**IN THE COURT OF APPEAL**
**AT NAKURU**
**(CORAM: WAKI, ONYANGO OTIENO & NYAMU, JJ.A.)**
**CRIMINAL APPEAL NO. 343 OF 2008**

**BETWEEN**

**LAWSON OLE KUPELE ……APPELLANT**

**AND**

**REPUBLIC ……RESPONDENT**

***(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Koome, J.) dated 9th October, 2008***

**in**
**H.C.Cr.C. No. 69 of 2009)**
********************

**JUDGMENT OF THE COURT**

Learned State Counsel ***Ms Nerolyne Idagwa*** concedes this appeal and we think she was right to do so. The appeal arose from a trial before the High Court in which the appellant was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The allegation was that on 16th day of August, 2006 at Likurumani area of Narok District of the Rift Valley Province, he murdered *Nenkalal Ole Kupele (deceased).* The deceased was his younger brother.

The trial commenced on 26th September, 2006 before *Kimaru, J*. who properly empanelled three assessors to assist him in accordance with the procedure applicable at the time. The prosecution thereafter called six witnesses before closing their case on 19th July, 2007. At the resumed hearing of the defence of the appellant on 27th June, 2008, there was no mention of the assessors and the defence of the appellant was heard without the aid of assessors. So were the final submissions which were received in the absence of the assessors. Furthermore, there was no summing up before judgment was delivered on 9th October, 2008. It is clear from the record, therefore, that the trial was partly conducted with the aid of assessors and partly without. There is no reason on record explaining that departure from procedure but we suspect it may have been influenced by the amendment to the Criminal Procedure Code by *Legal Notice No. 7 of 2007* which came into effect on 15th October, 2007. By that amendment the procedure for trials with the aid of assessors was repealed with effect from the date of its commencement. This Court has, however, stated in many previous decisions that the amendment was not retroactive and therefore, by dint of ***section 23*** of the Interpretation and General Provisions Act, the trial ought to have proceeded with the aid of assessors, the amendment notwithstanding. The predecessor of this Court has also stated, in relation to the requirement for assessors, thus:-

***"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 notions 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; and they should give their opinions in general and on special points as the circumstances of a case require."***

- See ***Kinuthia v Republic [1988] KLR 699*** at page 702.

So that, the appellant had a legitimate expectation that the assessors who had sat and listened to a substantial part of the trial would in the end express their opinions on his culpability for the offence. We are of the view that the role of the assessors before the amendment was considered an important component of the concept of a fair trial, which was a right an accused could not be deprived of. The opinions of assessors would not be binding on the Court, but that would not lessen the fairness of the process or the expectation of the appellant. We find and hold that the part of the trial conducted without assessors irreversibly vitiated the whole trial and we declare it a nullity. It follows that the conviction and sentence meted out to the appellant must be and is hereby set aside.

We have agonized over the appropriate consequential order to make as learned counsel for the appellant ***Mr. A. M. Murindi*** contends that the appellant has been in custody since his arrest on 14th September, 2006 and therefore his continued incarceration would be unjust. He further submitted that the witnesses were unlikely to be found and it was pointless therefore to order a retrial. On the other hand, Ms Idagwa submitted that the prosecution was not to blame for the turn of events and was ready to mount a fresh trial since all the witnesses were from the same village and were relatives. It was also necessary to consider the victims of the crime in the interest of justice, she concluded.

Whether or not a retrial should be ordered is always at the discretion of the court and is generally made in the interests of justice. This Court has also stated 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 Republic [1983] KLR 522***. We have considered the matter fully in the light of the guiding principles and we are persuaded that a retrial would serve the interests of justice in this matter. Ordinarily, the most suitable order would have been to remit the case to the same Judge for completion of the trial in accordance with the prevailing procedure, but there is no certainty on the whereabouts of the trial Judge or the assessors. In the circumstances the order that commends itself to us is to order a retrial before any Judge of the High Court other than *Kimaru, J.* The applicant shall be detained in prison custody for production before the High Court within 14 days of this order.

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

**P. N. WAKI**

**…….**

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

**…….**
**JUDGE OF APPEAL**

**J. G. NYAMU**

**…….**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**