IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO 286 OF 2009

BETWEEN

W S …………..…. APPELLANT

AND

REPUBLIC …….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (Maraga, J. as he then was) dated 26th November, 2009 in **H.C.Cr.C. No 8 'A' of 2006**

JUDGEMENT OF THE COURT

1. This is yet another matter from this station where the appeal has been pending hearing for the last seven years owing to numerous adjournments on account of unavailability of the appellant. The appellant has been unavailable because of a finding made on 26th November 2009 by the High Court **Maraga J**. (as he then was) in a murder trial that she was 'guilty but insane' in accordance with **Section 166(1)** of the **Criminal Procedure Code** (CPC). The court then made an order that the case be reported to the President where upon the appellant was transferred from her confinement at Lang'ata Women Prison to Mathari Mental Hospital on 29th March 2011. That is where she continues to be. Yet, a notice of appeal and memorandum of appeal were drawn, thumb-printed and filed by her on 12th December 2009. Learned counsel was also availed to her *pro bono* in the person of **Mr. Wambeyi Makomere,** Advocate. Prosecution Counsel, **Ms Nelly Kasiso Ngovi** appears for the State.
2. At the hearing of the appeal on 23rd February 2016, learned counsel, **Mr. Maragia Ogaro** held brief for Makomere and obtained leave to file supplementary grounds of appeal which were couched as follows:-

i. ***"THAT the learned trial Court erred in law and in fact in failing to sum up the case to the assessors and in the assessor (sic) returning the verdict before the judgment was delivered hence this renders the decision and the entire proceedings a nullity despite the same being a special finding.***

ii. ***THAT the proceedings were conducted with the aid of three assessors namely: Damacline Momanyi, Thomas Kipkemoi Rotich and Harrison Maina. They were mandated by law to pass the verdict before judgment."***

3. For its part, the State gave notice on 24th September 2014 through Senior Prosecution Counsel, **Mr. Joel Omari**, that it would raise a preliminary objection to the appeal on the ground that no appeal lies on a special finding of 'guilty but insane'. At the hearing of the appeal, Ms Ngovi also pointed out that **Section 200** of the **CPC** was not complied with by the trial court and the State would be seeking a retrial. The three issues of law raised on both sides were argued and we think they are dispositive of the appeal without going into the merits.
4. We may start with the preliminary objection that the appeal does not lie. It was Ms Ngovi's submission that a special finding is not a conviction but an acquittal while appeals to this Court lie only against convictions or sentences as provided in **Section 379** of the CPC. In her view, the order made that the matter be reported to the President and the subsequent transfer of the appellant to a mental institution was not a sentence. In support of those submissions, counsel relied on the decision of this Court in ***Paul Irungu Mwangi v Republic** [1982] eKLR* **(PIM case)** where it was held that a special finding of 'guilty but insane' was an acquittal for purposes of **Section 379** of the **CPC**. Despite the attention of Ms Ngovi being drawn by the Court to a subsequent decision of this Court in ***Bgkm v Republic [2015] eKLR,*** which distinguished the **PIM case,** she maintained her objection to the appeal. In his brief contribution to the issue Mr. Maragia, at first unsure of his stand, nevertheless supported the view taken by this Court in the ***Bgkm case*** but asserted that each case should depend on its own facts.
5. This issue need not unduly detain us since this Court has made itself clear in the ***Bgkm case (supra).*** The Court reiterated and applied the decision in the case of ***Jane Chesigei Sang v. Republic, Nakuru Cr. Appeal No. 219/2011 (UR).*** In both decisions, the Court acknowledged that the **PIM case**, after reviewing and following English decisions, had reached the conclusion that:

   > ***"..no appeal to the Court of Appeal from the High Court lies under Section 379 of the Criminal Procedure Code in respect of a special finding under section 166 of the Code, and a special finding is not a conviction, but is an acquittal." (***Emphasis added).

6. In departing from that decision**,** this Court in the ***Jane Chesigei Sang case*** stated:

   > "***The Bgkm case, however, differed with that conclusion*** (PIM case) ***on the basis that:***
   >
   >> ***"..the law in England upon which the decision was predicated has since changed, specifically casting doubts that a special finding was an acquittal. We find no reason to hold that it is. Indeed, in view of the traditional duty of the first appellate court to re-examine the trial court record exhaustively and make its own conclusions on matters of fact and law, we find no reason to bar an intending appellant who seeks to question glaring blunders of law and fact which a trial court may have made."***
   >
   > ***We may now add that Section 6 of the CPC provides that the "High Court may pass any sentence authorized by law". There can be no argument that the finding made under Section 166 of the CPC is a form of sentence authorized by that provision of the law and is amenable to appeal. We so find."***

   We maintain that finding and dismiss the objection raised by the state.

7. The second issue relates to assessors. Mr Maragia drew our attention to the charge sheet where the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code was alleged to have been committed on 28th March 2006 and the plea was taken on 7th June 2006. There was a legal requirement at the time that the trial shall proceed with the aid of assessors and the court did in fact select three such assessors to sit in the matter. They took part in the trial when three prosecution witnesses testified before **Musinga J.** (as he then was) up to 6th March 2007.
8. The matter resumed hearing before **Koome J.** (as she then was) on 18th February 2008. By then, the law on assessors had changed through **Act No. 7 of 2007** which did away with trials with the aid of assessors. Koome J. made an order that the part heard trial shall proceed without assessors and fixed a hearing date for 3rd March 2008. On that date it fell before **Maraga J.** (as he then

was) who made an order that the trial would commence *de novo*. He heard five witnesses without any assessors and the hearing was adjourned to 23rd June 2008.

9. **Justice GBM Kariuki** then took over the case on that day and heard two more witnesses before it was adjourned and landed before **Ang'awa J.** (as she then was) on 2nd February 2009. She made an order that the case be placed before Maraga J. for hearing. And so it was on 25th June 2009 when Maraga J. heard two more prosecution witnesses, two defence witnesses and subsequently drew up the judgment which was delivered on 26th November 2009.
10. Throughout the proceedings, submitted Mr. Maragia, the assessors who began the trial were never involved. It mattered not, counsel stressed, that the law changed midway, or the trial commenced *de novo*, the operative date was the date of commission of the offence and the law applicable at the time. In support of that submission, he cited the case of ***John Ndirangu Wahome v. Republic Cr. App No. 371 of 2009 (UR)*** where, as in this case, the offence was committed before Act 7/07 came into effect and the trial ended after the Act took effect.
11. In response to that issue, Ms Ngovi submitted that the operative date is when the trial commenced and in this case it commenced *de novo* after the law had changed. All along, the appellant was represented by counsel but never raised the issue of assessors. Distinguishing the ***Wahome case***, Ms Ngovi submitted that the hearing of the case commenced before the law changed and it had to proceed the same way it started, but in this case, the hearing of the case commenced after the change in the law, dispensing with assessors. The authority was therefore irrelevant.
12. In a brief response, Mr Maragia contended that the trial commenced with the aid of assessors and evidence is on record which was recorded before those assessors. The court was entitled to look at it even after the case was heard *de novo*.
13. We have anxiously considered this issue but in the end we agree with Ms. Ngovi that it does not arise. The history of the trial as reproduced above was correctly related by Mr. Maragia. He was also right in the submission that a trial that commenced with the aid of assessors must be concluded in the same manner, the change in the law notwithstanding. This Court made that clear in the ***Wahome case*** when it stated, thus:

> ***"The law on assessors was amended by Act No. 7 of 2007 which repealed, among other provisions, Section 322 of the Criminal Procedure Code. However, where the trial commenced with the aid or assessors, by reason of the provisions of Section 23(3)(e) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya it must be continued to conclusion with the aid of assessors as if the relevant law had not been amended.***

14. The main issue, as we see it, is whether the operative date was the date of the offence, as Mr. Maragia contends, or the date of commencement of the trial, as contended by Ms Ngovi. ***Section 262*** of the **CPC** before its repeal by Act 7/07, provided for the ***'Mode of Trial'*** and stated that :

> ***"All trials before the High Court shall be with the aid of assessors."***

In compliance with that Section, the trial in this matter commenced before Musinga J. with the aid of assessors and proceeded until the enactment of Act 7/07. When Koome J. took over and made an order that the trial would henceforth proceed without the aid of assessors, it would have been a mistrial if it proceeded. But it did not. When the trial resumed before Maraga J. the previous proceedings were vacated and the trial commenced afresh. This was long after the commencement of Act 7/07 and in our view, it was not in violation of the law. The entire trial was post Act 7/07, and we find no impropriety in omitting the participation of assessors since the law did not require them. Even where a retrial of a murder case is ordered by this Court for valid reasons, it would not take place with the aid of assessors since it would be post Act 7/07. To argue that the 'trial' commenced when the offence was committed is to import a strained construction of the word. That ground of appeal fails.

15. The final issue relates to the application of **Section 200** of the CPC. As observed earlier, this was an issue taken up and conceded by Ms Ngovi in the course of her submissions and she called for a retrial. Mr Maragia supported the submission but opposed the retrial. Both counsel are, of course, right in their observation that there was a glaring breach of **Section 200(3)** as read with **Section**

201(2) of the CPC. The record as summarized above shows a succession of judges hearing the case but at no time was the Section referred to or complied with. That was particularly so when Kariuki J. took over from Maraga J. and again when Maraga J. took over from Kariuki J. On both occassions, the evidence of different witnesses was heard by the different judges but the fair trial rights of the appellant were not considered let alone complied with.

16. In the case of ***David Kimani Njuguna V. Republic Cr.App. No. 294 of 2010*** (UR) this Court extensively reviewed previous decisions on the section and stated:

> ***"All of these decisions declare that the provisions of Section 200 (3) are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity."***

See also ***John Bell Kinengeni v Republic [2015] eKLR*** and ***Ndegwa v Republic [1985] KLR 534***. The trial in this case was vitiated and we so find.

17. The only issue to determine therefore is whether a retrial is appropriate in circumstances of this case.

> ***" In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or 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 a 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 own facts and circumstances and an order for a retrial should only be made where the interest of justice require it".*** See ***Fatehali Manji v R [1966] EA 343***

18. We have considered the seriousness of the charge made against the appellant who is alleged to have killed a defenceless innocent girl. The State has sought a retrial on the basis that it is still feasible despite the passage of time. The appellant has spent most of the time since the decision of the High Court in a mental hospital and will most likely be recovered enough to stand trial. In the interests of justice, a retrial is appropriate in this matter and we make an order for it as sought by the State.
19. The appeal is allowed and the special finding made by the High Court is set aside. We direct that the appellant shall be presented before the High Court at Nakuru for retrial within 14 days of this order.

Dated and delivered at Nakuru this 14th day of April, 2016

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR