IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE & SICHALE JJ.A)

CRIMINAL APPEAL NO. 21 OF 2013

BETWEEN

HENRY KAILUTHA NKARICHIA…..1ST APPELLANT

AMBROSE MUNGATIA NKARICHIA…2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Emukule, J) dated 6th March, 2009

IN H.C.CR.C. NO. 22 OF 2006)

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JUDGMENT OF THE COURT

The two appellants HENRY KAILUTHA NKARICHIA and AMBROSE MUNGATIA NKARICHIA are brothers. The duo were by an information dated 4th May 2006 arraigned before the High Court at Meru on a single charge of Murder. The particulars were that on the 5th day of November 2005 at Kisima Location in Meru Central District within (the former) Eastern Province, they jointly murdered **Stanley Nkarichai.** He was their father.

The trial of the case was before **Lenaola J.** with the aid of assessors. The prosecution called some ten witnesses and closed its case whereupon, by a ruling made on 2nd August 2007, the learned Judge found that a *prima facie* case had been made out and placed both the appellants on their defence. On 24th October 2007 they each gave an unsworn statement after which a date was fixed for final submissions in the case.

As fate would have it, **Lenaola J.** left the Meru Station of the High Court on transfer and the submissions were eventually made before **Anyara Emukule, J**. who, by a judgment dated and delivered on 6th March 2009, convicted the appellants as charged, and sentenced them to death.

This appeal is against that conviction and sentence. The appellants filed self-crafted identical memoranda

of appeal. They also filed identical supplementary memoranda of appeal in person raising some fourteen grounds of appeal.

At the hearing of the appeal, the appellants' learned counsel **Mrs. Ntarangwi,** elected to canvas only two of those grounds namely common grounds 2 and 3, rendered rather tautologically thus;

> ***"2. That the learned Judge erred in law in failing to consider that the assessors who presided over (sic) and followed the trial to the letter did not give their opinion in court as enshrined under Section 322 (1) of the Criminal Procedure Code.***
>
> ***3. That learnt (sic) trial Judge erred in law in failing to observe the demeanour of the prosecution in the person of the PW2 was questionable and could as well evoke the stipulations of Section 200 (3) of the C.P.C. and set the whole issue*** *denovo* ***for a better glimpse of the truth."***

Regarding the assessors, Mrs. Ntarangwi pointed out that the trial commenced with assessors all the way to its conclusion as they were present when the defense case was heard but thereafter there is no record of their presence or participation. Nor is there any explanation for their sudden disappearance from the record. Counsel contended that the non-participation of the assessors after the evidence was taken, by way of a summing up to them and recording of their opinion, rendered the trial a nullity. She cited in aid two decisions we rendered at our last session here in Meru namely **ISAYA GITONGA MBAABU –VS- REPUBLIC** [2015] eKLR and **STEPHEN NTABATHIA & 2 OTHERS –VS- REPUBLIC** Criminal Appeal No. 48 of 2013 (unreported).

Turning to **Section 200 (3)** of the **Criminal Procedure Code**, it was counsel's submission, again borne out by the record, that all the witnesses gave their evidence before Lenaola J. and Emukule J, took over at the submissions stage, whereafter he wrote a judgment. The appellants' complaint is that they were not given the opportunity to exercise their right to elect whether the learned

Judge should have proceeded with the case from where it had reached or whether they wanted to have any of the witnesses recalled to testify before the taking-over Judge. This omission, in counsel's contention, also rendered the trial a mistrial and a nullity.

As to what should follow were we to accept her submissions that there was a mistrial, Miss Ntarangwi sought to persuade us that this would not be a proper case for a retrial bearing in mind the length of time the appellants have been in custody, which she put at over nine years. Counsel urged us to quash the conviction, set aside the sentence and set the appellants at liberty.

For the respondent, the learned prosecution counsel Mr. Kariuki Mugo conceded that on the issue of the assessors, there was a mistrial, but opposed the appellants' plea for an outright acquittal. He argued that the error in discharging or ignoring the assessors was not of the prosecution's making and submitted that the interests of justice would be served by a retrial. He stated that this case involved close family members and there will be no difficulty in availing the witnesses should a retrial be ordered.

As regards **Section 200 (3)** of the **C.P.C**. Mr. Mugo made the rather startling submission that since the case was not part heard, but had been fully heard as at the time it was taken over by Emukule J, there was no need for compliance with the provision in granting the appellants the right to recall witnesses. He concluded with the submission that non-compliance with Section 200 (3) did not occasion the appellants any prejudice especially because they were represented by counsel.

A criminal trial at the High Court that was commenced with the aid of assessors, before their participation was repealed by **Act No. 7 of 2007,** necessarily required their participation to the very end, their role terminating with their rendering of their individual opinions on the guilt or otherwise of an accused person. The amendment that did away with assessors effective 17th October 2007 appears to have spawned much confusion with some High Court judges abandoning or discontinuing the use of assessors mid-stream, often, like in the case before us, unceremoniously and without any explanation.

That such a course is improper and renders the entire trial a nullity and a mistrial is common ground and has been pronounced by this Court on many decisions. **BOB AYUB alias EDWARD GABRIEL BWANA alias ROBERT MANDIGA –VS- REPUBLIC,** CRIMINAL APPEAL NO. 106 OF 2009, aptly captured the repeated and consistent reasoning of the Court thus;

> ***"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 Chapter2, Laws of Kenya were to be applied and trial should have continued with the aid of assessors to the end."***

See also **PETER NGATIA RUGA –VS- REPUBLIC,** CRIMINAL APPEAL NO. 42 OF 2008; **WANJIKU –VS- REPUBLIC** [2009] KLR 210 and **KEDISHA –VS- REPUBLIC** [2009] KLR 604.

As to the contested consequence of the learned Judge's failure to inform the appellants of their right to call any or all of the witnesses who had testified before his predecessor, we cannot agree that the need to comply with **Section 200 (3**) is lessened by the fact that all the witnesses had already testified by the time the case was taken over by Emukule J. If anything, we would opine that the more the witnesses who had testified, the greater the possibility of prejudice and therefore the more the need for the accused person to be informed and availed of the right of recall. At any rate, the provision applies to all cases of take over of a partly or fully heard case by a succeeding judicial officer; because whether such officer acts on the evidence of his predecessor or recommences the trial *de novo*, it is always subject to the accused person's right of recall. The entire **Section 200** is in these terms;

1. ***Subject to Sub-Section (3) where a magistrate, after 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. ***Deliver a judgment that has been written and signed but not delivered by his predecessor; or***

   b. ***Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummons the witnesses and recommence the trial.***

2. ***Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment***

3. ***Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***

4. ***Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."****(Our emphasis)*

The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no

obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial. We need do no more than reiterate what we recently stated in **DAVID KIMANI NJUGUNA –VS- REPUBLIC,** NAKURU CRIMINAL APPEAL NO. 294 OF 2010 after a review of several decisions of this Court on the subject;

> ***"All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity.***

See also **NDEGWA –VS- REPUBLIC** [1985] 534; **KARIUKI –VS- REPUBLIC** [1985] KLR 504 and **BOB AYUB alias EDWARD GABRIEL MBWANA alias ROBERT MANDIGA –VS- REPUBLIC** (supra).

As the trial of the appellants was a nullity on account of the two grave, nay, fatal errors we have addressed, the question that remains for us to decide is whether we should order a retrial. As we have already stated, the defects herein were of the trial court's making and not the prosecution's and we are also assured that the witnesses are readily available in the event of a retrial. All these are relevant considerations, among others, the most important one being that a retrial will be ordered only where the interests of justice require it, each case being decided on the basis of its particular facts and circumstances. See, **AHMED SUMAR –VS- REPUBLIC** [1964] EA 48; **MUIRURI –VS- REPUBLIC** [2003] KLR 552 and **ISAYA GITONGA MBAABU –VS- REPUBLIC** [2015] eKLR.

Bearing all the circumstances of this case in mind, and while appreciating that the appellants have been in custody for quite a while, we nonetheless think that the ends of justice will be served by a speedy re-trial leading to a determination of the case on merit.

In the result, we quash the conviction and sentence and direct that the appellants be presented before a Judge of the High Court in Meru (other than Emukule J) within fourteen (14) days of the date hereof for purposes of taking a plea to be followed by an expeditious retrial, without the aid of assessors.

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

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR