



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, ONYANGO OTIENO, & NYAMU, J.J.A)
CRIMINAL APPEAL NO. 371 OF 2008**

BETWEEN

JOHN NDIRANGU WAHOME APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome J.) dated 3rd October 2008

in

H.C.CR. NO. 33 OF 2006)

JUDGMENT OF THE COURT

John Ndirangu Wahome, the appellant, is before us on a first appeal against both conviction and sentence for the offence of murder contrary to **section 203** as read with **204** of the Penal Code respectively, particularly of which read as follows:-

“JOHN NDIRANGU WAHOME:

On the 7th day of May 2006 at [particulars withheld] District of the Central Province murdered C.W.W.”

At his trial the evidence against the appellant was wholly circumstantial. On 7th May 2006, the appellant with the permission of C.W (PW1), the grandmother of the deceased, left with the deceased and her 5 years old brother called J on the understanding that those children were going to show him the home to where his cousin, Francis Mwangi, was alleged to have gone. That was the last time the deceased was seen alive. Her 5 years old brother testified after a *voir dire* examination that after they had walked with the appellant for some distance, the appellant asked him to wait there while he went with his sister. He promised to be back soon. He never did and J decided to walk back home alone. The deceased did not return and her grandmother mobilized people to mount a search for her. Her clothes were found in a neighbour’s pyrethrum plantation but her body was not immediately found until later the same night.

The deceased, an eleven year old girl, had no clothes on. The body was soiled and partly covered with soil. A lot of soil was stuffed into her mouth, and a casual observation revealed multiple bruises on the neck anteriorly. She had lacerations in the mouth, palate, tongue, gums, cervix and vaginal wall. Her hymen was torn, and she was bleeding from her vagina. Her uterus had bruises as well. She was dead. Post mortem examination revealed the cause of death to be cardio-pulmonary failure due to choking and defilement.

There was no eye witness account on who was responsible for the deceased's death. The appellant was, however, treated as the prime suspect, was arrested, and was subsequently arraigned in the High Court at Nakuru, for the offence of murder as earlier on stated. The record of proceedings for that court shows that his trial was with the aid of three assessors whose names are given as **Christopher Ondieki, Rosemary Wambui** and **Judith Musembi Kiilu**. They all participated in the proceedings, at least up to the close of the prosecution case when the trial judge (M. Koome , J.), made the following order:

“Court Defence hearing on 11th October 2007; Accused remanded in custody. Assessors allowance to (sic) today end. Witness expenses for 7 witnesses be paid.”

On 11th October, 2007 the case did not go on because the appellant's counsel was absent, so, the case was adjourned and an order was again made for the payment to the assessors of their allowances. The order for the payment of allowances suggests that the assessors were present in court on that day. During the defence hearing and final submissions, the record is silent on whether or not the assessors were in attendance – what is however clear is that there was no summing up to the assessors, and they were not invited to give their opinion on the matter. The trial Judge at the conclusion of submissions merely gave a date for judgment. That was a fundamental error. Under **Section 322 (1)** of the Criminal Procedure Code, as it then obtained, there was a need for the court to sum up the evidence to the assessors. Although the provision was not worded in mandatory terms, this Court has held on times without number that in view of the fact that assessors are not schooled on matters of law and procedure it is essential to sum up the case to them at the conclusion of the respective cases of the prosecution and the defence. The summing up was intended to provide guidance to the assessors on how to reach a finding without telling them the decision they should come up with. Indeed in **Eliud Njeru Nyaga v. Republic Criminal Appeal No. 182** of 2006 this Court differently constituted explained the rationale for a summing up, and concluded thus:

“This must be the basis on which this Court has consistently held that even though the word ‘may’ is used in Section 322 (1) of the Criminal Procedure Code, the need to sum the case for the assessors is a long-standing practice of law, has acquired the force of law and must always be complied with by trial judges... In the circumstances of the case, we think the learned trial Judge's failure to sum-up the case to the assessors rendered the trial fatally defective.”

That decision was rendered on 18th May 2007, and was followed in later decisions, among them **Ann Wangeci Kimani v. Republic Criminal Appeal No. 157** of 2006 given on 2nd November, 2007. The law on assessors was amended by Act No.7 of 2007 which repealed, among other provisions, **Section 322** of the Criminal Procedure Code. However, where the trial commenced with the aid of assessors, by reason of the provisions of **section 23(3)(e)** of the Interpretation and General Provisions Act Cap 2 Laws of Kenya it must be continued to conclusion with the aid of assessors and as if the relevant law had not been amended.

In view of the conclusion we have come to we eschew any attempt at discussing the propriety or otherwise of the appellant's conviction. That is the more so because upon our full reflection on the matter we have come to the conclusion that the trial against the appellant was irregular and we are constrained to order a retrial.

In coming to that conclusion we have considered the seriousness of the charge against the appellant. He was charged with the murder of an 11 year old girl, who is alleged to have been sexually defiled before being killed. Besides, the State has urged us to consider a retrial implying that witnesses will be readily available. Although Mr. Ngure for the appellant opposed a retrial on the ground that the appellant has been in custody for long and is unlikely to have a fair trial due to the long passage of time, we have considered the fact that justice must look at both sides of the street.

All in all we have come to the conclusion that his appeal must be and is hereby allowed. The appellant's conviction for the offence of murder, contrary to **section 203** as read with **section 204** of the Penal Code respectively is quashed and the sentence which was imposed on him for it is hereby set aside. We direct that the appellant be presented to the High Court at Nakuru before a Judge other than Koome J. for retrial for the same offence.

Dated and delivered at Nakuru this 23rd day of February 2012.

S. E. O. **BOSIRE**

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR