IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 53 OF 2014

BETWEEN

EVANS MASHETI SHIMWATI.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kakamega (Ochieng, J.) dated 12th February 2009,

in

H.C.CR.A No. 5 of 2004)

****

JUDGMENT OF THE COURT

Evans Masheti Shimwati, the appellant, wa***s*** charged with 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 9th of December 2003, at Shikhalia village, Lunerere sub-location, Isulu Location, in the then Kakamega District, he murdered ***Mike Mutayi Mbenji (deceased)***.

The brief facts are that, on 9th December 2003 at about 8.00pm, ***Maurice Alaba Masheti PW1, (Maurice)*** the father of the deceased, was having supper with his wife, ***Jenipher Masheti, (PW2),*** when the deceased came to collect his child from Maurice's house. As the deceased returned with the child to his house which was in the same compound as Maurice's, Cyrus, another of Maurice's sons, assisted by carrying some food for the deceased. After a few minutes, Cyrus returned to Maurice's house carrying the deceased's child. At that moment, Maurice heard the deceased calling his mother, saying that he was dying. When Maurice and Jenipher rushed out of their house, they found the deceased lying on the ground. They also saw two men whom they recognized as the sons of their neighbours, the appellant, and one Lakami walking away from the scene. The deceased had been stabbed in the genitals and was bleeding profusely. He was rushed to a private hospital where he was stitched, and was to have been taken to Kakamega General Hospital the next day, but he died the following morning. The matter was reported to police, and the appellant was subsequently arrested and charged with the said offence.

The trial took place during the time when trial Judges sat with assessors. Three assessors were appointed

to assist, but by the time the proceedings closed, only two of them remained on record.

The appellant was convicted and sentenced to suffer death by the High Court as by law prescribed.

Being aggrieved by the decision of the High Court, the appellant has lodged this appeal which is before us. The grounds of appeal are that the High Court fell into error when it failed to adhere to the requirements of ***section 200*** of the ***Criminal Procedure Code*** to inform the appellant of his rights at the time the case was taken over from GBM Kariuki, J. (as he then was) by Ochieng, J.; that the trial court failed to ensure that all the assessors or at least two of them were always present during the trial; and finally that the trial court fell into error when it failed to sum up the case to the assessors, but instead went ahead to deliver judgment without seeking or obtaining their opinion.

We will begin by considering the complaint concerning the failure by the lower court to comply with the requirements of ***section 200*** of the ***Criminal Procedure Code.***

It is provided at ***section 200 (1)*** that;

> ***"Subject to subsection (3), where a magistrate having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-***
>
> ***(a)…***
>
> ***(b) where a judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial."***

By dint of ***section 201 (2) of the Criminal Procedure Code,*** the procedure set out in ***Section 200*** applies ***mutatis mutandis*** to trials in the High Court. In the instant case, prior to 31st October 2007, GBM Kariuki, J. took the trial judge, and had recorded all the evidence from the witnesses for the prosecution as well as from the defence. On 2nd April 2008, by the time Ochieng, J. took over the hearing of the case, both the prosecution and the defence had already closed their respective cases. At this point, it was the behest of the succeeding judge to either transit to the next stage of the proceedings or to opt to resummon the witnesses and commence the trial afresh. The learned judge opted to receive submissions, and to subsequently deliver judgment, which he did on 12th February, 2009.

In our view, following the closure of both the prosecution and the defence case, it was not a mandatory requirement for the succeeding judge to recommence the trial, and we find that there was no failure in the compliance with ***section 200*** of the ***Criminal Procedure Code*** on his part. Accordingly, this ground fails.

The next ground of appeal was that the trial court failed to ensure that all the assessors or at least two of them were always present during the trial.

Under the repealed ***section 262*** and ***263*** of the ***Criminal Procedure Code***, all trials were required to be carried out with the aid of three assessors. This requirement was flouted during the proceedings. For instance, following closure of the prosecution's case on 2nd March 2006 when the learned judge ruled that the accused had a case to answer, none of the assessors were present in court. In addition, Ochieng, J. also failed to summon the assessors and sum up the case to them.

In the circumstances, Mr. Ketoo, learned Principal Prosecution Counsel, was right in conceding that the appellant's trial was a nullity. Mr. Ketoo, however, urged us to order a retrial.

Section 322 (1) (repealed) of the ***Criminal Procedure Code*** provides;

> ***"... the judge may sum up the evidence of the prosecution and the defence and shall***

require each of the assessors to state his opinion orally and shall record that opinion. ”

In the case of ***Kenga Kaingu Mweni & 2 Others vs Republic*** ***[1997] eKLR***, this Court stated;

> ***“Whilst it is true that a judge may not be required to sum up to the assessors, good sense and indeed, the authorities have laid down not only, that this must be done but also, how it should be done. In the case of John Kipkurui Arap Lelei v. Republic Criminal Appeal No. 45 of 1994 (unreported) this court made the following pertinent observation;***
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> > *“The words of the section do not appear to impose a mandatory duty on the learned judge to sum-up to the assessors. However, in view of the fact that the judge shall then require the assessors to give their opinions, implies that the summing up should have taken place before then. In any case, good sense dictates that laymen who act as assessors require the guidance of the judge on legal issues particularly where the charge before the assessors is one of murder. The failure of the learned judge to sum-up to the assessor in our view, makes the proceedings fatally defective.”*
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> ***“This court again in the case of Joseph Mwai Kungu v. Republic Criminal Appeal No. 68 of 1994 (unreported) endorsed the views expressed in the case of Washington S/O Odindo V. R. (1954) 21 EACA 392 about summing up to assessors in this way:***
>
> > *“The opinions of assessors can be of great value and assistance to a trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors’ opinions is correspondingly reduced. The instant case was essentially one where the assessors should have had the benefit of a careful summing-up if any weight is to attached to their opinions. The failure of the learned judge to sum-up largely negative the value of the assessors.”*
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> ***This Court in Kungu’s case then concluded:***
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> ***“We would, for our part, now emphatically assert that the practice of summing –up to the assessors is a thoroughly sound one and has been followed for so long that it has acquired the force of law.”***

In ***Brian Kariuki vs Republic*** ***[2013] eKLR*** this Court cited ***Peter Ngatia Ruga vs Republic- Criminal Appeal No. 42 of 2008*** where it was stated that ***“… pursuant to Act No. 7 of 2007, trial with aid of assessors was repealed and removed from our statutes, but the trial in respect of this appeal started 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 assessors.” As*** a consequence this Court found the trial there to be a nullity.

Likewise in this case, no guidance was provided to the assessors for summing up, and the assessors did not provide an opinion before the judgment was delivered. It is notable that they were not even present at the conclusion of the case. As such, we find that the judgment rendered was indeed a nullity.

Having said that, the next issue we must consider is whether to order a retrial.

The general powers of this Court are set out in ***Rule 31*** of the ***Court of Appeal Rules*** which stipulate;

> ***“On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings of the superior court with such directions as is appropriate, or to order a new trial, and to make any incidental or necessary orders, including orders as to costs.”***

The rule does not specify the basis upon which any orders derived from this rule may be applied. However, as this Court stated in ***Muiruri vs Republic [2003] KLR 552***, generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case, and whether or not the interest of justice so demand. In ***Mwangi vs Republic [1983] KLR 522*** this Court further held following ***Braganza vs Republic (1957) (CA) and Pyarala Bassam vs Republic (1960) EA 854*** at page 538 that:-

> ***" … a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidenc,e a conviction might result."***

Bearing these principles in mind, this being a murder offence, despite the length of time since the offence was allegedly committed, the interest of justice demand that we order a retrial.

Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed by the High Court. We direct that the appellant be taken to the High Court at Kakamega for retrial before another Judge. We also order that he remains in custody pending retrial.

Orders accordingly.

Dated and delivered at Kisumu this 17th day of December, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

……..……..

JUDGE OF APPEAL

A. K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR