IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), MWILU & MUSINGA, JJ.A.)

CRIMINAL APPEAL NO. 111 OF 2006

BETWEEN

BENSON MATHEKA JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (R. Wendoh, J.)

dated 30th March, 2006

in

HC. CR. A. No. 21 of 2002)

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JUDGMENT OF THE COURT

Benson Matheka Juma, the appellant, was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** The particulars of the offence were that on the 9th day of December, 2000 at Kaseve Village, Kiima Kiu location, Makueni District, the appellant murdered one **Stanlus Thiongo**, hereinafter referred to as **"the deceased".** After a full trial before the High Court (Wendoh, J.) the appellant was convicted of the aforesaid offence and sentenced to death as by law prescribed. Being dissatisfied with the said conviction and sentence, the appellant preferred this appeal to this Court.

This being the first appellate court, it is enjoined to evaluate afresh the evidence tendered before the trial court and reach its own decision. The Court must however bear in mind that the trial court had the benefit of seeing and hearing the witnesses as they testified before it and must therefore make due allowance for that. See **OKENO v REPUBLIC (1972) E.A. 32.**

The evidence before the trial court may be summarized as hereunder:

On the night of 10th and 11th November, 2000 thieves broke into the shop of **Joseph Mutungei Leshai, PW1** and stole various items**.** Leshai sought the intervention of a witchdoctor in a bid to find who had stolen his goods. He was directed to the home of the appellant. Accompanied by police

officers, **Police Constable Jack Wafula, PW6,** and **Police Constable Thiongo** (the deceased) and one **King'oo,** they visited the appellant's home. The police officers introduced themselves and informed the appellant that they were looking for stolen goods. There were two houses in the appellant's compound and he was asked to open one of them. PW1 was able to identify some of the stolen goods, (among them his bicycle), that were stored in the appellant's house. The appellant was asked to produce receipts for the said goods but was unable to do so. He was also ordered to open a cupboard that was in the house but he declined and demanded to be shown a search warrant by the police officers.

The appellant began to argue with PW6, who handed over a gun that he had to the deceased. Both the deceased and King'oo went and stood outside the appellant's house, leaving the appellant, PW1 and PW6 inside the house. Suddenly, the appellant ordered the police officers to get out of his home, took a Somali sword and cut PW6. Both PW1 and PW6 ran out and jumped across the fence. They later noticed that PW6 had been injured and one of the fingers had been cut off.

PW1, PW6 and King'oo ran away leaving the deceased behind. While PW6 went to seek treatment for the injuries inflicted on him, PW1 got some members of the public and went back with them to the appellant's house. Near the home of the appellant, they found the deceased under a tree. He had injuries on the head and was dead. The evidence of PW1 was substantially corroborated by **David Mule Muviti, PW4**, who was present when the police officers conducted the search at the appellant's house. He ran away when the appellant threatened them. Although he did not see the appellant assaulting the deceased, he saw the deceased's body.

Daniel Kiteng'e Juma, PW2, a brother of the appellant, testified that he was away when the attack occurred. Having heard about the incident, he went to the appellant's home and the appellant told him that some people who claimed to be police officers had gone there and purported to conduct search. He saw the deceased's body as well as the gun that was in the appellant's possession. Later on PW2 met the area **Assistant Chief, Jonathan Musyoka, PW3,** who sent him to get the gun that had been left in the appellant's home. When he got there the appellant's wife directed him to where the gun was.

PW3 testified that on 9th December, 2000 at about 6 p.m. he was called by the area Chief, **Joseph Kituku, PW5**, who asked him to accompany him to a place where a police officer had been killed. They found the deceased's body near a tree. While there, the appellant approached them and was armed with a bow and arrow. PW3 was left at the scene as the Chief went to report the incident at Salama Police Station. The police went to the scene and removed the deceased's body.

Chief Inspector Zakayo Mutua, PW7, was the OCS Kajiado. On 2nd December, 2000 he was informed by Sultan Hamud Police Station about the death of the deceased. When he proceeded to the scene, he found that the OCS Kilome had collected the deceased's body and put it in a vehicle. The deceased had injuries on the head. PW7 and other officers started to look for the appellant. They went to his home but did not find him. PW7 saw blood stains outside the appellant's house and a pool of blood about 100 metres from the house. He learnt that the deceased had fallen at the spot where the pool of blond was. It was within the appellant's shamba. They entered the house of the appellant and found assorted shop goods which were identified by PW1 as having been stolen from his shop.

Police Constable James Mutisya, PW8, and **Police Constable Andrew Ngeno, PW13,** were sent to lay ambush for the appellant at his home. They went there on 28th February, 2001. When they spotted the appellant approaching on a bicycle they stopped him. Upon being asked for identification, the appellant drew a sword and threatened to assault the police officers. They fired in the air and the appellant ran away. The police shot at him and managed to arrest him.

A post mortem of the deceased's body was conducted by **Dr. Mwangi** at the Machakos District Hospital. The post mortem report showed that the deceased sustained multiple deep cuts on the head, depressed skull and massive intra-cerebral haemorrhage. The doctor concluded that the cause of the deceased's death was cardia pulmonary arrest secondary to head injury.

In his sworn testimony of defence, the appellant stated that on 9th December, 2000 at about 1 p.m.

four people arrived at his home. They did not identify themselves and asked to search his home. They did not tell him what they were searching for. He was forced into one of his houses. Three of the people entered the house while one who had a gun remained outside. The three were armed with a Maasai sword, a metal bar and a simi. While in the house, one of the people claimed that some bed sheets and other goods there were his. The appellant feared that the visitors were upto no good and he suggested that they go and see the area Chief. However, one of the visitors got hold of the appellant and a struggle ensued.

The person who was outside the house and holding a gun asked his colleagues to move out so that he could shoot the appellant. The three men moved out of the house and as the one who was armed with the gun was entering the house the appellant tripped him and snatched the gun. The appellant further stated that he disarmed the rest and they all ran in different directions. The appellant denied having assaulted the deceased.

After that incident the appellant decided to take the gun to the area Chief. On the way he saw one of the four men being chased by members of public. The appellant did not find the Chief at his home and decided to proceed to the Assistant Chief's home. On the way he met both the Chief and his assistant and explained to them what had happened. The Chief allegedly told him to keep the gun as the owner would come for it, which the appellant did.

Mr. Oyalo, learned counsel for the appellant filed a supplementary memorandum of appeal and raised six grounds of appeal which are as follows:

"1. That the trial was fundamentally flawed.

2. That the trial Judge erred in law and in fact in convicting the appellant of the offence not withstanding that there was no direct evidence connecting him with the death of the deceased and circumstantial evidence on record did not reach the threshold required to convict an accused person on that kind of evidence.

3. That the learned trial Judge misapprehended the evidence and thus misdirected himself *(sic)* ***on the same.***

4. That the findings of the learned Judge are not supported by the evidence on record.

5. That the learned trial Judge based her decision on theories put forward by herself and not on the evidence on record.

6. That the learned trial Judge based her decision on suspicion and that suspicion, however strong, cannot supply a basis for inferring guilt when proof of guilt cannot be safely inferred beyond reasonable doubt."

Arguing the first ground of appeal, Mr. Oyalo submitted that the trial was with the aid of assessors. At the commencement of the trial, three assessors namely Joel Mutune, Francis Mutisya and Danson Kianga were selected. The record shows that as at the close of the prosecution case only two assessors were participating in the trial. No reason was given for the absence of the third one. At the commencement of the defence case, the two assessors were present. The defence case was closed on 13th December, 2005. Before the trial Judge summed up the case to the assessors, a new assessor, D.M. Nzioki was recruited in place of the two assessors. That assessor had not taken part in the entire hearing. The trial Judge summed up the case to the two assessors. However, it is not clear whether the assessors returned any verdict because there is none on record.

Mr. Oyalo submitted that no reason was given by the court for proceeding in the absence of one of the assessors. Further, the trial Judge erred in appointing D.M. Nzioki as an assessor at such a late stage.

Counsel submitted that the trial court contravened **Section 298** of the **Criminal Procedure Code**

(now repealed) which stated as follows:

> ***"298(1) If, in the course of trial with the aid of assessors, at any time before the finding, an assessor is for any sufficient cause prevented from attending throughout the trial, or absents himself, and is not practicable immediately to enforce his attendance, the trial court shall proceed with the aid of the other assessors.***
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> ***(2) If two or more of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors."***

There was a fundamental flaw in the conduct of the entire trial in view of non compliance with **Section 298** of the **Criminal Procedure Code,** counsel submitted. Further, failure by the assessors to give their verdict was contrary to the law. As a result, the entire trial was vitiated. In support of that submission Mr. Oyalo cited this Court's decision in **MUTUA KIMINZA v REPUBLIC, Criminal Appeal No. 454B of 2007** where the Court delivered itself thus:

> ***"In the case of Dickson Mwaniki M'obici and another vs. Republic, Criminal Appeal No. 78 of 2006, (ur) this Court stated the law as follows:***
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> ***"We stated the law on trials with the aid of assessors at the beginning of this judgment. It is evident that the trial proceeded without one assessor at some stage and there was no reason given as required under section 298 of the Criminal Procedure Code. The appellant was entitled to have the entire evidence tendered by the prosecution, as well as their own evidence, heard and evaluated by three assessors. That there were only two assessors when the appellant testified and no reasons were given for the absence of the third assessor was a fundamental departure from that procedure and therefore an infringement of that right. The third assessor returned to hear the summing up and to give his opinion in the trial but that was of no consequence. The death blow had been inflicted on the trial as a whole. The predecessor of this Court considered the effect of such anomaly in Cherere Gikuli vs. R., (1954) 21 EACA 304 and held:-***
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> ***"(1) A trial which has begun with the prescribed number of assessors and continues with less than that number is unlawful unless the case can be brought precisely within section 294 of the Criminal Procedure Code (ubi supra).***
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> ***(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 it is not practicable immediately to enforce his attendance. (Muthemba s/o Ngonchi vs. R. (Supra distinguished.")"***

The appellant's counsel argued grounds 2 to 6 together. He submitted that there was no direct evidence connecting the appellant to the offence. The case was decided on circumstantial evidence which was insufficient to sustain a conviction.

Counsel criticized the trial Judge for introducing her own theory as to the circumstances that led to the death of the deceased. He cited a part of the Judgment where the learned Judge stated, *inter alia*:

> ***"PW7 Chief Inspector Mutua who visited the accused (sic) home on the same day after the death of P.C. Thiong'o found a pool of blood 100 metres from the accused house. Deceased's body was also near accused's home but outside his compound. Accused remained with the deceased's rifle. From what I believe happened I will further find that accused must have suddenly attacked the deceased and cut him on the head with the sword and disarmed him of the rifle. The injuries inflicted on deceased were so serious that they caused his death." (emphasis supplied)***

The appellant's counsel further faulted the learned trial Judge for rejecting the appellant's

evidence for no good reason. He submitted that the several cuts that were found on the deceased's head and which ultimately caused his death could have been sustained when he was assaulted by members of the public who chased him after the appellant raised an alarm.

Mr. Monda, Senior Principal Prosecution Counsel, conceded the first ground of appeal relating to absence of one of the assessors and substitution of one of the remaining ones in the course of the trial. He conceded that Section 298 of the Criminal Procedure Code was not fully complied with. He urged the court to order a retrial because the evidence that was tendered by the prosecution witnesses was overwhelming. He submitted that there was sufficient evidence that the appellant inflicted fatal injuries upon the deceased, adding that the appellant had even been found in possession of the deceased's gun, and even admitted that he had disarmed the deceased of the same.

Mr. Monda further submitted that the evidence of PW6 was that the appellant armed himself with a Maasai sword with which he assaulted him, cutting off his first left finger. The appellant must have used same sword to cut the deceased severally on his head.

We now turn to the determination of the various grounds of appeal raised in the supplementary memorandum of appeal by the appellant's learned counsel. As regards ground 1, it is not in dispute that prior to the enactment and operationalization of the Statute Law (Miscellaneous Amendments) Act, 2007 which abolished the role of assessors in murder trials, all murder trials were required to be conducted with the aid of three assessors. See Section 297 of the Criminal Procedure Code (now repealed). However, upon commencement of the trial and before the finding was arrived at, if one of the assessors fell sick or for any sufficient cause was unable to attend court, the murder trial could proceed with the aid of the other assessors. In the trial that gave rise to this appeal, it appears that after selection of the three assessors one of them did not avail himself throughout the conduct of the prosecution case and the record does not show any reason for his absence. After the closure of the defence case a new assessor replaced one of the two remaining assessors. When the trial Judge summed up the case to the two assessors, only one of them had fully participated in the trial.

Further, the record of appeal does not contain the verdict of the assessors. But even if the verdict was on record, it is only one assessor who could effectively give a valid verdict in law. We agree with Mr. Oyalo that failure to comply with the provisions of Section 298(2) of the Criminal Procedure Code (now repealed), was a fatal flaw to the entire proceedings. We have already cited the relevant case law in MUTUA KIMINZA v REPUBLIC (Supra).

Having so found the next issue that we must determine is whether a retrial should be ordered or not. In MUIRURI v REPUBLIC [2003] KLR 552 the court held:

> ***"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.***
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> ***4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution making or not."***
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> **In MWANGI v REPUBLIC [1983] KLR 522, it was held that:**
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> ***"A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the evidence or potentially admissible evidence, a conviction might result."***

The fundamental flaw that vitiated the appellant's trial was the absence of two assessors. However, trial of murder suspects with assistance of assessors is no longer required following the enactment of the **Statute Law (Miscellaneous Amendments) Act, 2007.** In the circumstances, if this Court were to order

a retrial of the appellant the same would be conducted without assessors. Is it therefore in the interest of justice to order a retrial, and particularly so if the evidence on record was sufficient to sustain a conviction?

This Court considered the above issue in **JOSEPH KARURU MUNGAI v REPUBLIC, Criminal Appeal No. 223 of 2009**. In the case that gave rise to the said appeal, the appellant was tried on a charge of murder. The trial commenced with the aid of assessors. The trial Judge failed to sum up the case to the assessors after enactment of **Statute Law (Miscellaneous Amendments) Act, 2007.** This Court held that if the law regarding trial of murder suspects had not been changed a retrial would have been ordered. But in refusing to order a retrial the court stated as follows:

> ***"Having carefully considered the entire record of appeal, we are satisfied that the prosecution adduced overwhelming evidence against the appellant and the trial judge arrived at the correct finding, and so, even if we were to order a retrial on account of the trial Judge's failure to finalize the trial with the aid of assessors, we highly doubt whether the outcome would be any different from what it was. We think a retrial would be a mere formality that would entail unnecessary use of scarce judicial time and expense by the Office of Director of Public Prosecutions in bonding and transporting prosecution witnesses to court. We are not inclined to make such an order."***

We have carefully considered all the evidence on record. While we agree that there is no direct evidence that the appellant murdered the deceased, there is sufficient circumstantial evidence that it is the appellant who attacked the deceased with a sword and caused him fatal injuries. The deceased was found dead in a pool of blood near the appellant's home. The evidence of PW1 showed that the appellant took a sword from his house and chopped off one of the fingers of PW6. That forced PW1 and PW6 to run out of the appellant's house and as the trial Judge, found the appellant must have used the same sword to cut the deceased on his head before he disarmed of the gun. **Although Mr. Oyalo submitted that the Judge's summation was inconsistent with the evidence on record, we do not entirely agree. We think the learned Judge was entitled to draw her own conclusion upon analysis of the entire evidence.**

We are satisfied that there is overwhelming circumstantial evidence that points to the appellant as the only person who could have occasioned those fatal injuries to the deceased. All the available evidence points to the appellant as the deceased's assailant. It has repeatedly been held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find the exculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. See **REX V KIPKERING ARAP KOSKE [1949] 16 EACA 135**. We reject the explanation given by the appellant as to how the deceased might have otherwise met his death as not being plausible.

In conclusion therefore, while we agree that the appellant's trial was flawed for non compliance with **Section 298(2)** of the **Criminal Procedure Code (now repealed),** for reasons stated hereinabove, we do not think that a retrial ought to be ordered. We dismiss grounds 2 to 6 of the supplementary memorandum of appeal with the result that this appeal is unsuccessful and is hereby dismissed.

Dated and delivered at Nairobi this 20th day of June, 2014.

P. KIHARA KARIUKI

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PRESIDENT, JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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