



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: VISRAM, KARANJA & KOOME, JJ.A

CRIMINAL APPEAL NO. 53 OF 2017

BETWEEN

KAHINDI CHAROAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (A.H. Omondi, J.) dated 7th August, 2011

in

H.C.C.R.C No. 4 of 2007.)

JUGDMENT OF THE COURT

1. Before us is an appeal against **Kahindi Charo's** (the appellant) conviction and sentence for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge were that the appellant on 29th November, 2006 at Kiembeni Location, Kilifi District within the then Coast Province, murdered **Sidi Benjamin Shaha** (the deceased).
2. The prosecution's case with regard to the said offence was that on the material day the appellant and his wife, the deceased, had a disagreement which culminated in the deceased going to her parents' home. Upon arrival she met her mother, Nyevu Shaha (PW2) in the company of Saumu Shaha (PW1) outside her parents' house and informed them of the disagreement, the details of which were not disclosed at the trial court. She also told them that she had resolved not to go back to her matrimonial home until the appellant came for her.
3. Apparently, later in the evening between 5:30p.m and 6:00p.m the appellant went to his uncle's home, Safari Charo Mulinda (PW3) and told him that the deceased had ran away to her parents' house. Safari's efforts to dissuade the appellant not to go after her that evening came to naught. A little while after the appellant left his house Safari decided to follow him to the deceased's parents' home.
4. At the deceased's parents' homestead the appellant found both Nyevu and Saumu outside Nyevu's house; they exchanged greetings and the appellant asked the deceased to give him drinking water. It seems Saumu went into her house which was within the homestead while it is unclear where Nyevu retreated to but she maintained she remained close by. Moments later, Saumu, Nyevu and Safari who was by then about 100 meters away, heard the deceased screaming that she was being killed. They all rushed to the scene only to find the deceased lying dead on the ground with multiple stab wounds. According to Safari, he saw the appellant running away.
5. The matter was reported to the area chief and a postmortem was conducted on the deceased's body. Thereafter, the appellant was arrested, arraigned and charged at the High Court with the deceased's murder. He denied committing the offence in his defence. However, the trial court (H.A Omondi, J.) in a judgment dated 7th August, 2011 found the appellant culpable and sentenced him to death.
6. It is that decision which is the subject of this appeal wherein the appellant complains that the learned Judge erred in failing to appreciate that-

i. The exclusion of the assessors who had been present since the commencement of the trial at the later stage of the trial occasioned a miscarriage of justice to the appellant.

ii. *The prosecution's case was marred with contradictions and was not safe to warrant the appellant's conviction.*

7. Mr. Adalla, learned counsel for the appellant, relied on the written submissions on record and also made oral highlights. He submitted that the trial had commenced with the aid of three assessors before the initial trial Judge Ombija, J., (as he then was). However, upon A.H. Omondi, J. taking over the matter, the said assessors were excluded from the proceedings without any reason. Further, the learned Judge tried to trivialize the implication of this anomaly by stating that it was a mere procedural technicality. In point of fact, the omission rendered the proceedings a nullity. In buttressing that line of argument, counsel cited the case of *Charo Karisa Salimu vs. R [2016] eKLR* wherein this Court expressed:

“In this appeal the learned trial Judge acted on a mistaken belief that the law having changed, doing away with trial with assessors, parties or the Court could dispense, at will with their participation. Authorities after the amendment are legion to the effect that a trial which had commenced with the aid of assessors before the amendment had to be finalized with their participation and that if discharged half-way the trial would be a nullity.”

8. Mr. Adalla went on to attack the prosecution's case as being inconsistent. He argued that the witnesses' evidence with respect to the injuries on the deceased's body and the sequence of events was contradictory. All in all, there was no basis for the appellant's conviction. It is on those grounds that counsel urged us to allow the appeal.

9. On his part, Mr. Isaboke, Senior Prosecuting Counsel, not only supported the appellant's conviction but also the learned Judge's holding that the exclusion of the assessors was a procedural matter which was not fatal to the proceedings. He added that contrary to the appellant's allegations there were no contradictions in the prosecution's case which was watertight. In his concluding remarks he stated that the appeal lacked merit and should be dismissed.

10. We have considered the record, submissions by counsel and the law. Prior to the *Statute Law (Miscellaneous Amendments) Act, No. 7 of 2007* coming into effect on 15th October, 2007, trials at the High Court were required to be conducted with the aid of assessors. The amendment Act in question precluded the participation of assessors in trials. Following the said amendment an issue arose with respect to pending trials which commenced before the amendment with the aid of assessors; whether such assessors could be discharged or excluded from the trial on account of the amendment. This issue was settled by a number of decisions by this Court which were aptly discussed in *Charo Karisa Salimu vs. R (supra)*.

11. This Court's position to date is that where a trial was commenced prior to the amendment with the aid of assessors such a trial should continue to its conclusion with the said assessors. This much was restated in the case of *Paul Mutwiri Munene vs. R [2015] eKLR* thus,

“Notwithstanding the repeal of those provisions by the amendments brought in by Act No. 7 of 2007, the trial, having commenced while they were in force, should have proceeded with the aid of assessors till the end.”

12. The foregoing position was bolstered by the provisions of *Section 23(3)(b),(c) &(e)* of the *Interpretation and General Provisions Act* which stipulates:

“23.

3) *Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not*

...

b) *affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed;*
or

c) *affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or*

...

e) *affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”* [Emphasis added]

13. The learned Judge seems to have appreciated as much and in her own words stated:

“There is then, the procedural matter I had alluded to regarding the assessors who were not summoned to complete their participation in the trial. This was an oversight on my part, and I think neither the State Counsel nor the defence counsel realized that the assessors had been left out, otherwise I am sure one of them would have drawn this court's attention to that omission. I am keenly aware of the Court of Appeal's position regarding participation of assessors in murder trials under the now repealed provision of section 263-273 of the Criminal Procedure Code – where the superior court has held that where a matter begun with the assessors, then they must participate in the trial until conclusion of the same – even if the trial continues after the date of repeal.”

14. What was the consequence of the exclusion of the assessors in this case? The learned Judge in finding that the same was not fatal to the proceedings stated:

“So should this court suo moto declare the proceedings here a mistrial and have the matter heard afresh? I wonder whether this would be in line with the fair and expeditious dispensation of justice. Accused has been in custody since February 2007, the trial suffered several hiccups including transfer of the Judge who was dealing with the matter, to the extent that when he returned to the station to complete the trial, the prosecution witnesses (were unavailable – (the Hon. Judge having travelled from Kitale to Malindi). Worse still for the accused, he had to endure a period of uncertainty when the Malindi Bar had an indefinite period of boycotting pauper briefs. Surely would justice be done by declaring these proceedings a mistrial and ordering that the matter begin from the evidence of Pw5 so as to accommodate the assessors, so as to include them in the process of summing up?

My view is that the then existing provision for assessors was a procedural technical requirement which would not affect the court’s findings, because the assessors opinions were never binding on the court and I am persuaded that it was due to this “ceremonial” role, that the criminal justice process eventually did away with them. If this court were to order that the trial begins afresh from the evidence of Pw 5, then I think the case may well celebrate five years within the court system, and I think this would go against the spirit and letter of the Constitution of Kenya 2010 section (sic)159 (d) which specifically provides that Justice shall not be hampered by undue procedural technicalities – I think this is one such situation, so I will not declare the proceedings a mistrial and set aside the “un-assessed” portion, nor do I find it just enough to direct for accused being set at liberty.”

15. In our view, the learned Judge misapprehended the implication of the exclusion of the assessors more so, in light of the provisions of **Section 23(3)** of the **Interpretation and General Provisions Act**. The appellant’s right to have the trial conducted with the aid of assessors could not be written off as a mere procedural technicality since it was one of the tenets of a fair trial before the amendment in question. See this Court’s decision in **Bob Ayub vs. R [2010] eKLR**. Moreover, the learned Judge erroneously took into account the efficacy of a retrial as the basis of determining the consequence of the said exclusion. The effect of exclusion of assessors in a case such as the one before us is equally settled. The proceedings therein are rendered a nullity and as this Court succinctly put in **Paul Mutwiri Munene vs. R (supra)**:

“The conviction of the appellant cannot therefore stand as his trial was effectively a mistrial and a nullity ...”

16. As such, should a retrial ensue? Whether or not a retrial should be ordered is dependent on the circumstances of each case. However, the dominant factor for consideration is whether justice will prevail. In summing up the relevant considerations this Court in **Muiruri vs. R [2003] KLR 552** page 556 observed:

“Generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (see Zedekiah Ojoundo Manyala –vs- R Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or the Court’s.”

17. Applying the aforementioned principles in the case before us we find that a retrial is not suitable. This is because a new trial would more likely occasion a miscarriage of justice to the appellant who has been in custody for a period of over 10 years.

18. Accordingly, we find that the appeal has merit and is hereby allowed. We quash the appellant’s conviction and set him at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR