IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE & SICHALE, JJA)

CRIMINAL APPEAL NO. 41 OF 2009

BETWEEN

JOHN BELL KINENGENI ..... 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. 87 of 2003)

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JUDGMENT OF THE COURT

This is a first appeal against the Judgment of ***M.J. Anyara Emukule,*** J delivered at Meru on the 6th day of March, 2009. It arose from the proceedings where the appellant herein ***John Bell Kinengeni*** faced a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence are that on the night of the 13th and 14th day of March, 2003 at Kaneu village Kiathathi sub-location, Meru location, Igoji Division in Meru District within the Eastern Province he murdered ***M'Arimi Mucheke***.

The appellant denied the charge prompting the trial in which the prosecution called a total of eleven (11) witnesses to prove its case. The appellant, who gave sworn evidence, was the sole witness for the defence. The trial commenced before ***Lenaola, J*** with the aid of three assessors namely Jadiei ***Gikundi; Fredrick Mwenda*** and ***John Kirera***. The approval of the assessors took place on 21st November, 2006, the very date on which the trial commenced. A total of six (6) witnesses PW1,2,3,4,5 and 6 gave evidence in the trial with the three assessors.

On the 25th June, 2007 when the trial resumed before ***Lenaola, J*** one assessor ***John Kirera*** who had absented himself without permission was discharged. The trial then proceeded with two assessors when PW7 gave his evidence.

On 10th July 2008 the trial recommenced now before ***Anyara Emukule, J***. There is no mention of what become of the remaining two assessors. Neither was **section 200 (3)** of the Criminal Procedure Code complied with. The above notwithstanding ***Emukule, J*** took the testimony of PW8, 9, 10 and 11. Neither the prosecution nor the defence raised the issue of either the incoming Judge complying with **section 200 (3)** of the Criminal Procedure Code before recommencing trial or the issue of non participation of the assessors or what may have become of them. On the 22nd October, 2008 the learned Judge gave his ruling on the finding that the appellant had a case to answer and proceeded to put him to his defence on 24th November, 2008. Thereafter the learned judge received submissions from both learned counsel in the absence of assessors and reserved the matter for judgment which he delivered on the 6th day of March, 2009 in which the appellant was found guilty as charged, convicted and sentenced to death.

The appellant was aggrieved by that decision and has appealed to this Court raising six (6) grounds in his home made memorandum of appeal. This was supplemented by five (5) grounds in a supplementary memorandum of appeal filed on his behalf by his advocate on record.

In his submissions, learned counsel for the appellant ***Mr. Muchiri Wa Gathoni*** argued both the merits and the jurisdictional issue arising from the appellants' appeal. We however find it prudent to reflect on the record the submissions on the jurisdictional, issue only because if upheld they will dispose of the appeal. Learned counsel urged us to find that the two fundamental procedural flaws in the trial are fatal to the prosecutions' case. It was ***Mr. Wa Gathoni's*** argument that the trial commenced with the aid of assessors but then they fizzled before its conclusion. ***Mr. wa Gathoni*** urged that the law at the time required that a trial commenced with the aid of assessors be continued as such to its logical conclusion.

The assessors did not participate in the trial up to its conclusion neither was any summing up made to them and their opinions received before the drafting and delivery of the impugned judgment.

Mr. Wa Gathoni then submitted that **section 200 (3)** was not complied with by the learned judge ***Anyara Emukule*** when he took over the trial as a part heard from ***Lenaola, J*** who had commenced it. This too is fatal to the prosecutions' case.

As for the consequence of such fundamental procedural flaws, counsel urged that we should not order a retrial for an offence which occurred more than ten years ago and the case was not very strong. A retrial would greatly prejudice the appellant who had been incarcerated for long. We should instead order his release from custody forthwith.

In his response, ***Mr. E.O. Onderi the*** learned SADPP concurred with the appellant's submissions that the two fundamental procedural flaws in fact exist and do vitiate the trial. He is also in agreement that a retrial would not serve the ends of justice herein as the evidence tendered in support of the prosecution case was weak. It had gaps and contradictions which were never reconciled and it should not have been used as a basis for the appellant's conviction.

Thereafter the trial was taken over by ***Anyara Emukule, J*** who proceeded with it without the aid of the assessors and also with no complaint from either of the learned counsel on record for the parties. At the conclusion of the trial, the learned succeeding Judge proceeded to receive submissions from both sides without assessors and proceeded to write the judgment impugned herein without any input from the assessors.

In ***Peter Ngatia Ruga versus Republic Criminal Appeal No. 42 of 2008*** (*Unreported*) wherein this Court was faced with a similar challenge, it set out the correct position in law as hereunder:-

> ***".....Though the hearing started with the aid of the assessors and continued with their aid till the close of the prosecutions 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. 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 3 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 mid stream, we cannot for certain say that was done because of the 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.

Whatever reasons necessitated her doing away with the assessors mid stream, one matter is certain and that is that on matters that fell under the provisions of the law on trial with the aid of the assessors, the law required that the number of assessors be three and that number 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 denovo".

In ***Bob Ayub "alias" Edward Gabriel Mbwana alias Robert Mandiga versus Republic Criminal Appeal No. 106 of 2009*** 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 mid stream, the court either dismissed the assessors but never said so or just forgot all about the assessors such that at the end, the summing up to the assessors was not done and their opinion were not sought and recorded by the court, and no mention 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 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 began, 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 the trial should have continued with the aid of the assessors to the end."

The trial in the High Court which began on 21st November, 2006 before the repeal of the relevant provisions on the trial with the aid of assessors ought to have continued as such up to the end. Failure to observe this procedure on the part of the court vitiated the said trial and rendered it a nullity *ab initio.*

Turning to the issue of failure to comply with the provisions of **sections 200 (3) & (4)** of the Criminal Procedure Code, the same provide as follows:

(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 resummomed and reheard and the succeeding magistrate shall inform the accused person of the 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."

This Court has on numerous occasions pronounced itself on the proper interpretation and application of these two provisions. We cite a few by way of illustration. In R***ichard Charo Mole NRB Criminal Appeal No. 135 of 2004*** this Court approved the principles set in ***Ndegwa versus Republic [1985] KLR 534*** and stressed that the duty is reposed on the court and there is no requirement that an application be

made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as **section 200(3)** requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In ***Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006*** the Court added that the use of the words "***shall inform the accused person of that right"*** in **section 200 (3)** (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. In ***BOB AYUB Alias Edward Gabriel Mbwana Alias Robert Mandiga*** (supra) the court ruled that the mere mention in the judgment that **section 200 (3)** was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law. This court stressed in ***Ndegwa versus Republic [1985] KLR 534*** thus:

> ***"No rule of natural justice, no rule of statutory protection, no Rule of evidence, and no rule of common sense is to be sacrificed; violated or abandoned when it comes to protecting the liberty of the subject as he is the most sacrosanct individual in the system of our legal administration.***

In the light of the above principles the learned succeeding judge's failure to inform the appellant of his rights under **section 200 (3)** of the Criminal Procedure Code as was mandatorily required of him vitiated the appellant's trial as well.

In considering the consequences of the material, we have to bear in mind the concurrent view of both learned counsel that this is not a fit case for us to order a retrial.

In ***Benard Lolimo Ekimat versus Republic Criminal Appeal No. 151 of 2004*** the court ruled that "***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 requires it."*** In **Muiruri versus Republic [2003] KLR 552** the Court went further to state that a retrial will only be ordered where the interests of justice require it if it is unlikely to cause injustice to the appellant. The court suggested some of the factors that the court may take into consideration when deciding either way. These include but are not limited to illegalities or defects in the original trial, (see ***Zedekiah Ojoondo Manyale versus Republic Criminal Appeal No.57 of 1980)***, the length of time which has lapsed 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. See also the case of ***Ahmed Sumar versus Republic [1964] EA 481*** at page 483; wherein the predecessor of this Court, stated 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 follow that a retrial would be ordered. It depends on the facts and circumstances of each case and more importantly the interests of justice intended to be served.

The trial herein was vitiated on two fronts on the fault of the court. However both learned counsel agree that there is a gap in the evidence in support of the prosecution case in that the only crucial evidence that the prosecution relied upon to base its case was the testimony of PW 10 and 11, which was contradictory and those contradictions were never reconciled by the learned trial Judge in his judgment. It also created a doubt as to whether it would form a chain sufficient enough to satisfy the threshold of circumstantial evidence capable of being applied to support a conviction.

We have revisited the record on our own and are satisfied that there was no direct evidence to the murder. The prosecution's case stood or tumbled on the basis of circumstantial evidence only, which we find was rather weak and doubtful. In this regard ordering a retrial in our view would be highly prejudicial to the appellant who has been incarcerated for over a decate.

In the result and for the reasons given we declare the appellant's trial by the High Court a nullity but

decline to order a retrial. We order the appellant to be released from custody forthwith unless otherwise lawfully held. Order accordingly.

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

R.N. 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 a

true copy of the original

DEPUTY REGISTRAR