IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 168 OF 2011

BETWEEN

GERISHON KUBAI MWITHIA ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

in

H.C.CR. C NO. 50 OF 2005)

****

JUDGMENT OF THE COURT

1. Life is sacrosanct. The appellant, Gerishon Kubai Mwithia was charged with murder; an alibi was raised in defence and in submission, counsel for the appellant alleged that it was a hide and seek game and in any event, the identification of the appellant as the perpetrator of the crime was not free from error as there were trees near the scene and he could not properly be identified.
2. The Information is that Gerishon Kubai Mwithia on 2nd February 2005 at Athiru Gaiti Location in Meru North District within Eastern Province he murdered Jeremiah Mwithia. There were two eye witnesses to the crime. The trial was conducted with the aid and assistance of assessors. The trial Judge convicted the appellant and sentenced him to death as by law prescribed. The key issues in this appeal relate to identification by the two eye witnesses and the legality of proceedings conducted with the aid of assessors.
3. PW1, Joshua Musyoka testified that on 2nd February, 2005 at about 4.00 pm on his way to the shop, he saw the appellant chasing Jeremiah (deceased). The appellant was with a sword and Jeremiah ran around a tree to avoid being stabbed; he hid behind the tree but the appellant reached him and stabbed him on the right side of the ribs; immediately Jeremiah fell right near the tree; he was dead. PW1 stated he was about 6 metres from where the appellant and Jeremiah were and he saw all that happened; he knew the appellant from childhood; he also knew the deceased. That Mr. Kareithi was approaching the scene at the material time and he left Kareithi at the scene where the body was and went to call the police.
4. PW2 John Kareithi gave evidence as to what he saw when about 70 metres from the scene. He testified that on 2nd February, 2005 at about 4.00 pm he was going home from his shamba. He saw the appellant who was known to him chasing the deceased. The appellant was holding a sword and the deceased tried to avoid being stabbed by going round a tree; he witnessed the appellant stab

the deceased; he approached the scene, observed the deceased and went away.

5. At the time of taking plea, the appellant replied "I killed him but it was bad luck." A plea of not guilty was entered. In his defence, the appellant stated that he was a miraa trader and on the material day, he woke up in the morning and went to Ruanda to look for miraa for sale. He returned in the evening and was arrested and charged with the offence.
6. The trial of the appellant was conducted with the assistance of assessors. The selection of assessors was done on 12th July, 2007; three assessors were selected: Susan Wangui Kaburu, Jane Mwaromo and Miriti M'rimberia. Trial commenced on 12th July, 2007 in the presence of all three assessors who heard the testimony of PW1, PW2, PW3 and PW4. However, midway during the trial on 15th December, 2008, the 2nd assessor (Jane Mwaromo) could not be traced. The trial court recorded the 2nd assessor has relocated from Meru and her whereabouts are not known. It is directed that she is discharged and the hearing to proceed with the aid of 2 assessors. PW 5 testified in the presence of the remaining two assessors Susan Wangui Kaburu and Miriti M'rimberia.
7. On 2nd February, 2011, at a resumed hearing, another assessor by the name of Mary Kathure Mugambi was in court. The hearing did not proceed as she was the only assessor present. This assessor never heard the testimony of all prosecution witnesses; she only took part in the hearing of the defence testimony and the summing up. She was not present when PW1, PW2, PW3 and PW4 testified for the prosecution.
8. On 3rd February, 2011, the trial resumed in the presence of three assessors namely Susan Wangui Kaburu, Mary Kathure Mugambi and Miriti M'Imberia. The defence hearing was in the presence of all the three assessors and summing up was made to the three assessors. The assessors returned a guilty verdict. The appellant has taken issue in this appeal that the presence of the third assessor, Mary Kathure Mugambi, who never heard the entire prosecution case, was fatal and vitiated the entire trial which should be declared a nullity.
9. Aggrieved by the conviction and sentence meted out by the learned Judge, the appellant lodged this appeal citing various grounds:

i. **That the learned Judge erred in law and in fact in convicting the appellant for the offence of murder by failing to consider that the prosecution had not proved the essential element of *mens rea* required for the offence of murder.**
ii. **That the trial Judge erred in law and in fact in failing to consider that the prosecution had not established the motive necessary to prove the offence of murder.**
iii. **That the learned Judge erred in law and in fact in convicting for the offence of murder in the absence of the essential and mandatory evidence of the investigating officer who was not called to testify and the learned Judge erred in failing to draw an adverse inference for the failure to call the investigating officer.**
iv. **That the learned Judge erred in convicting the appellant when the murder weapon was not produced in evidence though it had been recovered.**
v. **That the learned Judge erred in law in finding the evidence adequate whereas the same was inadequate due to failure to call the investigating officer.**
vi. **That the absence of one Assessor during part of the trial vitiated the trial of the appellant.**
vii. **The subsequent inclusion of an Assessor who was not part of the trial but was present during part of the trial had the effect of nullifying the entire trial of the appellant.**

10. At the hearing of the appeal, learned counsel Mr. Muhoho Gichimu appeared for the appellant while Mr. E.W. Makunja, Senior Public Prosecution Counsel appeared for the state. This is a first appeal and we are obliged to consider and analyse all the evidence on record and make our own findings without overlooking the findings of the trial court and bearing in mind that we did not have the advantage of seeing and hearing the witnesses testify.
11. Counsel for the appellant elaborated the grounds of appeal and submitted that the learned Judge did not adequately evaluate the evidence on record. The gist of this submission was that the charge sheet was amended and the appellant was not called upon to plead to the new charge and this was an irregularity and error on the part of the trial court. The prosecution applied to amend the charge under **section 214 and 382 of the Criminal Procedure Code** as follows:

"All the evidence so far has identified the deceased as Jeremiah Kimathi, similarly the post mortem shows that the body which was identified by relatives is Jeremiah Kimathi even the file and the statements which defence counsel have indicate the name of the deceased as Jeremiah Kimathi. There is a possibility that the names were mixed up. I apply to amend the name of the deceased in the Charge Sheet to read "Kimathi" instead of "Mwithia".

The learned Judge accepted the amendment but did not call the appellant to plead to the new charge. The appellant contends that this is an error of law that vitiates the whole trial. We have considered this submission and note that the case of **Okeno – v – R, {1972} EA 32**, clearly shows that mere failure to evaluate the evidence by the trial court does not in all cases lead to an acquittal. The court has to be satisfied that the irregularities complained of occasioned a failure of justice. We are satisfied that the irregularity complained of that the appellant was not called to plead to the amended charge did not in fact occasion a failure of justice and had the learned Judge discharged her duty in accordance with the law as laid down in **section 214 of the Criminal Procedure Code**, she must have inevitably come to the same conclusion. The amendment related to the change of name of the deceased person; the person allegedly murdered is one and the same person whose name was being amended; the deceased body was one and same that the appellant was called to plead when he was first arraigned in court. The amendment did not substantially affect the facts and particulars of the case and we find that there was no miscarriage of justice in this case. This ground of appeal fails.

12. The other ground of appeal is that the identification of the appellant was not free from error. Counsel for the appellant stated that there were trees near the scene of crime and it may well be possible that the two eye witnesses did not see and identify the appellant properly. It was further submitted that the eye witnesses did not use the words "broad daylight" in their testimony and the learned Judge introduced the concept of "broad daylight" as an extraneous matter to convict the appellant. The learned Judge expressed herself on this issue as follows:

In regard to identification by recognition, I find both PW1 and PW2 knew the accused person very well prior to the day in question. They saw him in broad daylight, PW1 at a very close distance. PW1 and PW2 acknowledge in their evidence that they saw each other at the scene.... PW1 led police to accused brother's home after the incident...where the murder weapon was also recovered and the accused arrested. All these circumstances together with the conditions of lighting prevailing at the scene at the time of incident establish that both PW1 and PW2 witnessed the incident and saw the accused stabbing the deceased. I find that the evidence of identification adduced by the prosecution was watertight.

13. Our evaluation of the evidence on record shows that both PW1 and PW 2 testified that the offence was committed 4.00 pm. We take judicial notice that 4.00 pm is not at night and there is no darkness at 4.00 pm. We find that the learned Judge did not introduce an extraneous matter by referring to 4.00 pm as broad daylight. It was submitted that there were trees that prevented PW1 and PW2 from properly identifying the appellant. We have perused the evidence on record and find no scintilla of evidence that there were trees at the scene of crime. The testimony of both PW1 and PW2 refer to a single tree that was beside the road which tree the deceased tried to use to shield himself from the appellant. The fact that PW2 could see PW1 who was about 70 metres away means that there was proper visibility; and coupled with recognition of the appellant, we find that identification of the appellant was free from error. It is not disputed that PW1 led the police to the house where the appellant lived and he was found therein, this further confirms that PW1 saw the appellant and the identification and recognition was free from error.
14. The other ground of appeal is that the murder weapon was not produced in evidence and consequently, the prosecution had not proved its case beyond reasonable doubt. The learned Judge stated:

The doctor's evidence of his finding at post mortem is in tandem with the evidence of

PW1 and PW2. The doctor found a stab wound at the exact place the two eye witnesses saw the accused stab the deceased.

15. There were two eye witnesses to the offence. The post mortem report submitted by PW 5 Dr. Mutugi Muriithi revealed that the body of the deceased had a 6 cm penetrating wound on the right side of the chest with a collapsed respiratory system with One litre of blood in the right chest cavity. The cause of death was given as cardinal pulmonary chest secondary to shock from massive bleeding due to collapse of the lung secondary to the stab wound.
16. The appellant submitted that failure to produce the murder weapon was a fatal flaw in the prosecution case and the standard of proof was not met. On the strength of the eye witness account and the post mortem report, we find that failure to produce the murder weapon did not prejudice the appellant's defence nor did it weaken the prosecution case. PW 1 testified that the appellant stabbed the deceased on the right side of his ribs; he testified that the murder weapon was recovered on the same day at the time of arrest of the appellant in the house where the appellant lived with his brother. We adopt and cite the case of **Ramadhan Kombe – v- Republic Criminal Appeal No. 168 of 2002 at Mombasa** where this court faced with a similar submission stated:

> **In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission.**

17. We draw comfort from the prosecution evidence that the murder weapon was in the hands of the appellant. Both PW1 and PW2 saw the appellant with the sword; the weapon was recovered from the house where the appellant lived; the post mortem report showed that the deceased died of stab wounds inflicted on the right side as testified by PW1. We find the case of **Ekai –v – R, Criminal Appeal No. 115 of 1981** relevant to the present case where it was held "that though the murder weapon had not been produced, the conviction stood on the basis of the post mortem examination which established beyond all reasonable doubt that the fatal injury had been caused by a sharp bladed weapon..."It is our finding that in the present case, failure to produce the murder weapon was not fatal to the prosecution case.
18. The other contention by the appellant is that the investigating officer was not called to testify before the trial court. The appellant contends that if the investigating officer had been called to testify, the motive for the crime and results of investigation may have affected the outcome of the case. This court was invited to draw an adverse inference for the failure to call the investigating officer. We have carefully perused the record of the trial court and find that the evidence that was adduced by the prosecution, particularly the account of the two eye witnesses is credible and compelling, and identify the appellant as the perpetrator of the crime. The weapon of murder is also identified. We are satisfied that the trial judge was justified in reaching the conclusions she did. The investigating officer was not at the scene at the time of the crime and even if the investigating officer came and testified, he would not have made a difference to the prosecution case. As was correctly stated in the case of **Republic – v- Josephine Muthoni Baariu {Criminal Appeal No. 145 of 2003** by the learned Judge of the High Court (Sitati J); since the investigating officer was not at the scene of the crime, he would not have testified to the fact that the appellant was chasing the deceased and he stabbed him with a sword. We find that no prejudice was caused to the appellant through failure to call the investigating officer and the trial was satisfactory in the circumstances.
19. Another ground of appeal is that the prosecution had not proved malice aforethought and the motive for murder. One of the essential characteristics of the offence of murder as set out in **section 203 of the Penal Code** is malice aforethought. **Section 206** of the same code sets out what constitutes malice aforethought and as far as it is material to the matter before us, paragraphs (a) and (b) of that section are important and provide as follows:

Malice aforethought is:

a. **An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
b. **knowledge that the act or omissions causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused:"**

20. The facts in this matter are not generally in dispute. The appellant while carrying a sword was seen chasing the deceased and he stabbed him to death. The fact that the appellant while carrying a sword was chasing the deceased showed that he possessed the necessary malice aforethought to make the killing murder. The fact that he actually used the sword to stab the deceased shows that he either intended to kill or to cause grievously bodily harm. There is ample and acceptable evidence that the appellant without any reason whatsoever stabbed and killed the deceased. The appellant's behaviour of chasing the deceased clearly falls within the circumstances outlined in **paragraph (b) of section 206 of the Penal Code**. By stabbing the deceased, the appellant must have known either that death or grievous harm would result to the deceased and was indifference as to whether death or grievous bodily harm occurred.
21. In **Daniel Muthee – v- R CA No. 218 of 2005 (UR)**, Bosire, O'Kubasu and Onyango Otieno JJA while considering what constitutes malice aforethought observed as follows:

> ***"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."***

22. We entirely adopt the statement by the learned Justices of Appeal made in the **Daniel Muthee** case. The appellant by stabbing the deceased after chasing him, a rebuttable presumption of fact is raised that by doing so, he intended to kill him. As was stated in **Francis Kimtai Rono – v- R, Criminal Appeal No. 78 of 1997**, the burden was on the appellant to offer a reasonable explanation justifying his behaviour. That was a matter within his own knowledge and by dint of **section 111 of the Evidence Act; Cap 80 of the Laws of Kenya;** a court will be perfectly entitled to infer malice aforethought from his unexplained conduct. The evidence against the appellant from the two eye witnesses is overwhelming and cogent.
23. The other central issue raised in this appeal relates to the trial with the aid and assistance of assessors. As emphasized in the case of **Dickson Mwaniki M'Obici & Another 2006 e KLR**, **sections 262 and 263 of the Criminal Procedure Code** provided in mandatory tone that all trials before the High Court shall be with the help and aid of three assessors, unless under **section 298**, an assessor is prevented or absents himself and is not practicable immediately to enforce his attendance. In such a case, the trial may proceed with the remaining two assessors. In **Kinuthia – v- R {1988}KLR 699 at 702**, the purpose of assessors was stated as follows:

> **"the purpose of the assessors is to make sure that, as far as possible in the most serious cases which are tried by the High Court, the decisions of fact have a broad base conforming with the notion of that part of society to which the accused person belongs. The assessors are of special value in determining what action amounts to provocation. They are also of great importance in assessing contradictory stories of what occurred in a particular case, and they may be able to guide a court as to the manners and customs and so to the truth of what the witnesses have said. It is therefore right and proper that the trial should be with the aid of assessors, in the full sense; they should be allowed to ask the witnesses questions; they should have**

exhibits and reports shown and explained to them; they should give their opinions in general and on special points as the circumstances of the case require."

24. In the present case, the selection of assessors was done on 12th July, 2007. Three assessors were selected: Susan Wangui Kaburu, Jane Mwaromo and Miriti M'rimberia. The trial commenced on 12th July, 2007 in the presence of all three assessors who heard the testimony of PW1, PW2, PW3 and PW4. However, midway on during the hearing on 15th December, 2008, the 2nd assessor (Jane Mwaromo) could not be traced. The trial court recorded "the 2nd assessor has relocated from Meru and her whereabouts are not known. It is directed that she is discharged and the hearing to proceed with the aid of 2 assessors". PW 5 testified in the presence of the remaining two assessors Susan Wangui Kaburu and Miriti M'rimberia. On 2nd February, 2011, at the resumed hearing, another assessor by the name Mary Kathure Mugambi was in court. The hearing did not proceed as she was the only assessor present. Mary Kathumbe Mugambi never heard the testimony of all prosecution witnesses; she only took part in the hearing of the defence testimony and the summing up. The appellant takes issue with the presence of Mary Kathure Mugambi, who never had the testimony of PW1, PW2, PW3, PW4 and PW5. She did not hear the entire prosecution witnesses. It is contended that her presence only at the defence hearing vitiated the entire trial which should be declared a nullity.
25. In the case of **Dickson Mwaniki M'Obici & Another 2006 e KLR,** the facts relevant to this appeal are that the appellant were charged with murder and trial with the aid of assessors conducted. At the beginning of the trial, there were three assessors. Midway, only two assessors were present, the third assessor was recorded as absent and no reason was given for his absence and no order was made that his presence would be dispensed with or the reasons therefor. The appellants testified on oath and were cross-examined in the absence of the third assessor. Later, the third assessor re-appeared and joined the other two during summing up. It was evident that the trial proceeded without one assessor at some stage and there was no reasons given as required under **section 298 of the Criminal Procedure Code**. The appellants were entitled to have the entire evidence tendered by the prosecution, as well as their own defence, heard and evaluated by three assessors. This court differently constituted stated:

That there were only two assessors present when the appellants testified and no reasons were given for the absence of the third assessor was a fundamental departure from 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 whole.

26. The predecessor of this Court considered the effect of an anomaly in conducting a trial with the aid of assessors in the case of **Cherere Gikuli – v- R {1954} 21 EACA 304** and held:

"**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. To be within Section 294 aforesaid one of the two conditions must be satisfied, viz, either the absent assessors is "from any sufficient cause prevented from attending throughout the trial or that he absents himself and it is not practicable immediately to enforce his attendance"**

27. The predecessor to this court in the same **Cherere case** (supra) stated that where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity. **(See Joseph Kabui – v- R {1954} 21 EACA 260 and Bwenge – v- Uganda (1999) 1 EA 25).**
28. In the present case, the record shows that when the 2nd assessor failed to be present in court, the trial Judge recorded the reasons for absence and discharged the assessor. We are satisfied that the provisions of **section 294 of the Criminal Procedure Code** were complied with. The critical issue is the presence of the third assessor, Mary Kathure Mugambi, who never heard the entire prosecution witnesses. We find that it was irregular for Mary Kathure Mugambi to participate in the case as an assessor and participate only during the defence evidence and the summing up.

What is the consequence of this irregularity and transgression in procedure? Ordinarily, a retrial would be ordered. This court has however stated before, that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result – **see Mwangi – v- R {1983} KLR 522.**

29. The evidence in this case is by two eye witnesses PW1 and PW2. Their testimony is consistent and corroborated by the post mortem report. The prosecution which has the sole burden of proving the case beyond reasonable doubt presented the two eye witnesses as truthful witnesses. The evidence of the two eye witnesses was found to be credible **(see Section 143 of the Evidence Act; Abdalla Bin Wendo & Another – v- R {1953} 20 EACA 166 at 168.** The trial judge specifically said she believed the evidence of PW1 and PW2 who were eye witnesses; their credibility was not shaken and she disbelieved the alibi put forward by the appellant. We have carefully considered the evidence on record and in our assessment, the testimony of the two eye witnesses and the post mortem report, would certainly lead to conviction of the appellant if a retrial is ordered; we decline to order a retrial. The totality of the above is that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 11th day of July, 2013

MARTHA KOOME

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JUDGE OF APPEAL

KATHURIMA M'INOTI

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR