IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 499 OF 2010

BETWEEN

CHARO KARISA SALIMU…..……APPELLANT

AND

REPUBLIC ……...……...……RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 25th October, 2010

in

Criminal Case No. 16 of 2002)

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JUDGMENT OF THE COURT

On 25th October, 2010 the High Court (Odero, J.) brought to an end what, in our consideration was a record delay of over 10 years, when it rendered the judgment now challenged in this appeal. The offence of murder contrary to **section 203** as read with **section 204** of the Penal code was alleged to have been committed by the appellant, Charo Karisa Salimu against his father, Kibanje Salimu Mwanyele, the deceased on 24th July 2001. The appellant was promptly brought to court after being charged on 16th August, 2001. The trial did not commence until 5th June 2003, nearly two years later before Ouna, J. when only one witness, the widow was heard. The next hearing on 28th March 2007 before Njagi, J was *denovo,* four years after the adjournment. On the occasion the widow took the witness stand for the second time. Apart from her the court took evidence of three other witnesses before it adjourned to 18th June 2007, when only one witness testified and subsequently on 18th September, 2007 one more witness was heard. The hearing was adjourned after this date for a period of nearly two years. On 26th June 2009, two witnesses gave evidence after which the case for the prosecution was closed and the hearing adjourned to enable parties to make submissions. It would appear that after this adjournment Njagi, J. was transferred from Mombasa, hence the orders of Ibrahim J (as he then was) on 22nd September, 2009 directing that the hearing to proceed from the stage Njagi, J. had reached, with the appellant being granted the liberty to recall any of the previous witnesses. It fell upon Odero, J. to complete the trial by receiving the submissions and the defence evidence and subsequently delivering the judgment giving rise to this appeal. It took more than 10 years between the time the appellant was brought to court for the first

time and when the judgment was finally delivered.

The second aspect of this appeal relates to the discharge of all the three assessors. When the charges against the appellant were brought, **sections 262** and **263** of the Criminal Procedure Code made it mandatory that trials before the High Court be conducted with the aid of three assessors. Throughout the trial, the court complied with this requirement. As a matter of fact one of the many reasons attributable to the delay was with regard to empanelling of assessors. On many occasions, one or two would fail to attend court, two died during the period in question and following the change of judges, new assessors had to be selected. But of relevance to the issue presently under our consideration, is the discharge of all the assessors on 11th February 2008 by Njagi, J. following an application by the State (Mr. Monda) on the grounds that the law requiring participation of assessors in the trials before the High Court had been repealed and with no objection from the defence (Mr. Gichana). However after a few months Mr. Gichana made an about-turn on the matter and filed a notice of preliminary objection protesting the discharge of the assessors. The court directed, strangely, that the objection be raised in the appellant's submissions after the close of the prosecution case. Without assessors the trial proceeded with two last prosecution witnesses testifying. Thereafter submissions were made under **section 306** of the Criminal Procedure Code.

Pursuant to an order directing the appellant's counsel to raise the issue of the discharge of the assessors at this stage, Mr. Gichana urged the trial court to find that there was a mistrial on account of the discharge and that the case ought to have proceeded with the aid of assessors, even if the law had changed. Responding to those submissions, Mr. Onserio, learned counsel for the State submitted that counsel on both sides agreed to dispense with assessors and that the court in its discretion discharged them. In her ruling, in which she found the appellant had a case to answer under the aforesaid **section 306**, the learned Judge considered the issue of the assessors at length but ultimately, overruled the objection. She distinguishing the facts in the Court of Appeal decision in the case of **Bernard Kinoti M'Arachi** v **R**, Criminal Appeal No. 114 of 2008 with those in the matter before her. In **Bernard Kinoti** (supra) the Court held that the trial judge committed an error in summarily discharging the assessors on the basis that **section 262** and all the relevant sections had been repealed by Act No.7 of 2007. The learned Judge in the present appeal drew a distinction between that decision and this case stating that;

> ***"Whilst I do not wish to challenge or differ with this position of their Lordships on this matter, I do find that the present case is distinguishable from the Bernard K. M'Arachi case in one respect. In the former there was no indication that the accused voluntarily waived or gave up his right to trial by assessors. In this case there is a clear indication from the record that the State Counsel and the accused advocate (sic)who is properly trained in the law "agreed to dispense" with the assessors. In other words the accused through his legal representative opted to have the trial proceed without the use of assessors once the law had been amended. In view of this consent if you will, the learned trial Judge Hon. Justice Njagi did discharge the assessors on 11th February 2008. If the trial by assessors was a right or privilege which the accused did not want to relinquish he would have through the legal representative opposed such a move. The fact that he did not do so means that, that right or privilege was waived and accused cannot now demand that which he had already relinquished. I do find that the Bernard K. M'Arachi case is further distinguishable in that in that case their lordships were more concerned by the fact that the Learned trial Judge having discharged an assessor later apparently rescinded this decision by allowing the same assessor to resume his part in the same trial."***

The learned Judge further justified the discharge of assessors on the basis of a likely further delay, considering that there was already a delay of over 10 years.

After the appellant gave sworn evidence, the learned Judge rendered the judgment in which she found that the appellant had, as a matter of fact, using a panga, inflicted on the deceased severe injuries on the first occasion, being the night of 21st July 2001. The deceased, however, did not die. After three days, once again at night, on 23rd July 2001 the appellant returned to his parent's house and inflicted the final and

fatal injuries on the deceased; that apart from the evidence of the appellant's mother that the appellant, on both occasions ordered her to leave the house, there was also evidence of a dying declaration; that the deceased told his daughter in-law that it was "Charo" who had injured him; that the witness understood this to refer to the appellant; that in totality the circumstantial evidence pointed exclusively to the appellant's guilt; and that from the attack and the injuries sustained, the appellant had malice aforethought. Upon convicting the appellant, the learned Judge imposed on him a death sentence.

In the appeal before us Miss Otieno, learned counsel representing the appellant urged us to discharge the appellant because his right to a fair hearing under **section 77 (1)** of the former Constitution was infringed by the inordinate delay of over 10 years, throughout spent in custody. She cited the cases of **Githunguri** v **R** (1986) KLR1 where the Court strongly deprecated any form of delay in criminal justice process. Regarding the discharge of the assessors, counsel submitted that it amounted to a mistrial for the court below to have proceeded to hear and determine a case without assessors when it had began with the assistance of assessors. She cited **Bob Ayub "alias" Edward Gabriel Mbwana "alias" Robert Mandiga** v **R**, Criminal Appeal No. 106 of 2009 in support of that submission. Although counsel raised other grounds such as contradictions in the prosecution case, mix-up in the name of the deceased, non-compliance with **section 200** as read with section **201 (2)** of the Criminal Procedure Code, the failure to register the information in court, as it did not bear a court stamp, the wrongful admission of dying declaration and the failure to consider the appellant's defence, the gravamen of this appeal is however in respect of the first two issues. We ourselves think that the two grounds alluded to above are sufficient to dispose of the appeal.

Sections 72 (5) and **77** of the former Constitution recognized the right of an accused person to be tried fairly within a reasonable time; and that unless charged with a capital offence, the accused would be released either unconditionally or upon reasonable conditions, which included conditions that would ensure that he appeared at a later date for trial or for proceedings preliminary to trial.

By way of comparison, **Article 50 (2) (e)** of the Constitution of Kenya, 2010, simply recognizes the right of an accused person to a fair trial which includes the right ***" to have the trial begin and conclude without unreasonable delay"*** The Constitution and the former constitution do not define the period that would constitute unreasonable delay. The Constitution does not provide for the consequences of failure to conclude a trial without unreasonable delay.

In other jurisdictions with similar provisions in their laws the courts have, through judicial innovation developed an interpretation that weighs various factors before setting a presumptive ceiling beyond which the delay would be considered unreasonable. **Section 11 (b)** of the Canadian Charter of Rights and Freedoms, for instance, provides in part that;

> ***"11. Any person charged with an offence has the right***
>
> a. **…**
> b. ***to be tried within a reasonable time;***
>
> **…."**

This provision has been the subject of far-reaching judicial interpretation and innovation. In the famous Canadian Supreme Court case of **R** v **Morin** (1992) S. C. R, 771, the court declared as a guide that the threshold of a reasonable time within which a criminal trial must be concluded is 8 to 10 months in the provincial courts (trial courts) and an additional 6 to 8 months in the superior courts, (dealing with trials and appeals), from the date the accused is arraigned before the court that is a total of 14 to 18 months. Just this month, on 8th July 2016 the same Supreme Court, in **Jordan** v **R**, S. C. C 27 of 2016, where the appellant's trial had been delayed for 4 years between charges and the end of trial, by a majority of 5 – 4 set new framework under **section 11 (b)** aforesaid, holding that it would be a rebuttable presumption of unreasonable delay if the accused person was to wait for his trial to be concluded for a period in excess of 18 months in cases tried in the provincial courts and 30 months for cases in the superior courts, thereby expanding the presumptive ceiling set in the **Morin** case (supra).

The presumption of unreasonableness would be rebutted if there are exceptional circumstances which are shown to be beyond the Crown's control. The court also held that where it is demonstrated that **section 11 (b)** has been infringed, the remedy is to stay proceedings and set the accused at liberty.

We, in this appeal, have not been invited to set any similar presumptive ceiling. Of course through its performance management initiative the Judiciary has set time frames for each level of court within which Criminal trials and appeals must be determined. For instance, in the magistrate's courts the trial must be determined within 360 days from the date the suspect is arraigned in court, similarly 360 days in the High Court, 180 days in the Court of Appeal from the date of filing and 90 days in the Supreme Court. These are only but performance targets that have no judicial ramification in case of breach. We have cited the two Canadian authorities merely to illustrate the importance of timely dispensation of justice as one of the hallmarks of a free and democratic society, to draw a parallel with the provisions of **Article 50 (2) (e)** aforesaid and to confirm that the Article is not a mere pious aspiration on paper; that by requiring that a trial must begin and conclude without unreasonable delay, the people of Kenya through the Constitution expect the criminal justice system to bring suspects to trial expeditiously because delays in a trial have far reaching ramifications to the accused person, the victim, the families, witnesses and even the general public. **Article 50** is therefore an important safeguard to prevent any oppressive incarceration and to minimize anxiety on the part of the accused person. It is perhaps informed by the time-honoured **chapter 40** of the 1251 Magna Carta which stipulated that;

> ***"to no one will we sell, to no one deny or delay right or justice."***

It appears to us that the same complacency displayed in the trial of this appellant is no different from the experience elsewhere. The Judges in **R** v **Jordan** case (supra) observed that;

> ***"(4) Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the current analytical framework governing s. 11 (b). These difficulties have fostered a culture of complacency within the system towards delay."***

In an appropriate application, with opportunity for parties to suitably argue the relevant points, and taking into account our peculiar Kenya circumstances, perhaps one day the courts will give an interpretation limiting the period a criminal trial ought to take just as they have done in Canada.

We reiterate that, in this appeal it took 6 months to conclude the committal proceedings which was then a requirement. The trial itself was hampered by a number of setbacks. There were numerous adjournments for various reasons ranging from change of trial judges, selection of new assessors, lack of witnesses, withdrawal of advocates representing the appellant, death of assessors, plea bargaining, appellant's ill-health, absence of advocates and State counsel, to delayed typing of proceedings.

It cannot be therefore said on the facts of this case, that the appellant has been accorded a hearing within a reasonable time, considering that upto this point he has been in incarceration for a total of 16 years.

The second aspect of this appeal upon which it will ultimately be decided relate to the discharge of the assessors. Upto 2007, by **Statute Law** (**Miscellaneous Amendment**) **Act**, it was a mandatory requirement under sections **262** and **263** of the Criminal Procedure Code for trials in the High Court to be with the aid of three assessors. Prior to that amendment, this Court interpreted these sections to mean that a murder trial before the High Court had to be with the assessors; and that failure to comply with this requirement would render the entire trial a nullity. In **Charles Mwangi Muraya** v **R**, Criminal Appeal No. 97 of 2000 that position was summarized as follows;-

> ***"And section 263 of the same Code, which we quoted earlier in this judgment, says that where the trial is to be with the aid of assessors, the number of assessors shall be three.***

> ***We pause to emphasize that both sections 262 and 263 use the word 'SHALL". This, to our mind, means that all trials before the High Court must be with the aid of assessors and the number of assessors must be three …Without satisfying these requirements about assessors, the High Court would not properly be constituted or competent for purposes of a trial before it. Thus the trial, once started with three assessors as mandatorily required by section 263 CPC, can only proceed with two assessors in the circumstances envisaged by section 298 (1) of the same Code"***

This point was made as early as 1937 in the case of **Romani Bin Mwakiponya** (1937) 4 EACA 62, and later followed in the cases of **Muthemba s/o Ngombe** v **Reginum** (1954) 21 EACA 234 and **Cherere Gikuli** v **Reginum** (1954) 21 EACA 304, all of which emphasized that a trial required to be conducted with assessors would be a nullity and unlawful if conducted without assessors or in the absence of one without an explanation.

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. For example the Court was explicit in **Peter Ngatia Ruga** v **R** Criminal Appeal No. 42 of 2008 that;

> ***"We are aware that pursuant to Act No. 7 of 2007, trial with the aid of assessors was repealed and removed from our statutes, 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) (e) 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."***

Similarly in the case of **Bob Ayub "alias" Edward Gabrial Mbwana** (supra) cited by the appellant, this Court reiterated that it would amount to an infringement of the accused person's right to a fair trial to discharge the assessors who had participated throughout the trial on the ground that the law had changed. These authorities, in our view represents the correct interpretation of **section 23 (3) (b)** of the Interpretation and General Provisions Act which stipulates that;

> ***"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."***

Similarly **subsection *(3) (e)*** provides that a repeal of law shall not;

> ***"(3) (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 may be ….continued or enforced….as if the repealing written law had not been made."***

The learned Judge, we reiterate, committed an error of law and misdirected herself by assuming that the parties had the right and the court the discretion to dispense with the assessors before the trial was concluded and judgment rendered.

We come to the conclusion that the appellant's trial was a nullity. It only remains for us to consider the final order, bearing in mind what we have said in the preceding paragraph. Where a trial is declared a

nullity, the first option usually is to order a retrial. A retrial will, however, not be resorted to where it is likely to occasion injustice, or where it will be used merely to fill up gaps in the prosecution case. The Court will also consider the length of time that has elapsed since arrest, and whether the mistake leading to the quashing of the conviction was entirely of the prosecution making or not. See **Muiruri** v **R** (2003) KLR 552.

In all the circumstances of this appeal, particularly the delay explained earlier, we do not think a retrial would serve any purpose after 16 years. Instead, we allow the appeal, quash the conviction and set the appellant at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 29th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR