IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 198 OF 2010

REPUBLIC ……………………….………………..…………………….APPELLANT

AND

EDWARD KIRUI ………………………………….………………….RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi by (Justice Ochieng) dated 21st June, 2010

in

HC.CR.C. No. 9 OF 2009)

****

JUDGMENT OF THE COURT

1. GEORGE WILLIAM ONYANGO and **ISMAEL CHACHA** lay dying and dead, respectively on the 16th day of January, 2008 at Kondele Market within Kisumu city following gun shots into their bodies. **GEORGE WILLIAM ONYANGO** was later that day to succumb to his injuries while undergoing treatment at the then Provincial General Hospital, Kisumu. **ISMAIL CHACHA** died right on the spot where he and **GEORGE WILLIAM ONYANGO** were shot. The shooting was done by a police officer thought to be **EDWARD KIRUI**, then stationed at Kondele Police Station. It had happened that Kenya held its General Elections on 27th December, 2007 and the result that the Party of National Unity's (PNU) presidential candidate was declared winner, was hotly disputed by the closest rival, the Orange Democratic Movement (ODM) which claimed that its Presidential victory had been stolen by PNU. ODM consequently gave notice of intention of its membership to hold peaceful protests across the Republic of Kenya to express their displeasure at those declared presidential results. Those protests were declared illegal by the government but the protests went ahead regardless. It was when police officers were quelling the riotous mobs gathered at Kondele market on 16th January, 2008 that **GEORGE WILLIAM ONYANGO** and **ISMAEL CHACHA**, met their end through gun shots fired at them by a uniformed armed policeman, who heartlessly kicked one of the dead bodies after the shooting as if shooting them was not bad enough.

2. Following those deaths, policeman **EDWARD KIRUI** was singled out as the perpetrator of the crimes committed on the two deceased persons named in paragraph 1 above and was consequently interdicted from the Police Force (now Service) arrested and charged with two counts of murder as in the statement of offence as hereunder quoted:-

“ ***<u>COUNT 1</u>***

Murder contrary to section 203 as read with section 204 of the Penal Code cap. 63 laws of Kenya.

The particulars of offence were that *EDWARD KIRUI* ***on the 16th day of January, 2008 at Kondele market within Kisumu city, Nyanza Province murdered*** *GEORGE WILLIAM ONYANGO.*

<u>COUNT 2</u>

Murder contrary to section 203 as read with section 204 of the Penal Code cap. 63 laws of Kenya.

The particulars of offence were that *EDWARD KIRUI* ***on the 16th day of January, 2008 at Kondele market within Kisumu City, Nyanza Province murdered*** *ISMAEL CHACHA.* ***”***

3. The trial commenced before Mr. Justice O. K. Mutungi who took the evidence of some nineteen (19) prosecution witnesses. The honourable Mr. Justice F. A. Ochieng who took over the hearing of the case upon the retirement of the first judge in the case and after complying with the Provisions of **section 200** of the **Criminal Procedure Code**, continued with the case from where he found it at and took the evidence of the remaining three (3) prosecution witnesses and that of two defence witnesses. At the conclusion of the prosecution case the trial judge found that the prosecution had made out a prima facie case against the accused person. The judge wrote:-

“At this moment in time, the court is required to determine whether or not the prosecution has adduced sufficient evidence to warrant the accused being placed on his defence. In arriving at that decision, I will take into account the fact that unless there is such evidence as can connect the accused to the offences for which he was charged; and also if the evidence on record is sufficient to lead to a conviction, there would be no need to require the accused person to defend himself.”

Further down in his Ruling the learned trial judge stated:-

“For now it is clear two persons were shot dead. Those two persons were Ismail Chacha and George William Onyango. The prosecution has led evidence to establish the cause of death of each of the two victims. The prosecution has also led evidence to show that the accused was one of the police officers who were on duty at the Kondele area of Kisumu on the date when the two persons were shot dead. From the video clips it appears that it was not easy to identify the particular police officer who shot the victims. But it is also on record that at some point, the police officer raised the helmet exposing his face. From that evidence it would appear that the accused was placed squarely at the scene of crime. Furthermore the ballistics expert appears to have linked the bullet head to the gun which had been issued to the accused on the day when the victims were shot dead. As the gun had many bullets which had been fired from it and as some of the bullets were recovered from the bodies of the victims, it does appear to me that the accused has a case to answer.”

And with that the accused person was placed on his defence.

4. At the close of the defence case the trial judge retired to consider his determination. After a very elaborate analysis of the entire evidence on record the judge found, proved beyond reasonable doubt, the following issues:-

4(a) <u>That</u> there was no doubt at all that there was a shooting incident at Kondele, a fact proved by the prosecution through what the judge called ‘a very rare kind of evidence; a video caption; from viewing which the judge saw that the shooting was done by a man dressed in a jungle jacket and

who wore a helmet. He had a gun in his hands. He shot two young men who were not armed as clearly appeared from the video footage. In those circumstances the shooter was not justified in his action as his life was not in any danger, concluded the learned trial judge;

4(b) That the identity of the two young men who were the victims of the said shooting was proved and the two were George William Onyango and Ismail Chacha both of whom were shot at Kondele. He dismissed as unproved the defence allegation that George William Onyango was not shot at Kondele;

4(c) Is it the accused, as asserted by the Prosecution who shot the two young men? That was the question that the trial judge asked himself and he answered it in the affirmative. The judge found that the accused was positively identified by PW1 who was with the two young men at the time and place of shooting as the person who shot the two dead. The judge believed PW1 when he said that while he lay down on his side at the shooting scene, and the accused went to them after the shooting, PW1 asked accused '*Je bwana unatuua*' at which the accused lifted his helmet and PW1 clearly saw him as the Kirui he previously knew as one of the two Kiruis stationed at Kondele police station;

4(d) That Pc Kirui the accused was similarly identified by PW2 his OCS, as the one who shot the deceased persons herein, and not the other Kirui (DW2) who also worked at the same Kondele police station. PW2, the trial judge found, had identified Kirui the accused from his "*unique walking style*" and the fact that he also lifted his helmet thereby exposing his face and although he thought PW2's evidence on identification might not be described as watertight and free from possible error, the trial judge concluded that both PW1 and PW2 knew the accused prior to the incident of 16th January 2008 and theirs was recognition not identification of the accused, and hence safe.

4(e) That the causes of death of George William Onyango and Ismail Chacha, had been established by the postmortem reports by Dr. Margaret Oduor who found that in respect of George William Onyango there was a gun-shot wound through his back around the spinal cord, with the bullet head going through the chest and tearing the left lung before emerging through the 3rd left side rib and lodging in the upper left chest muscles from where the doctor retrieved it. The cause of death was haemorrhage secondary to chest injury as a result of a gunshot.

In respect of Ismail Chacha the same doctor found that the body had an entry gunshot wound at the back on the 10th thoracic spine with the bullet perforating the diaphragm on the left side and fracturing the 7th and 8th ribs before exiting the body through the chest at the 8th thoracic spine. Ismael Chacha's death was found to have been caused by haemorrhage due to lacerated liver as a result of a gunshot. The trial judge conclusively found that the two died from massive loss of blood arising from gunshots;

4(f) That the two were shot on their upper bodies and the trial judge had no doubts that the person who fired at them intended to either kill them or to cause them grievous harm. He was satisfied and found proved that it was murder that had been committed. He found both the provisions of **sections 203** (as to murder) and **206** (as to malice aforethought) of the Penal Code satisfied.

4(g) That PW1 David Wafula Manyonge had positively identified the accused as the person who was at the scene of the shooting incident on 16th January 2008 and therefore it should follow that the bullet head which had been retrieved from the body of George William Onyango should be traced back to the gun which the accused had at the material time. Further, the accused testified that he was issued with an AK 47 rifle "*of body parts number **08378***" and serial number **23008378**. PW2 testified that the AK 47 he recovered from the accused on 19th January 2008 was number **08378**. PW8 sergeant Isack Serem at that time in charge of the armoury at Kondele Police Station testified that he had issued the accused with an AK 47 serial number **23008378**. The judge further found that PW9 the firearms examiner, was given "an AK 47 rifle **S/No 3008378**" to examine and

his finding, after carrying out microscopic examination, was that the bullet head that was retrieved from the body of George William Onyango was fired from the AK 47 rifle **S/No.3008378**.

4(h) That the prosecution did not produce before court the rifle number **3008378** or make any attempt to link that firearm to the accused and hence the trial judge concluded that the prosecution had failed to prove that the fatal bullet was fired from the gun which had been issued to the accused. "***He was issued with AK 47 rifle serial number 2008378***," the trial judge concluded, adding that that was the gun that had been issued to the accused. The judge's further conclusion was that even though all the other evidence adduced showed that the accused was positively identified at the scene of the shooting incident by PW1, and even though he was captured on film as he appeared to shoot the two victims, the judge found himself unable to reconcile that evidence with that of the firearms examiner which concluded that the fatal bullet was discharged from a gun that was different from the one the accused had. And with that the judge acquitted the accused as not guilty in the following words, ***"I thus find the accused, Not Guilty."***

5. It is that verdict that so dissatisfied the honourable the Attorney General that he took out a certificate under the provisions of section 379(5) of the Criminal Procedure Code cap. 75 of the Laws of Kenya, stating that he was dissatisfied with the whole of the judgment of the honourable Justice Fred A. Ochieng delivered on 21st June 2010 in **Nairobi HCCr. Case no. 9 of 2008 R -v- Edward Kirui** and certifying that that trial involved points of law of exceptional public importance and that it was desirable in the public interest that the points should be determined by the Court of Appeal. The honourable the Attorney General set out those points of law for the determination of this Court as we reproduce them hereunder:-

"1. Whether by failing to state whether the acquittal of the accused was in respect of count 1 and 2 of the information dated 6th February 2008, the trial contravened the provisions of section 163(3) (sic) of the Criminal Procedure Code cap. 75, Laws of Kenya.

2. Whether such failure:-

(a) rendered the entire trial, the proceedings thereof, and the resultant judgment a nullity.

(b) occasioned a gross miscarriage of justice

3. Having correctly found that:-

i. The two victims died of gunshot wounds;

ii. The person who shot the two victims had the requisite malice aforethought;

iii. That the person was positively recognized and/or identified as the person who was at the scene of the shooting incident;

iv. That the accused was captured on film as he appeared to shoot the two victims;

v. That the fatal bullet (exhibit 5(a) was fired from the assault rifle S/N 3008378 (Exhibit 5b).

whether the judge was right in acquitting the accused person on the mistaken ground that the fatal bullet recovered from the body of one of the victims was discharged from a gun that bore a different serial number from the one the accused had, when in actual fact the totality of the evidence adduced proved beyond reasonable doubt otherwise."

The honourable the Attorney General then prayed that this Court do issue declaratory orders as follows:-

"(a) That the trial contravened section 169(3) of the Criminal Procedure Code,

(b) That by reason thereof the entire trial, the proceedings thereof, and the resultant judgment

are a nullity,

(c) That the trial occasioned a gross miscarriage of justice,

(d) That in the premises there was a mistrial of the said case."

6. We heard submissions from Ms. Dorcus Oduor for the Director of Public Prosecutions that the acquittal was inconsistent with the adduced evidence and the trial court's own finding that there was a case to answer. Counsel further submitted that the acquittal raised a major point of law in that the trial judge made a finding only on one count yet the accused person was charged with two counts of murder. She submitted that the judge's analysis of evidence relating to the gun and bullet concerned itself with count I only. That left count II without a specific finding either way, stated counsel, adding that the nature of evidence on count II was circumstantial.

7. Ms. Oduor's further submissions were that the trial judge failed to comply with the requirements of **section 169(1) (2)** and **(3)** concerning what is to be contained in a judgment even in the case of an acquittal. Learned counsel concluded that failure by the judge to make a finding on the 2nd count resulted in a mistrial. She stated that the failure to make a finding on count two was an error that could not be remedied by a declaratory judgment. That error and omission counsel added, led to a miscarriage of justice.

8. The second point of law raised by the acquittal of the accused was that the trial judge based his judgment on a distinguishable case, that of **Erick Akeyo Otieno V R Nyeri Criminal Appl. No. 10 of 2008** and thereby misled himself, submitted counsel, adding that the descriptions of the gun in question as given by PW8 and PW9 related to the one and same gun, the descriptions being different merely on style. Counsel distinguished the **Akeyo** case in that in that case several persons were firing whereas in the present case only the accused was firing. Counsel submitted that the gun they produced in court as an exhibit was the one that the accused used to fire the fatal bullet. Ms. Oduor then concluded her submissions thus, the trial judge having found that there was *actus reus* and *mens rea*, even if the relevant weapon was not found, circumstantial evidence should have sufficed to result in a conviction. With that counsel urged us to find that there was a mistrial.

9. On his part Mr. Mitey learned respondent's counsel submitted that there was in fact no case to answer and none should have been found to have been made out without the benefit of the defence case. He added that the accused was not identified in the video clip and further that the firearm that shot the deceased was not the same one that was produced in court as is clear from the different serial numbers given in evidence, adding that the prosecution made no attempt to clarify the discrepancy in the gun serial numbers.

10. It was Mr. Mitey's further submissions that the trial judge considered the two counts of murder in the analysis of the evidence before he passed his judgment. Counsel admitted that the trial judge failed to state under what count he acquitted the accused person but stated that that omission is the kind that is curable under **section 382** of the **Criminal Procedure Code.** He saw no miscarriage of justice occasioned by the acquittal.

11. Both counsel also availed to us their written submissions which we have considered alongside the oral ones advanced before us. We have considered relevant law on the subject. We clearly appreciate our role as required by the provisions of **section 379** of the **Criminal Procedure Code** and are guided accordingly in that regard. We are similarly alive to our appellate jurisdiction as enshrined in the Constitution of Kenya and all other enabling statutes and in compliance with all the above we now render our judgment.

12. Under the provisions of **Article 164(3)** of the **Constitution** this court is enjoined to hear appeals from the High Court and any other court or tribunal as prescribed by an act of Parliament. In instances where this Court acts as the first appellate court, the same is statutorily required to analyse and assess the evidence of the case and come to its own conclusion which may or may not concur with the Court whose

decision is appealed – see **OKENO V R (1972) EA 32** in respect of criminal cases and **SELLE V ASSOCIATED MOTOR BOAT COMPANY [1968] KAR 425** as regards civil cases. Where the court sits as a second appellate court its jurisdiction is restricted to considering points of law only.

13. In the instant case this Court's jurisdiction is confined to making a declaratory judgment as per the dictates of **section 379(5)** of the **Criminal Procedure Code**, after a review of the entire case. It is expedient that we set out those provisions as we do here-below;

> ***"379(5) Where a person has been acquitted in a trial before the High Court in the exercise of its original jurisdiction and the Attorney- General has, within one month from the date of acquittal or within such further period as the Court of Appeal may permit, signed and filed with the Registrar of that court a certificate that the determination of the trial involved a point of law of exceptional public importance and that it is desirable in the public interest that the point should be determined by the Court of Appeal, the Court of Appeal shall review the case or such part of it as may be necessary and shall deliver a declaratory judgment thereon."***
>
> And **subsection (6)** of the said **section 379** of the **Criminal Procedure Code** on its part provides;
>
> ***"379 (6) A declaratory judgment under subsection (5) shall not operate to reverse an acquittal, but shall thereafter be binding upon all courts subordinate to the Court of Appeal in the same manner as an ordinary judgment of the court."***

14. Leaving the issue of this Court's jurisdiction behind for a moment, we note with satisfaction that the trial judge correctly directed himself at the close of the prosecution case and more particularly in his Ruling after submissions on '***No Case To Answer'*** as we have outlined at paragraph 3 of this judgment. We agree that the prosecution evidence was sufficient to require the accused to offer his defence. We also note from the said Ruling that the trial judge was conscious of the fact that the victims of the shooting were two people and that the available evidence as regards the cause of death was that the two died following gun shots. He named the two deceased persons in his said Ruling as the very deceased persons named in the statements of offence in the charge that the accused faced. The trial judge was satisfied that the accused person was positively identified as the shooting culprit. This he did by noting that the accused person was squarely placed at the scene of the shooting by lifting the head helmet thereby exposing his face which made it easy for PW1 to recognize him; and that the ballistics expert had appeared to link the bullet head removed from the body of George William Onyango to the gun which the accused had been issued with on the date the deceased persons were shot dead. These same factors of identification/recognition of the accused were later to be reasserted by the trial judge in his final judgment only for him to depart from his earlier finding on the offending gun on account of what he saw as different serial numbers. The trial Judge's final findings are captured in paragraph 4 of this judgment.

15. Was the trial judge right in acquitting the accused person in the light of the available evidence? As already stated above the trial judge had found that the accused person was positively identified/recognized and placed right at the scene of crime and that it was he that had fired the offending bullet that killed George William Onyango and which bullet was retrieved from the deceased's body. The judge's handling of the identity of the gun from which the fatal bullet was fired was, with the greatest possible respect, flawed. All the availed evidence was that the firearm the accused was issued with had, like all other firearms, a serial number that consisted of body part and serial number so that the one number was 08378 and the full serial number was 23008378. The bullet head retrieved from the body of one of the deceased persons was confirmed to have been fired from the gun no. 3008378. The trial judge accepted as an error the evidence of the armourer PW8, that he had entered into the Arm's movement register the wrong body number of the gun he issued to the accused on 30th December, 2007 as being 03378 instead of 08378. There was uncontradicted and uncontroverted evidence that no other firearm was taken away from Kondele Police Station for examination and more importantly there was no evidence that the gun recovered from the accused was not the one submitted for forensic examination. PW8 at page 48 of the record gave the serial number of the gun he issued to the accused as no. 23008378. The defence concurred that indeed that was the serial number. The forensic evidence that the fatal bullet was fired from the firearm serial number 3008378 was never displaced. The totality of the evidence proved beyond

doubt that it was the accused who, using the gun issued to him by PW8 and which was handed to PW9 to examine, shot and killed George William Onyango as in count I of the Statement of Offence. That the digit '*2*' was dropped from the serial number given by the forensic expert should have been an easy circumstantial issue for the trial judge to resolve in the abundance of all other availed watertight convicting evidence. The trial judge erred. He erred further by comparing the case before him with a totally different case, that of **ERIC AKEYO OTIENO V R Nyeri Criminal Appl. No. 10 of 2008** where the facts were completely the opposite of what he had before him. In that case the recorded serial number of the gun issued to the accused was completely different from that on the gun for, whereas the register had number 369369, that on the gun was 359359 clearly giving a reasonable doubt as to which gun had been issued and whether or not it was the same one that was examined. In the **Akeyo case** there was no accompanying supportive evidence, unlike in the case before the trial judge. In the **Akeyo** case, there were multiple shooters whereas in the case under review there was only one person seen shooting and kicking one of the persons he shot.

16. The trial judge compounded his misdirection by stating that the accused was issued with an AK 47 rifle serial number 2008378 when indeed he was issued with one of serial number 23008378. His following hypothesis that the relevant gun may have been replaced with another by some unknown person for some unknown reason finds no support whatsoever in the availed evidence. That misdirection in the assessment of the evidence continued, and remained unresolved in the judge's finding that there were two different serial numbers for the same gun when indeed a careful consideration of that evidence would have proved the opposite. He erred. All the adduced evidence and which the trial judge accepted as proving the accused's culpability led to the one inescapable conclusion that it was the accused person, to the exclusion of anyone else, who fired the fatal bullet. His acquittal of the accused person was therefore wrong and unsupported by the adduced evidence as it was.

17. Did the trial judge comply with the provisions of **section 169(3) of the Criminal Procedure Code** to wit?

> ***"In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."***

This is how the trial judge concluded his judgment leading to the acquittal of the accused person,

> ***"----- even though all the other evidence adduced shows that the accused was positively identified at the scene of the shooting (by PW1); and even though he was captured on film as he appeared to shoot the two victims; this court is unable to reconcile those facts with the finding by the Firearms Examiner who concluded that the fatal bullet was discharged from a gun that was different from the one which the accused had. In the event, I have no alternative but to give the accused the benefit of doubt, because it is possible that the fatal bullet was not discharged from his gun. I thus find the accused, Not Guilty. He is therefore acquitted. I order that he be set at liberty forthwith unless he is otherwise lawfully held*** ." (emphasis provided).

So, what did the trial court acquit the accused of? That does not appear in his judgment. Undoubtedly the accused faced two (2) counts of murder as evident from the Statement of Offence. In the trial judge's assessment and evaluation of the evidence all he did as concerns the deceased in count II in respect of Ismael Chacha was to affirm, that he died of haemorrhage from the lacerated liver as a result of a gunshot. And the judge noted;

> ***"In effect, the prosecution has proved, beyond any reasonable doubt that the two victims died due to massive loss of blood, arising from gunshots. In light of the fact that the victims were shot on their upper bodies, there can be no doubt that the person who fired at them intended to either kill them or to cause them grievous harm."***

From thence on, there is no mention of Ismail Chacha, the deceased in count II of the Statement of Offence, even though the judgment runs for another several pages. So then there is left a glaring lacuna as to the death of Ismael Chacha. Was he shot by the accused person? With the same bullet as that that killed

George William Onyango in count I or a different one? Or was he shot by another person and at what place? These, among others, are the issues the judgment of the trial judge left unresolved. Evidently the judgment is not in compliance with the mandatory requirements of the provisions of **section 169(3)** of the **Criminal Procedure Code cap. 75** of the Laws of Kenya.

18. What then is the effect of the non-compliance with the provisions of **section 169(3)** of the **Criminal Procedure Code**?

We find solace in the authority of **BALAND SINGH V R Crim. Appeal no. 483 – Court of Appeal for Eastern Africa** where it was stated;

"---- any failure to comply with the provisions of section 169, aforesaid, is an irregularity, even though no certificate has been granted that the case is fit for appeal on grounds of fact or mixed fact and law such irregularity will entitle and indeed oblige the Court of Appeal to examine the facts of the case with a view of determining whether there has been a failure of justice ----"

As stated elsewhere in this judgment, the trial judge completely misdirected himself and absolutely misapprehended the evidence on the identity of the offending firearm and despite the abundance of other compelling evidence proceeded to acquit the accused. To make an already bad situation worse, the trial judge said absolutely naught about count II. As concerns that count II therefore it cannot be said by any stretch of imagination or wishful thinking that there was an acquittal. That is evidently borne out by the judgment which substantially concerns itself with the death of George William Onyango in count I. The learned trial judge made no finding whatsoever on count II and therefore it cannot be said that he acquitted the accused on count II. We therefore declare that in respect of count II of the Statement of Offence there was a mistrial, there being neither conviction, sentence nor acquittal rendered.

19. Mistrial is defined in BLACK'S Law Dictionary (9th Edition) as,

"a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings"

The above is what the trial judge herein did as concerns count II.

20. On its part failure of justice, see **Baland Singh**, **supra**, and/or miscarriage of justice on its part would be described as;

"---- a gross unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime" – see Black's Law Dictionary (9th Edition) Garner, Ed. See also,

MURUGAN & ANOTHER V State By Public Prosecutor, Tamil Nadu & Another [2008] INSC 1668, in which, quoting the case of **BHAGWAN SINGH V STATE OF M.P. [2002]4 SCC 85**, the Supreme Court of India said, about miscarriage of justice;

"The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not."

In the exercise of our duty and jurisdiction we have re-appreciated and reviewed the evidence and found that the acquittal on count I was without legal basis, as we have already observed earlier in this judgment.

21. A miscarriage of justice is the result of, *inter alia*, an unfair trial and the trial under consideration was such an unfair trial with regard to the prosecution and the victims of the murder which the trial judge found was committed. Both the victims and their families were deprived of fairness and the public saw a deprivation of justice. A fair trial will attempt to ascertain the truth. Miscarriage of justice was discussed in the Indian case of **IN ZAHIRA HABIBULLAH SHEIKH & ANOTHER V STATE OF GUJARAT & OTHERS AIR 2006 SC 1367** wherein the Indian Supreme Court stated:

> ***"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted ---- Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or a mere farce and pretence --- The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."***

We have no hesitation to state that the case of **Republic V Edward Kirui** occasioned great miscarriage of justice.

22. We now must consider whether failure to comply with the provisions of **section 169(3)** of the **Criminal Procedure Code** and the resultant miscarriage of justice rendered the entire trial and judgment nullities. Non-compliance with the requirements of **section 169** does not automatically result in the trial process being vitiated. See the authority of **HAWAGA JOSEPH ANSANGA ONDIASA V R Criminal Appeal no. 84 of 2001** where the appellant asked the court to set aside his conviction at the trial saying that that court had not complied with **section 169 Criminal Procedure Code**. This Court found that –

> ***"It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or <u>is to be</u> <u>invalidated"</u>*** (emphasis our).

In the case of **SAMWIRI SENYANGE V R [1953] 20 EACA** from which the case of **HAWAGA (supra)** drew support it was similarly found that;

> ***"where there had not been a strict compliance with the provisions of sections 168 and 169 of the Criminal Procedure Code, that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."***

In an ordinary appeal therefore non-compliance with the provisions of **section 169 Criminal Procedure Code** though not invalidating a conviction, would enable the court to consider the case on its merit and reverse a conviction if that be warranted. But this is no ordinary appeal, it is a Revision under **section 379(5)** of the **Criminal Procedure Code** and **section 379(6)** fetters this court's jurisdiction to reverse an acquittal. **Section 382 Criminal Procedure Code**, contrary to the contention of the defence, cannot cure the error the trial judge fell into, that of non-compliance with the provisions of **section 169 Criminal Procedure Code**, even though that error occasioned a failure of justice because the proviso to that section requires that any objection to the error or irregularity could and should have been raised at an earlier stage in the proceedings. In this case, the earliest the objection could be taken was after judgment and then again a reversal of an acquittal is prohibited by **section 379(6) Criminal Procedure Code**. A mere non-compliance with **section 169** of the **Criminal Procedure Code** does not render the entire trial a nullity.

23. What about the acquittal of the accused person on count I of the statement of offence? We have

already stated that the accused person was acquitted of culpability in the death of George William Onyango in the face of compelling convicting evidence on what the trial judge found to be a difference of the serial number of the gun. We have already found that the trial judge erred and ended up with an acquittal on count I. This is the acquittal that the provisions of **section 379(6)** of the **Criminal Procedure Code** will not permit this Court to reverse, no matter how tainted that acquittal be. This Court has had occasion to deal with similar situations, suffice to quote but one of those, that of **MWANGI V R [2005]2 KLR** where it was stated,

> ***"The Attorney General can also appeal against the acquittal of the accused person by the High Court in exercise of its original jurisdiction under the circumstances specified in section 379(5) of the Code and in such a case the Court of Appeal can give a declaratory judgment without reserving an acquittal"***

24. That was the situation in Uganda in the case of **UGANDA V ODOCH ENSIO, HC Cr Appeal case no. 28 of 2004 [2008] U9HC14** where the court, held:-

> ***"In the absence of a specific law authorizing this court to overturn the lower court's decision and to pass sentence against the respondent, this court's hands are tied. For section 35 of the Criminal Procedure Code (cap 116), on its own, does not appear to offer a clear basis for such intervention. Consequently, the only remedy that this court will provide, in the circumstances of this case, is simply a declaration that the decision of the lower court acquitting the respondent was absolutely wrong; and it is so ordered. In other words, what finally happens to a case of this nature in this court is exactly what used to happen in the Supreme Court before the enactment of Statute 19 of 1996 whenever the Supreme Court was faced with an appeal against an acquittal from a decision of the High Court in exercise of its original decision. At that time, the Supreme Court could not "confirm, vary or reverse" the decision of the High Court acquitting an accused person. It could only "review the case or such part of it" as was necessary "and ----- deliver a declaratory judgment thereon" see STEVEN MUGUME & ANOTHER V UGANDA SCCA no 4 of 1994; and UGANDA V TIGAWALANA and OTHERS etc, Court of Appeal Criminal Appeal no. 21 of 2005."***

> However, Uganda has moved from that position and enacted legislation which gave an appellate court on revision the power to reverse on acquittal. Kenya is still in the original position of **section 379(6) Criminal Procedure Code**.

25. Justice is said to be blind to status and cuts both ways. Law should and exists to facilitate justice to all and not to fetter it, which is what the provisions of **section 379(6) Criminal Procedure Code** do by absolutely tying the hands of prosecutors and this Court in the event of an acquittal by the High Court, even where that acquittal flies in the face of the evidence, fairness, is made *per incurium* and against public interest and causes apparent injustice. It is a mockery of justice to retain laws that clearly occasion injustice to a party in a case. We think that legislative measures ought to be urgently undertaken to ensure that in tainted acquittals no one escapes justice. This absurdity, where the Court of Appeal is rendered impotent by statute to correct a glaringly wrong outcome by the High Court must surely call for that urgent repeal of the law. Over to Parliament.

26. We have said enough, we think, to show that we can do naught about the acquittal of the respondent in count I of the statement of murder in respect of the death of George William Onyango, courtesy of the provisions of **section 379(6) Criminal Procedure Code**.

27. What about count II? We have agonized over the dictates of the provisions of **section 379(6)** of the **Criminal Procedure Code** and their disabling and stifling effect of this Court's jurisdiction. However, having found, as we have, that the trial judge failed to make a finding regarding count II of the Statement of Murder and consequently passed no sentence on that count, and further having found that such failure resulted in a miscarriage of justice and occasioned a mistrial in respect of that count II, would we then in those circumstances order a retrial and would that have the effect of reversing an acquittal? Would it be construed as double jeopardy were the accused to be sent back to the High Court for a retrial on count II

relating to the death of Ismael Chacha? Would such an action offend the provisions of **section 77** of the retired **Constitution** or even **Article 50(2)(0)** of the **2010 Constitution** which provide:-

> **Section 77** of the **1963 Constitution:-**
>
> ***"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, <u>save upon the order of a superior court in the</u> <u>course of appeal or review proceedings relating to the conviction or acquittal.</u>"*** (emphasis provided)
>
> and
>
> **Article 50(2)(0)** of the **2010 Constitution** on its part provides:-
>
> ***"Every accused person has the right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."***

These provisions must now be read with the provisions of **section 379(5)** and **(6)** as set out in paragraph 13 of this judgment always bearing in mind that the **Constitution** is the superior law.

We have no doubt whatsoever that the trial of the respondent, tried as he was for double murder and not to a lesser extent considering the period and circumstances surrounding the commission of death, and the fact that there was no finding on count II of the offence, are all matters of public importance which in the public interest must be determined by this Court. We are agreed that it is not double jeopardy for an accused person, as in this case, to be tried for an offence which would have, but for the failure of the trial judge, been tried and due findings made alongside the other count. We have already found that on count II there was a mistrial and we so declare. It would be an absolute traversy of justice and fair trial were such a monumental error of law to be left uncorrected.

In the premises therefore we declare that the accused person, now Respondent, having not been acquitted or convicted on count II in respect of the death of Ismael Chacha, due process must be followed to meet the ends of justice and he must stand trial for the death of Ismael Chacha. We order therefore that **Edward Kirui** be arrested and charged before the High Court, before a judge of that court other than the honourable Mr. Justice F. A. Ochieng, for the murder of Ismael Chacha.

Orders accordingly.

DATED at NAIROBI this 17th day of October, 2014.

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR