IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 39 OF 2009

BETWEEN

DAVID GEOFFREY GITONGA……..….APPELLANT

AND

REPUBLIC……RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Meru (**Emukule, J**) dated 6th March, 2008*

in

***H.C.CR.C. No. 79 of 2004*)**

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JUDGMENT OF THE COURT

The appellant David Geoffrey Gitonga was arraigned in the High Court at Meru on the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 12th day of June 2004 at Athiru Ruujine location in Meru North District within Eastern Province he murdered Pheneous Gitije Kabui (deceased).

The appellant denied the charge prompting the prosecution to call six (6) witnesses to prove their case. These were **Francis Mutwiri PW1** (*Francis*); **David Ali PW2** (*David*); **Peter Gitonga, PW3** (*Peter*); **P.C. Ben Wafula PW 4**(*PC Ben*); and **Dr. William Ringera, PW6** (*Dr. William*).

The brief facts are that David had leased a miraa farm from the appellant. He hired Francis and the deceased to guard it. On the material date Francis came to check on the shamba as usual and found the appellant harvesting miraa there. When confronted by Francis and asked to explain his action, the appellant stabbed Francis and then ran away. Francis ran after him screaming. He was joined in the chase by the deceased who was fatally injured in the ensuing struggle. Members of the public, among them Peter and Nyaga, responded to the distress call by the victims. It was Peter and Nyaga's evidence that they saw the appellant holding a knife with the deceased lying on the ground bleeding from a wound on the chest. Members of the public set upon the appellant but were restrained by Peter and Nyaga. Arrangements were made for a vehicle to ferry the injured to hospital where the deceased succumbed to

his injuries, while the appellant and Francis were treated and discharged.

Meanwhile a report was made to Maua Police Station where it was received by P.C. Ben who booked it. The appellant was then arrested and arraigned in court. A postmortem examination was carried out on the body of the deceased by Dr. William who observed two penetrating wounds on the chest, one just at the right side below the right nipple and another one at the mid sternum. The cause of death was massive accumulation of blood in the thorax, as a result of the chest injury.

When put on his defence the appellant stated that on the material day he was in his shamba tending the various crops grown on it namely, miraa, beans, bananas and maize when he was attacked by Francis, the deceased and David. They did not tell him why they were attacking him. It was his assertion that the deceased stabbed him (appellant) and as they struggled the deceased fell on his own knife and got injured. He maintained the deceased was injured only once and he does not know where the 2nd injury mentioned by the doctor came from.

The trial was commenced and concluded by Lenola, J, with the aid of Assessors. Thereafter the learned Judge reserved the file for summing up to the Assessors. The learned Judge was however transferred out of the station before he could do so.

On the 24th day of October 2008 the matter was placed before Ouko, J (as he then was) for directions. The learned Judge gave the following directions: ***"The matter was heard by Mr. Justice Lenaola who had since been transferred out of the station. Mr. Gituma has indicated that he does not intend to recall any witnesses and prays that the matter proceeds from the state reached. Submissions 24th November, 2008."***

On 27th January 2008 the matter landed on the desk of M.J. Anyara Emukule, J for submissions. The learned Judge accordingly received submissions from both learned counsels. There was no mention about the presence or otherwise of the assessors, whether and when they had fizzled out of the trial and why. The learned Judge in a judgment dated the 6th day of March 2008, found the appellant guilty of the offence charged, convicted him and sentenced him to death.

The appellant was aggrieved by that decision. He is now before us on a first appeal raising six (6) supplementary grounds of appeal which were argued by his learned counsel Miss Kiome.

Learned counsel urged that the trial was flawed on account of the incoming learned Judge's failure to comply with the mandatory provisions of **Section 200** of the **Criminal Procedure Code** before embarking on receiving submissions and the drafting and delivery of the judgment. Further, Since the trial had commenced with the help of the assessors, it ought to have been concluded with their participation. They should not have been eased out of the trial unprocedurally. In view of the above, Miss Kiome urged us to either acquit the appellant or, alternatively, order a retrial.

In response to the appellant's submissions, Mr. E. O Onderi learned counsel for the State concurred with Miss Kiome in her submissions that the trial was flawed on account of the failure to involve the assessors in the trial at the submissions stage. In his view, by reason of this flaw, it was not therefore necessary for the court to interrogate at this stage the issue of whether this was a case of murder or manslaughter and that we instead should order a retrial. We think he is right.

Only one issue falls for our determination that is whether the trial was flawed on account of the failure to comply with section 200 CPC, and failure to involve assessors in the final submissions before judgment in a trial that had commenced and concluded with their participation.

In **David Kimani Njuguna versus Republic Nyeri CRA No. 294 of 2010,** this Court set out **Section 200** of the **CPC** in extenso, and after citing several decisions including **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga versus Republic, Kisumu Criminal Appeal No. 106 of 2009** and **Cyrus Muriithi Kamau & Another versus Republic, Nyeri Criminal Appeal No. 87 and 88 of 2006**

made the following observations:-

> ***"In all these pronouncements, this court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale and philosophy behind section 200 of the CPC more than thirty years ago in <u>Ndegwa versus Republic</u> [1985] 534 where it held that:***
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> ***"1. The provision of section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by the predecessor;***
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> ***(2) The provisions of section 200 should not be invoked where the part heard trial is a short time and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution;***
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> ***(3) No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration;***
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> ***(4) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanor and credibility of witnesses should always be maintained; and***
>
> ***(5) A magistrate who did not observe the evidence is not in a position credibility and personal demeanour of all the witnesses."***

Turning now to cases where a trial commences with the participation of assessors and then the law changes midstream, this Court in **<u>Peter Ngatia Ruga versus Republic</u> – Criminal Appeal No. 42 of 2008,** held;-

> ***"…Thus, though the hearing started with aid of the assessors and continued with their aid till the close of the prosecution's case, thereafter assessors never featured anywhere in the record and the court never stated the reasons for their having been withdrawn, if they were indeed withdrawn. The trial court did not seek their opinions and in her judgment no reference whatsoever was made of the existence of the assessors at one time during the hearing of the case.***
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> ***We are aware that pursuant to Act No. 7 of 2007, trial with the aid of assessors was repealed and removed from our statues, but the trial in respect of this appeal began as we have stated, on 10th August, 2006 long before the provisions for trial with the aid of assessors were repealed and that being the case, by virtue of the provisions of section 23(3)of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, which was applicable, the trial should have continued with the aid of assessors to the end. As the learned Judge never stated why she abandoned the assessors midstream, we cannot for certain say that was done because of repeal of the provisions on trial with the aid of assessors. We have mentioned this only as what we think might have acted in the mind of the court to take such a drastic act, but she may well have had her reasons for doing so.***
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> ***Whatever reasons necessitated her doing away with the assessors midstream, one matter is certain, and that is that on matters that fell under the provisions of the trials with the aid of the assessors, the law required that the number of the assessors be three and that number was to remain so throughout unless an assessor was to the satisfaction of the court prevented for any sufficient cause from attending throughout the trial or that he absented himself and it***

was not practicable immediately to enforce his attendance. If two assessors were not able to attend court for trial of an accused person, then such a trial had to start *de novo."*

See also, **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga – versus – Republic Criminal Appeal No. 106 of 2009.**

From the above it is our finding that indeed the trial at the High Court was flawed and merits interference by this Court. The question we have to ask ourselves is whether this is a proper case for a retrial or not. In resolving this issue we wish to adopt the court's reasoning in the case of **Isaya Gitonga Mbaabu versus Republic Nyeri CRA 47/2015** in which the court had this to say:

"What is the consequence of those findings?

Both counses were not averse to a retrial being ordered in this matter. But whether or not there shall be a retrial is an issue of justice depending on the circumstances of each case. This Court has said as much in a number of decisions and set out considerations which ought to be taken into account. In Bernard Lolimo Ekimat – versus – Republic Criminal Appeal No. 151 of 2004, the court stated:-

'There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it'.

Further, in Muiruri – versus Republic [2003] KLR 552 this Court at 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 – versus – Republic Criminal Appeal No. 57 of 1989); 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."

The alleged offence in this matter took place in the year 2001 and the trial commenced in the year 2006. It was on account of omissions by the trial court that the trial was rendered a nullity. It would have attracted different considerations if the prosecution was to blame, as the predecessor of this court stated in the case of Ahmed Sumar – versus – Republic [1964] EA 481, at page 483;

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered."

We fully adopt the above reasoning as stating the correct position in law in instances where a retrial is inevitable. We think that the interests of justice herein will best be served by an order for retrial.

The upshot of the foregoing is that we allow the appeal and set aside the orders of the trial court on conviction and sentence, as they were based on a nullity. We direct that the appellant be presented to the High Court at Meru within 14 days of this order for expeditious hearing and disposal of the case before any Judge other than M.J. Anyara Emukule, J. The retrial shall proceed without the aid of assessors. Orders accordingly.

Dated and delivered at Meru this 24th day of June, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL