IN THE COURT OF APPEAL

AT ELDORET

CORAM: MARAGA, GATEMBU & MURGOR, JJ.)

CRIMINAL APPEAL NO. 149 OF 2013

BETWEEN

CHARLES ANUNDA INZOFU…..……. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Bungoma (Hon. F. N. Muchemi, J.) dated 27th October, 2010

in

H.C.CR. NO. 2 OF 2005)

****

JUDGMENT OF THE COURT

1. The appellant, Charles Anunda Inzofu, was on 17th January 2005 charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on 7th December 2004 at Muliro Village Ndalu Location in the then Bungoma District within the then Western Province, he murdered Brian Inzofu. After a trial, the High Court in a judgment delivered on 27th October 2010 found the appellant guilty of murder, convicted him and sentenced him to death.

2. He has appealed against that conviction and sentence on the grounds that there was no direct or sufficient evidence to support the conviction, and that the prosecution did not establish his guilt to the required standard.

3. At the hearing of the appeal before us, Mr. David Korir, learned counsel for the appellant, submitted that the trial commenced with assessors; that during the currency of the trial the law was amended and the requirement of assessors was dispensed with; that only PW 1, 2 and 3 testified in the presence of assessors and thereafter the assessors were discharged; that notwithstanding the amendment to the law, the trial should have continued with assessors; and that the effect of continuing the trial without assessors was to render the entire trial a mistrial.

4. Ordinarily, Mr. Korir argued, a retrial should be ordered but in the circumstances of this case, a

retrial would not serve the interests of justice because the appellant has been in custody for over ten years and there would be difficulties in procuring witnesses.

5. Opposing the appeal Mr. Job Mulati, learned Principal Prosecution Counsel, submitted that although the issue of the trial proceeding without assessors is not raised in the appellant's grounds of appeal, the record shows that when the trial resumed on 23rd June 2008 before a different Judge without assessors, the provisions of section 200 of the Criminal Procedure Code were complied with and the advocate for the appellant indicated that the appellant did not wish to have any of the witnesses recalled. If the Court is however persuaded that there was a mistrial, Mr. Mulati argued, then a retrial should be ordered, as witnesses will be available to testify.

6. Mr. Mulati concluded his submissions by urging that the circumstantial evidence on the basis of which the appellant was convicted was overwhelming and that we should dismiss this appeal and uphold the conviction and sentence.

7. We have considered the appeal and the submissions by learned counsel. When the appellant was arraigned before the High Court in January 2005, it was a legal requirement under Section 262 of the Criminal Procedure Code that all "**trials before the High Court shall be with the aid of assessors**." The record shows that the trial in this case commenced with the aid of three assessors, as was required under Section 263 of the Criminal Procedure Code, but after an adjournment of the trial on 18th October 2007 the trial proceeded without the assessors and the witnesses namely, PW 4 to PW 9 and the appellant did not testify in the presence of assessors.

8. We are alive to the fact that by dint of The Statute Law (Miscellaneous Amendments) Act No. 7 of 2007, Sections 262 and 263 of the Criminal Procedure Code among other provisions of the Criminal Procedure Code were deleted with effect from 15th October, 2007 with the result that the requirement of conducting trials in the High Court with the aid of assessors was dispensed with. Notwithstanding the repeal of Sections 262 and 263 of the Criminal Procedure Code, the trial court should not have abandoned the assessors' midstream. In **Peter Ngatia Ruga vs. Republic [2010] eKLR**, this Court when dealing with a similar situation stated:

"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 Purposes Act, Chapter 2, Laws of Kenya, which was applicable, the trial should have continued with the aid of assessors to the end."

9. This Court has consistently emphasized an appellant's entitlement to have the entire evidence tendered by the prosecution, as well as his own evidence, heard and evaluated by the assessors. A trial that begins with assessors and continues without them is unlawful unless the attendance of the assessors is prevented, for sufficient reason, under the conditions prescribed under section 294 of the Criminal Procedure Code. See **Cherere Gikuli v R [1954] 21EACA 304**; **Dickson Mwaniki M'Obici and another vs. R, Criminal Appeal No. 78 of 2006**; **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga vs. Republic Cr. Appeal No. 106 of 2009**; **John Ndirangu Wahome vs. Republic [2012] eKLR**.

10. In a recent decision in **Brian Kariuki v Republic [2013] eKLR** where, like here, a trial commenced with assessors but was concluded without them, this Court had this to say:

"***In this instant the trial commenced before the Legal Notice No. 7 of 2007, came into force on 15th October, 2007, and therefore the trial court ought to have continued with the said assessors. We therefore, find that by virtue of the foregoing the trial at the High Court was a nullity***."

11. We therefore uphold the submission by learned counsel for the appellant that the trial was anullity.

12. As to whether, having regard to the principles in **Muiruri vs. Republic [2003] KLR 552**, we should order a retrial, we think the interests of justice in this case dictate that we do so. The life of a very young person was lost; the majority of the prosecution witnesses are family members who the respondent indicates will be easy to trace.
13. In conclusion, we allow the appeal. The appellant's conviction for the offence of murder is hereby quashed and the sentence imposed on him is set aside. We direct that the appellant be presented to the High Court at Bungoma before a judge other than F. N. Muchemi, J for retrial, without assessors, for the same offence.

Dated and delivered at Eldoret

This 29th day of October, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

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DEPUTY REGISTRAR