested.

Githoha Gahera spoke for the Appellant (PW1) but did not see anything relevant. Peter Njenga ((DW2) testified. He had asked Waititu to cut his hair, but then joined in drinking with Waititu, the Appellant and the Deceased at Gituamba Bar. They wanted to go to the other Bar. All three, Waititu Ndungu, Deceased and the Appellant fell off the verandah.

They went on to another place just opposite Mugunda Bar. They were pulling each other and fell down a second time. Waititu and the Appellant got up but Ndungu did not. There was no great hostility and the witness saw no stone throwing. The Appellant was accused and challenged to a fight. But the Appellant ran away.

The learned Judge summed up all this evidence to the Assessors. He drew attention to the discrepancies in the evidence quite properly. He explained the state of the ground where the combatants had been. He drew attention to the difference between manslaughter and murder. But the Assessors unanimously returned opinions that the Appellant was not guilty of any offence. A general opinion only was given. After a creditable trial dealing with the evidence correctly, and summing up fairly, if we may say so, the learned judge then precipitated this appeal by taking no account of the opinion of the Assessors, save that he correctly stated what their opinions were. The ninth ground of appeal is:-

> "9. The learned trial Judge wrongly failed to be persuaded by the findings of the Assessors."

The other grounds of appeal deal with the various aspects of the evidence upon which the Appellant contends that Waititu, who was a single witness ought not to have been believed.

This is a first appeal by way of rehearing. This Court is bound to evaluate the evidence for itself in the light of the Assessors' opinions and the learned Judge's finding.

We turn first to the principles of law involved.

Section 262 of the Criminal Procedure Code provides that In the High Court:

> "All trials shall be with the aid of Assessors."

Section 263 provides that they shall be three in number to be selected from the list of those persons summoned (Section 297). They are to attend during all adjourned sittings until the conclusion of the trial (Section 299).

At the close of the hearing section 322 then provides:-

> "(1) 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 of the Assessors to state his opinion orally, and shall record that opinion, but in doing so shall not be bound to conform to the opinion of the Assessors."

Section 322(4) allows the assessors to retire to consider their opinion and during such retirement to consult one another.

If the Judge is not bound by the opinion of the assessors, yet the trial is to be conducted with their aid, what form should this aid take? The purpose of the Assessors is to make sure that, as far as possible in the most serious cases which are tried by the High Court, the decisions of fact have a broad base conforming with the notions of that part of society to which the Accused person belongs. The Assessors are of special value in determining what action amounts to provocation. They are also of great importance in assessing contradictory stories of what occurred in a particular case, and they may be able to guide a Court as to the manners and customs, and so to the truth of what the witnesses have said. It is therefore right and proper that the trial should be with the aid of assessors, in the full sense; they should be allowed to ask the witnesses questions; they should have exhibits and reports shown and explained to them; and they should give their opinions in general and on special points as the circumstances of a case require.

Take for instance, *R v Paulo Lwevola Mupere* (1943) 10 EACA 63 a decision which perhaps would not attract modern approval. The modern assessor would have found provocation almost certainly. But to get to a decision which of several acts might be provocative, this Court's predecessor doubted the wisdom of merely allowing a general opinion or verdict to be recorded.

> "It is observed that the assessors merely said "I find accused guilty of murder."
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> It is often desirable for the Court of Appeal to know not only the assessor's opinions but also their reasons for their opinions. With regard to the judgement we should have liked a fuller judgement and we attract the attention of the learned Judge to Section 168 of the Criminal Procedure Code."

That is to say, the judgment ought to be based on reasons given for the decision. In that case, the assessors agreed with the Judge. Here the assessors disagreed. It is therefore fundamental that the Court gives its reasons for disagreeing with the Assessors. Now of course in the case of a general opinion the Court will hardly be able to do so. The value of *Paulo Lwevola's* case is that it established that decisions are to be taken with reasons, which can be seen to prevent arbitrary measures.

Later on in 1956, *Mohamed Bachu vs Rg.* was decided (23 EACA 399). The issue was whether the trial was a nullity because the specific opinions of the Assessors had not been taken, as to whether the evidence showed sufficient provocation to cause an ordinary person of the appellant's community to lose his power of self-control. In considering what might be meant by the phrase "a trial with the aid of assessors," the forerunner of the present section 322 was set out – they are in identical terms -, and the Court of Appeal commented that the Code did not specify that the opinions of the Assessors should be taken on every question that arises in a case. The conclusion however at p. 401 was:-

> "We can well imagine cases in which it would be proper and indeed advisable for the trial Judge to obtain a specific opinion from the assessors on a certain point in addition to their opinions on the case as a whole. In fact it is often done, but the Kenya Criminal Procedure Code does not specifically require it to be done in all cases and the interference by this Court solely on the ground that the Court had not required an opinion from the Assessors upon a particular point as well as upon the case as a whole could only be justified if it were shown that it was unfair to the accused or contrary to the principles of natural justice."

The problem in *Bachu's* case seemed to the Court of Appeal to be resolved as a straight-forward case of mere vulgar abuse exchanged between the Deceased and the Appellant, with no basis for provocation. Consequently no interference was justified. In the present case it appears to us that specific opinions should have been called for and we would specifically apply the test of unfairness to the accused and natural justice. The Criminal Procedure Code provides that a judgement must contain the points for decisions and reasoned decisions on those points. That is required so that justice may be seen to be done, especially in the serious cases that the High Court deals with.

The learned Judge had before him a very controversial case in which the main participants had all been drinking considerably. As the Appellant points out, there was only the evidence of Waititu, a single witness, for the prosecution, against that of Peter Njenga and the Appellant. It is very difficult to understand what "corroboration" Paul Mungai Kinuthia offered. He only saw the Appellant being chased

after Ndungu had fallen

down. On either side it was said that the Appellant ran away to avoid arrest, either because he was justly accused or unjustly suspected. Again while the prosecution alleged that the Appellant threw stones at his pursuers, Peter Njenga said the pursuers of the Appellant threw stones at him. Thus Njoroge's evidence of the chase after the Appellant is compromised by the evidence of peter Njenga. But the learned Judge found "corroboration to some degree" in Kinuthia's evidence.

The second confrontation is whether the Appellant threw the stone which injured the deceased or whether the deceased hurt himself in either of the two alleged falls. The finding of the stone at 10 p.m. when constable Ablon Nyambane visited the scene, after its use at 5 p.m., is rather extraordinary. According to Ablon it was identified by members of the public. Who were they? They were not Waititu, Kinuthia or Njoroge. Waititu identified the stone in Court as the one that hit the Deceased.

Then he says:-

> "I did not show it to anybody as I did not pick it up. It was the Police."

There was no evidence what happened to the stone after it hit the deceased, as to where it landed, or how it was guarded. At any rate none of the prosecution witnesses showed this stone to the Police Constable, and the evidence stood to be hearsay, unless Waititu could actually identify it for some reason. There were two stones in any case. Whether Waititu could actually identify either of them is problematic. At least he gave no distinguishing marks and they were not collected at once.

On the other hand, it was said that the deceased could not hurt himself by falling off the verandah, or falling on the road. As far as we can tell, the Police Officers did not give evidence as to the actual state of the ground in front of the verandah or the state of the road. The fact that the appellant could not quickly pick up a stone to throw, does not necessarily show that there was not a rock or rocky surface, which could not be picked up lying in the dusty surface. It would also depend on the force of the fall from the verandah or again at the road, if that were the case. It is doubtful if the witnesses knew or were asked to describe the surfaces where the deceased fell.

It seems clear that the learned judge maintained that the deceased fell over only once, not twice. It seems that he followed Waititu's evidence steadfastly. The defence was very clear that the deceased fell over twice in two different skirmishes.

It is to be inferred from the opinions of Assessors that some part or all of Waititu's evidence was not believed. It might be argued that the learned Judge gave his opinion explaining the reasons why he believed Waititu, Kinuthia and Njoroge, (PW3, 5,and 7). Therefore whether or not the Assessors had given their opinions on the specific aspects of the case, theJudge must have answered their objection in showing the strength of the prosecution case and rejecting the defence. But that is not so. We cannot tell what reasons would have been given. Moreover it is one thing to disagree with a general opinion which might be considered vague; it is another thing to overrule a specific finding such as that Waititu was not trustworthy; that the stone was not clearly identified; that the ground where the deceased fell was not carefully scrutinised; and that the benefit of these doubts must be given to the Appellant. It would be a very strong action to overrule the unanimous opinion of the Assessors on these points, in the circumstances of this case, where there is evidence with might be decided either way.

At least the learned Judge might have analysed the inferences from the assessors' opinions, and taking the most favourable position for the Appellant assessed the evidence in that light. That would have gone some way to cure the lack of taking specific opinions; but it would not have provided the Court with what the assessors actually thought. That is alone what would have given his judgement the basis on which to build a reasoned opinion differing from or in agreement with them. As it is, finding against the normal expectation, that the Judge would adopt the unanimous opinion of the assessors, the learned Judge has made findings

which are usually rather forced, such as the’“corroboration” of Kinuthia; the “identification” of the stone; and the “assurance” that the Deceased could not have hurt himself in falling. There was not cast iron evidence to support these findings, but sketchy evidence if any at all.

In these circumstances, looking at the evidence for ourselves in the light of these conflicting opinions, there is doubt whether the Appellant did receive a proper evaluation of his defence. His defence must have been accepted by the Assessors in general. Against that there is not recorded such reasoning which can be said to provide a balanced and convincing explanation why the Assessors’ opinion should not be followed, even if specific opinions were not called for. We are satisfied that we should accept the evidence of the Assessors as being at least equally as good as that of the learned judge. The Appellant must be given the benefit of doubt.

The appeal is allowed, the conviction quashed and the sentence set aside.

The Appellant is to be set at liberty forthwith unless held for any other lawful cause.

Dated and delivered at Nairobi this 14th day of January , 1988

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O. BMASIME

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AG. JUDGE OF APPEAL