IN THE COURT OF APPEAL
AT BUSIA

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI. JJA)

CRIMINAL APPEAL NO. 197 OF 2009

BETWEEN

NATHAN ODUOR ODINDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kakamega

(Ochieng, J.) dated 29th January, 2009

in

H.C.CR.C. NO. 14 OF 2003)

****

JUDGMENTOFTHECOURT

The appellant in this appeal ***Nathan Oduor Odindi***, was convicted of murder and sentenced to death by Ochieng, J. who had taken over the conduct of the trial in the High Court at Kakamega from Kariuki, J. (as he then was) who had heard all the seven (7) witnesses called by the prosecution to testify on behalf of the Prosecution and had found a prima facie case made out against the appellant and put the appellant on his defence. We observe that in effect, the learned Judge (Ochieng, J.) did not find it necessary to comply with the provisions of ***Section 200*** of the Criminal Procedure Code as read with ***Section 201 (2)*** of the same Code, but that will be discussed hereafter in this judgment. The record before us also does not contain an information as should have been the case, but it is clear to us that the charge sheet presented to the court by the Police reflected the true charge upon which the appellant was arraigned in court and upon which the trial proceeded. That charge sheet states that the appellant was charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code in that:

> **"On the 14th day of October 2002, at Uyala village, Dudi sub location, Kisa West Location, of Butere/Mumias District, within the Western Province, murdered Julia Odhiambo."**

He pleaded not guilty to the charge. The trial was to be with the aid of assessors as ***Sections 262*** and ***263*** of the Criminal Procedure Code had not been repealed by Act No.7 of 2007 which deleted them. These two sections stated:

> ***"262. All trials before the High Court shall be with the aid of assessors.***

263. When the trial is to be held with the aid of assessors, the number of assessors shall be three."

The learned trial Judge, in compliance with these two provisions, empaneled three assessors on 7th October, 2003, who were ***Peter Rioba, Caroline Hoka*** and ***John Omukenya***. Thereafter, the hearing was adjourned till 10th May, 2004 when the trial proper started.

Annah Mukhwana (PW3) of Bar Sauri, Yala Township is the mother of the *deceased* ***Julia Odhiambo.*** Her daughter, the deceased, was earlier on married to another person and had children with that person. They had differences with her legal husband and returned to her place of birth. Once then, she met and befriended the appellant with whom she lived as husband and wife though clearly not legally married. On 13th October, 2002, the deceased visited the house of ***Benta Oduma Likayi (PW2) (Benta)***, who was step mother of the appellant, and whose home was neighbouring that of the appellant. Benta said that was not the first of such visits by the deceased to her house as previously the deceased had slept at her place several times. She was normal. She slept there till next morning. Next morning Benta opened the door and saw the appellant standing outside the door. The appellant enquired whether the deceased had slept there and her response was positive. The deceased woke up and the appellant asked her to move near him and not to run away. He then grabbed the deceased and started beating her there outside Benta's house. He had a rungu. The deceased started screaming and struggling and Benta also screamed but none came to her rescue. Benta then rushed to ***Shadrack Nyamwanga Oyugi, (PW6)*** the village elder who went to the scene, saw the body of the deceased, who had died, and in turn reported the matter to ***Caleb Okwako Jagogo (PW5)*** the Assistant Chief Doha Sub-location. Jagogo reported the incident to the Police and thereafter visited the scene and noted on observing the body of the deceased that the part of the body where the spleen is was facing up and the abdomen had blood. Thereafter, Annah Mukhwana (PW3), the deceased's mother was informed of the incident by one called ***Ohito*** and she went to the home of Benta where she found the body of her daughter. In the meanwhile, Assistant Chief Jagogo, carried out quick investigations as to who was responsible for the death of the deceased and on being told, he called the appellant whom he saw walking away from the scene. On the appellant going to him, Jagogo arrested him with the assistance of ***Justus Oketch (PW1)*** and two others. Oketch tied the appellant. ***No. 53154 Corporal John langar (PW7)*** of Dudi Police Patrol Base, to whom the report was made by Jagogo and Shadrack went to the scene, drew sketch plan of the area and then took the body to Siaya District Mortuary. Later he rearrested the appellant and escorted him to Yala Police Station for safe custody, but later as the offence took place in the then Butere Mumias District the appellant was taken to Burete Mumias District Hospital for examination as to whether he was of sound mind. The body was identified to ***Doctor Kelly Aloo Okumu (PW4)*** of Siaya District Hospital who performed postmortem examination on it and formed the opinion that the cause of death was due to massive inner abdominal bleeding which could have been caused by a blunt object. He also opined that a rungu could have caused such injuries. The appellant was thereafter charged as stated above.

On being put on his defence, the appellant stated in an unsworn statement that on 13th October, 2002, the deceased whom he referred to as his wife, did not sleep at home and he did not find her at home when he went home from their farm that evening. On the next morning, as he was to go on a safari and the children would remain without attendance, he decided to go and look for the deceased. He found the deceasd lying on a mattress with another man inside Benta's house as they were drinking alcohol and the man was cuddling her tightly. The appellant got very much annoyed, went and got a branch of a tree which formed part of the fence. He hit her with that stick. Thereafter he left for Kisumu. On his return from Kisumu he was arrested by Jagogo and three of his Youth wing team. He was taken to Dudi Police Base. He was then taken to Yala Police Station and thereafter to Butere Police Station and to Butere Court where he was charged with the subject offence.

The above, was the entire evidence that was before the trial court and in respect of which the appellant was convicted and eventually sentenced to death. He was dissatisfied with both the conviction and the sentence and hence this appeal based on seven (7) grounds of appeal filed by the advocates for the appellant and upon which Mr. Obwoge Onsongo, the learned counsel for the appellant addressed us at length.

For reasons which will be apparent later in this judgment, though we have anxiously considered the grounds raised in the Memorandum of Appeal and the submissions of the learned counsel for the appellant, we will not reduce into writing our views on the same as in our minds this appeal has to be decided on two other grounds which the court must discuss suo motto and which we feel are enough to dispose of the entire appeal. One of these grounds goes to the root of the entire case while one is, though important could not have affected the entire case.

As we have stated above, the offence was allegedly committed when the provisions of trial with the aid of assessors was still in place and indeed, the learned Judge empaneled three assessors to help him in the trial. The record shows that when the trial commenced on 10th May, 2004, all the three assessors were present and on that day three witnesses gave evidence. The hearing was adjourned to 11th May, 2004. On that day two witnesses were heard and the assessors were present. It was adjourned to 8th July, 2004, but on that day the court did not sit. The hearing was thereafter fixed to proceed on 25th November, 2004. On that day, the assessors were all in court but as the defence counsel was absent, the hearing was adjourned to 9th December, 2004. On that day the sixth witness gave evidence in the presence of three assessors.

The hearing resumed thereafter on 11th July, 2005 and the assessors were present. The hearing date was pushed to 14th July, 2005. On that day, one assessor, John Omukenya was absent and it was reported to court that he had been arrested and was in Police custody. The hearing did not proceed on that day. Thereafter the hearing was adjourned from time to time for various reasons and that continued till 7th February, 2006 over one year and five months after the last prosecution witness was heard when the case came up for hearing and one assessor Peter Rioba did not attend court. The learned Judge (Kariuki, J.), entirely without investigating as to why the assessor was absent, made an order discharging him due to absenteeism. Thereafter, the prosecution closed its case. At the close of the prosecution's case both counsel declined to make submissions and the learned Judge reserved his ruling pursuant to provisions of ***Section 306*** to be delivered on 6th March, 2006, but that was not to be. On 6th March, 2006, the ruling was adjourned and was delivered on 3rd May, 2007. What looks odd though is that on that day 3rd May, 2007 when the ruling was delivered, Peter Rioba was listed as one of the assessors present, notwithstanding that he had been discharged and in law should have had no business attending court as an assessor that day. What is even more surprising is that on 16th May, 2007, when the defence hearing was to start, the court adjourned the same on grounds inter alia that that same assessor was absent and the court directed the Deputy Registrar to notify that assessor to attend court the next hearing date. With respect that assessor had long been discharged. This was clearly not in consonance with the legal requirements. However, when the matter came up for hearing of the defence case, although all assessors including the one already discharged were present the matter could not proceed to hearing as the defence counsel was absent. Kariuki, J. ceased to conduct the matter on 31st October, 2007. Throughout the period he conducted the hearing, the assessors continued aiding the court in hearing the matter and the only fault was when one assessor was discharged for absenteeism and was in our view reinstated against the law. The last date the matter was placed before him was on 31st October, 2007 as we have stated. Thereafter Ochieng, J. took over the conduct of the case and it was first before the learned Judge on 4th March, 2008. On that date the record shows that no assessor was present in court and indeed no mention was made of the assessors and no reason was assigned for that omission. The two learned counsel before the court made certain profound suggestions by consent which were acceded to by the court. These were made in the absence of the assessors who had all along been aiding the court. On 24th September, 2008, the defence hearing proceeded without the assessors and without any reason for their absence. The record does not show that they were discharged. We observe that by the time Ochieng, J. took over the trial of the case the provisions for trial with the aid of assessors had been repealed by Act No. 7 of 2007, but as will be clear hereafter that repeal could not have affected matters that were already proceeding with the aid of assessors before the repeal came into effect. After hearing the appellant and short submissions from both the defence counsel and the state counsel, the learned Judge proceeded to prepare and later to deliver judgment without any summary to the assessors and of course without receiving, recording and considering their opinions.

Mr. Abele, the learned Assistant Director of Public Prosecutions raised this point which was not in the Memorandum of Appeal. As it was a point of law and as we also had observed it on our own perusal of

the record and consideration of the law, we allowed him to address us on it. In his view, the trial was a nullity because the learned Judge (Ochieng, J.) proceeded to hear the case for the defence, submissions and pronounced judgment on the case without acknowledging that the trial had began with the aid of assessors and at a time when that was a necessity. The learned Judge ignored the fact that the assessors had all along been present when the prosecution's case was heard and closed and he had also ignored the need to proceed with the same assessors to the conclusion of the case. Further Mr. Abele submitted that it was not proper for the learned Judge (Kariuki, J.) to accept back a discharged assessor. He conceded the appeal and submitted that as the offence took place about twelve (12) years back, it was not certain that the prosecution would mount a successful retrial. He therefore felt the appellant should be released.

As we have stated above, two matters raised concern in our minds in this appeal. First was the way the learned Judges handled the issue of assessors and secondly was the way Judge Ochieng dealt with procedural requirements at the time he took over the conduct of the case.

First on assessors. The hearing started when the sections providing for trial with the aid of assessors were still applicable as the trial started on 4th June, 2003 long before Act No. 7 of 2007 removed trial with the aid of assessors from our statutes, and the learned Judge (Kariuki, J.) rightly empaneled three assessors as per the **Section 262** as read with **Section 263** of the Criminal Procedure Code. That having been done, by virtue of ***Section 23 (3)(e)*** of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya, the learned Judge (Ochieng, J.) should not have dropped the assessors mid-stream and proceed without them. This was a right that had in law accrued to the appellant and the repeal of those provisions by Act No. 7 of 2007 did not and could not have affected the trial with the aid of assessors which had already commenced. In the case of **Peter Ngatia Ruga vs Republic** - Criminal- Appeal No. 42 of 2008, this Court stated as follows:

> ***"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."***

In this case, as is clear above, the trial started with the aid of assessors and continued with the same aid till all prosecution's witnesses were heard and the prosecution closed its case. Thereafter the learned Judge (Ochieng, J.) proceeded to conduct the defence case without the assessors and further never summarised the case to the assessors and never received their opinions and thus never considered their opinions. That failure on the part of the trial court deprived the appellant of a right that had in law accrued to him. It deprived him of a fair hearing as was then enshrined in ***Section 77*** of the retired Constitution now provided in Article 50 of the Kenya Constitution 2010. ***Section 77 (1)*** of the retired Constitution stated:

> ***"If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."***

As we have said the same provisions are in Article 50 of Kenya Constitution 2010. We find that failure of the trial court to proceed and complete the entire trial with the aid of assessors vitiated the proceedings and rendered the trial a nullity. Further, the learned Judge also erred in discharging one assessor without complying with the provisions of Section 294 of the then Criminal Procedure Code. In the case of **Cherere Gikuli vs Republic** (1954) 21 EACA 304, it was held as follows:

> ***"1. A trial which has began with the prescribed number of assessors and continue with less than that number is unlawful unless the case can be brought precisely within section 294 of the Criminal Procedure Code.***
>
> ***2. To be within section 294 aforesaid, one of the two conditions must be satisfied, viz, either***

that the absent assessor is for any sufficient cause prevented from attending throughout the trial or that he absents himself and is not practicable immediately to enforce his attendance (Muthemba S/0 Ngonchi vs Republic Supra) distinguished."

In this case, the learned trial Judge discharged one assessor for absenteeism without in any way enquiring as to whether that assessor was for any sufficient cause prevented from attending throughout the trial or that he absented himself and was not practicable immediately to enforce his attendance. The learned Judge needed to ensure either of the two conditions obtained before discharging that assessor. As he did not do so, any further trial with the two assessors would have been unlawful. Even worse, the same assessor returned to the fold and was allowed back and continued as such before the court unceremoniously and without any reason sidelined all of them without any reasons being rendered. In law that assessor, having been discharged, should not have been accepted back. We however note that though the learned Judge erroneously discharged one .assessor and erroneously accepted the same assessor back, the errors did not occasion any injustice as the matter was not heard during the period these two unlawful actions took place. We however cannot ignore these errors as they could have led to unfair trial as well had the matter continued to be tried with the aid of assessors as should have happened.

The last issue we need to discuss is the manner in which Ochieng, J. took over from Kariuki, J. When Ochieng, J. took over the conduct of the case, the record shows:

"Anziya - The case is scheduled to come up for defence hearing. As the proceedings have been typed and certified I ask for a date for further hearing from where the case has reached.

Karuri That is the position. I wish to know if the accused will give a sworn or unsworn testimony so that I may prepare.

Anziya He will give unsworn testimony.

Court The case is fixed for defence hearing on 24.9.2008."

On 24th September, 2008, Mr. Odindi holding brief for Mr. Anziya informed the court that the accused was ready to proceed with the defence case and the hearing proceeded with the appellant giving unsworn statement. The record does not show that the learned Judge at any time appreciated the need to comply with the provisions of ***Section 200*** as read with ***Section 201*** of the Criminal Procedure Code. He might have ignored the provisions of these sections because the appellant's counsel had told him that they were ready to proceed from where the case had reached before Kariuki, J. That however meant the learned Judge failed to realise that the provisions of ***Sections 200*** as read with ***Section 201*** are to be read and explained to the accused in person and the court needed to ensure that the appellant's rights were explained to him. These are provisions meant to be communicated to the accused and not to his advocate for the court must appreciate that these provisions were meant to be communicated to an accused person as they were meant to protect his rights and to ensure fairness.

We think we have said enough to indicate as we have stated above that for all the above reasons, the trial in which the appellant was convicted and sentenced to death was vitiated and rendered a nullity. That conviction cannot stand. It is quashed and the sentence is also set aside.

What next, should we order a retrial? Mr. Abele thinks the prosecution may not mount a successful trial because of time lapse, which is now close to eleven and a half (11 ½) years. Mr. Onsongo seeks the appellant's release again because of the time he has been within the confinement of prisop..

We have anxiously considered whether or not we should order retrial. In law several factors will guide the court on whether or not to order a retrial. These are factors such as the illegalities or defects in the original trial, the length of time that has elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or not, whether on consideration of the available and admissible evidence, a successful conviction might ensue

on retrial and finally but not the least the interests of justice which must be given more serious consideration. (See cases of **Muiruri vs Republic (2003) KLR 552**, and **Mwangi vs Republic (1983) KLR 522**). A summary of all the above was set out by this Court in the case of **Benard Lolimo Ekimat vs Republic**- Criminal Appeal No. 151 of 2004 (ur) where the Court stated:

> ***"There are many decisions on the question of what appropriate case would attract on 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."***

In the matter before us, the state says it would be difficult for it to mount a successful prosecution as witnesses may not be there or may have forgotten what happened as a result of time lapse of eleven and a half {11 ½) years. We have carefully perused the record and we think the appellant having been in custody for over eleven years, has learnt a lesson if he is of the learning type. To subject him to fresh trial would not be fair and just although in saying so, we are not oblivious of the fact that as a result of his action a life was lost.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Busia this 9th day of May, 2014.

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR