IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 47 OF 2014

BETWEEN

ISAYA GITONGA MBAABU ……....……...…… APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru

(Sitati, J.) dated 4th July, 2008

in

H. C. CR. C No. 37 of 2003)

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JUDGMENT OF THE COURT

1. This is a first appeal. Ordinarily in such appeals this Court is under a duty to re-evaluate and re-assess the evidence on record to reach its own conclusions on both matters of fact and law. However, for reasons that will become apparent shortly, we shall not embark on that exercise in this matter.

2. The appellant was charged with two counts of murder contrary to ***Section 203*** as read with ***204*** of the ***Penal Code*** in the High Court at Meru. The particulars of the charges were that on 3rd November, 2001 at Maua Township, Maua Location in Meru North District within the then Eastern Province, the appellant jointly with others not before court murdered Lillian Njeri and Lucy Karambu. He denied both counts and the prosecution called a total of six witnesses in support of its case who were heard between 4th April 2006 and 31st July 2006. For some reason, the appellant did not testify despite expressing the desire to testify on oath. In the end, the trial court delivered its judgment on 4th July, 2008 convicting the appellant on both counts and sentencing him to death.

3. Aggrieved by that decision, the appellant preferred this appeal predicated on four grounds, which he

drew up in person. Again, it is unnecessary to consider all those grounds as we consider the two main grounds sufficient to dispose of the matter. They state as follows:-

> ***1) The trial court erred in law in denying the assessors an opportunity to contribute their opinions at the conclusion of the trial.***
>
> ***2) The trial court erred in law in declining to accord the appellant an opportunity to defend himself after the respondent had closed their case.***

4. On the first ground, learned counsel for the appellant **Miss LG Kiome,** submitted that the appellant's trial began with the aid of three assessors and subsequently, one of the assessors was discharged. At the close of the trial the trial court neither sought the opinion of the assessors nor gave the reasons for failing to do so. In her view, despite the fact that ***Legal Notice No. 7 of 2007*** which came into force on 15th October, 2007 did away with assessors in murder trials, the same did not affect the trial at hand because it had begun in the year 2003. Consequently, she asserted, the trial was a nullity.

5. On the second ground, while admitting that the appellant was represented by counsel at the trial, Miss Kiome submitted that his evidence was not recorded or considered, on the pretext that he did not wish to testify. This, in her view, was a violation of the appellant's right to a fair hearing.

6. In response, learned Prosecution Counsel, **Mr. Antony Musyoka**, conceded that the trial of the appellant was a nullity on account of the total absence of any opinion of the assessors at the end of the trial. He also conceded that the fair trial rights of the appellant were violated when his defence was not heard in unclear circumstances. He urged the Court to order a retrial.

7. We have considered the two grounds of appeal and the submissions of counsel. It is clear from the record that the appellant's trial commenced with the aid of three assessors on 4th April 2006. Midway, one of the assessors was discharged by the trial court for failure to attend court. The trial then continued with the two remaining assessors up to the close of the prosecution's case on 31st July 2006. They were subsequently recorded to have been present when the case was variously adjourned for an abortive defence case and were also summoned to attend the final submissions. However, the record is totally silent on any summing up having been made to the assessors or any opinions having been sought from them. It is not even clear whether or not the assessors were discharged.

8. This Court was faced by similar situation in the case of ***Peter Ngatia Ruga vs- R – Criminal Appeal No. 42 of 2008,*** and it 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 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. 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."

9. In another case, ***Bob Ayub "alias" Edward Gabriel Mbwana, alias Robert Mandiga –vs- R- Criminal Appeal No. 106 of 2009***, the hearing began with the aid of assessors but midstream they were abandoned without any reasons being assigned for such action by the trial court. This Court stated:-

" In our view, the trial of the appellant was vitiated, and three grounds support our view. Firstly, the trial began with the aid of assessors and midstream, the court either dismissed the assessors but never said so or just forgot all about the assessors such that at the end, no summing up to assessors was done and their opinions were not sought and recorded by the court, and no mention of that was made in the record. It is not easy to understand what happened but even if we were to accept that part of the hearing took place after the provisions for trial with the aid of assessors in the Criminal Procedure Code had been repealed through amendment by Act No. 7 of 2007, that did away with the assessors, still the law is clear that when the trial started on 14th October 2005, the provisions of the assessors was still part of the law and if the repeal of that law was carried out after the trial had begun then the provisions of section 23 (3) (e) of the Interpretation and General Purposes Act Chapter 2, Laws of Kenya were to be applied and trial should have continued with the aid of assessors to the end."

10. In the case before us, ***Sections 297, 298*** and ***299*** of the ***Criminal Procedure Code*** were still in force when the trial commenced. Before they were repealed, those Sections provided for trial of murder cases with the aid of assessors. ***Section 298(2)*** in particular underscored the centrality of assessors and provided: -

"If two or more assessors are prevented from attending or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors."

11. It is evident that the trial proceeded in complete disregard of specific provisions of the law which were applicable at the time. Despite the participation of assessors throughout the trial, there was no summing up or opinion sought or given by the assessors for whatever it would be worth. In the event, the trial was a nullity and Prosecution Counsel, Mr. Musyoka was right to concede the appeal on this ground.

12. He was also right to concede that the fair trial rights of the appellant were violated. The record shows that the appellant was represented by counsel at the trial and there was an indication on record that the appellant would give sworn testimony in his defence. It would then appear that the matter was taken over by another counsel who believed, mistakenly, that the matter was coming up for final submissions and not for the appellant to give his sworn evidence as earlier intimated. It was the duty of the court to ensure that the appellant's fair trial rights were observed at all times and prudence demanded that the court would remind the new advocate of the earlier order on the appellant's defence. Instead the trial court set a date for judgment and proceeded to convict.

13. The right to a fair trial has always been jealously guarded and enforced by the courts even before the new Constitution was promulgated. It is now clearly spelt out in **Article 50** of the **Constitution** and is one of the fundamental rights and freedoms that may not be limited under **Article 25**. Those provisions of the Constitution were obviously not in existence at the time of the trial, but as stated above, there was enough jurisprudential material to guide the court on the issue of fair trial. The appellant's rights were violated when his defence was not recorded or considered, and we so find.

14. What is the consequence of those findings?

Both counsel 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 –vs- R- 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."***

15. Further, in ***Muiruri –vs- R (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 Zededkiah 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."***

16. 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 –vs- R (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."***

17. The record before us shows that two innocent ladies lost their lives on account of murderous arson committed by a person or persons, one of whom was suspected to be the appellant. We stated earlier that we shall eschew the temptation to make conclusions of fact in the matter in the event that there would be a retrial. The appellant has been in custody for a considerable time now—about 13 years. In the circumstances of this case however, it is our view that justice demands a retrial, not only to vindicate the appellant, but also to assuage the victims of the said arson and the family of the deceased victims who were killed in cold blood. Any perceived further delay may be abridged by a court order for expedition.

18. 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 Sitati, J. The retrial shall proceed without the aid of assessors. Orders accordingly.

Dated and delivered at Meru this 9th day of July 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL