



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

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

**CRIMINAL APPEAL NO. 124 OF 2014**

**BETWEEN**

**PAUL MUTWIRI MUNENE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal against the conviction/judgment of the High Court*

*of Kenya at Meru (Emukule, J.) dated 24<sup>th</sup> April, 2009*

**IN**

**H.C.CR. NO. 21 OF 2002)**

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**JUDGMENT OF THE COURT**

By an Information dated 5<sup>th</sup> January 2002, the appellant Paul Mutwiri Munene was charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** in that on diverse dates between 4<sup>th</sup> and 8<sup>th</sup> September 2001 at Kabirichia, Market in Central Meru District of the then Eastern Province, he murdered Jacob Muriuki Munene (Jacob). Jacob was his brother.

The prosecution called four witnesses in a trial before Lenaola J who, after hearing counsel on both sides, ruled on 21<sup>st</sup> June 2006 that the appellant had a case to answer and called on him to enter upon his defence in accordance with **Section 211** of the **Criminal Procedure Code**. The learned Judge then ordered that the case be mentioned on 26<sup>th</sup> June 2006 to take dates for defence hearing. A hearing notice was also to issue to Mr. Nyaboga, the appellant's then advocate, to attend. It would seem that on 26<sup>th</sup> June 2006 there was no appearance by either side and the learned judge ordered, in chambers, that the matter be mentioned on 27<sup>th</sup> June 2006.

And there the record of proceedings suddenly ends.

Lenaola J, was subsequently transferred and what can be gleaned from the Judgment of Emukule J, dated 24<sup>th</sup> April 2009 is that he took over the conduct of the case from 15<sup>th</sup> May 2008 but formally complied with the provisions of **Section 200** of the **Criminal Procedure Code (CPC)** on 26<sup>th</sup> November 2008 by inviting the appellant to exercise the right to recall any witnesses who had previously testified. In the judgment the learned Judge stated;

***“When the matter was put to the accused he elected to continue from where Hon Mr. justice Lenaola left.”***

The court therefore made an order deeming the proceedings of 14<sup>th</sup> May 2008, 8<sup>th</sup> July 2008, 9<sup>th</sup> July 2008, 24<sup>th</sup> July 2008, 24<sup>th</sup> October 2008 and 24<sup>th</sup> November 2008 to have been proceedings taken over from where the Hon. Justice Lenaola left. What was left was submissions by counsel for the defense and prosecution.

As we have already observed, there is no record of those proceedings or of the submissions that were to follow. The missing part of the proceedings includes, significantly and critically, the appellant’s sworn defence and the cross-examination thereon which are referred to in the judgment. It is also not possible to tell whether any summing up was done to the assessors and whether their opinions were ever sought or obtained.

Both the High Court and this Court are of course courts of record. Indeed, when this Court hears appeals, it depends wholly on that which is on the record and, when determining a first appeal, like the one before us, it proceeds by way of rehearing and is required to peruse the record and draw its own inferences, of fact and arrive at its own conclusions based on a re-appraisal and re-evaluation of that which is on the record. Such a task is impossible when part of the record, especially of the significance and importance we have noted, is missing from the record. Even the original handwritten record of proceedings suffers the same deficit.

The evidence on record being so incomplete, we would be doing this appeal a great disservice and will moreover be undertaking an empty ritual were we to attempt to resolve any of the appellant’s self-authored Grounds of Appeal, which were the basis of his learned counsel Mr. Wamache’s arguments before us. We cannot say one way or other whether the circumstantial evidence tendered reached the required standard; whether the testimony on the whole was inconsistent, contradictory or conflicting; whether the prosecution failed to avail vital witnesses and whether the learned Judge failed to consider the appellant’s sworn credible defence as contended.<sup>6</sup>

Whereas Mr. Kariuki Mugo, Senior Prosecutions Counsel tried to counter those submissions, he did concede, as he had to, that the record stands materially compromised by the absence of the appellant’s defence on the record and from the apparent failure on the part of the learned Judge to sum up the case to the assessors and to seek and obtain their opinion.

It is common ground that the trial of the appellant commenced and proceeded for the most part with the aid of assessors as was required under **Sections 297, 298 and 299** of the **Criminal Procedure Code (CPC)**. 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. As this Court stated in **WANJIKU –VS- REPUBLIC** [2009] KLR 210;

***“In view of this provision Section 23(3) of the Interpretation and General Provisions Act, Cap 2] the appellant was entitled to be tried with the aid of assessors and the amendment of the law did not and could not have deprived him of the right which had accrued to him when the new legislation came into force. The High Court was not right in summarily dismissing the assessors.”***

See, also **KEDISIA –VS- REPUBLIC** [2009] KLR 604.

The conviction of the appellant cannot therefore stand as his trial was effectively a mistrial and a nullity for the reasons we have given.

What we now must determine is whether this is a proper case for a retrial. We note that the allegation confronting the appellant was of murder most foul. It is alleged that he killed his brother Jacob and dumped his mutilated body in the pit latrine in the compound where the two lived. Such grave offences should, in the public interest and in the interests of justice, be tried and the guilt or otherwise of the suspect established. It is necessary for vindication and for closure. We note that the errors that have led to our holding the initial trial to have been a nullity and a mistrial are not attributable to the prosecution, but to the trial court. We adopt the approach by this Court in **MUIRURI –VS- REPUBLIC** [2003] KLR 553;

***“3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.***

***4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or not.”***

Bearing all those factors in mind, and notwithstanding that the appellant has been in custody for more than a decade, we order that he shall be retried by a Judge of the High Court other than Emukule J. He shall be presented before the High Court in Meru within fourteen days from today for the mention of his case for purposes of plea to be followed by an expeditious trial without the aid of assessors. The appellant shall in the meantime be remanded in custody.

***Dated and delivered at Meru this 23<sup>rd</sup> day of July, 2015***

**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**

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

**DEPUTY REGISTRAR**

