IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & NYAMU, JJ.A.)

CRIMINAL APPEAL NO.213 OF 2007

BETWEEN

JULIUS MUTEI MUTHAMA..APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Rawal, J.) dated 17th March, 2004

in

H.C.Cr.C.No.50 of 2002)

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JUDGMENT OF THE COURT

Upon conclusion of committal proceedings on 24th June 2002 the appellant was on 10th June 2002 committed by the Resident Magistrate to stand trial in the High Court for the offence of murder, contrary to ***section 203*** as read with section 204 of the penal Code.

It was alleged that he murdered one Sophia Wakio Maina on 5th November, 2000 at Korogocho Village Nairobi. After a full trial, the trial court (Rawal, J.) convicted the appellant and sentenced him to death on 17th March 2004. Aggrieved by the verdict of the superior court the appellant filed a memorandum of appeal on 29th March 2004. In addition, the appellant through his counsel, filed a Supplementary memorandum of appeal on 19th January 2011. At the hearing Mr Nyende, learned counsel for the appellant opted to rely wholly on the six grounds raised in the supplementary memorandum of appeal. For reasons which will shortly become apparent and for the purpose of this appeal we consider it sufficient to set out only the first ground which states:-

"The learned Judge erred by proceeding with the trial in the absence of one assessor therefore rendering the proceedings a nullity."

In his opening remarks in support of the above ground, Mr Nyende, submitted that after the 7th prosecution witness had testified, one of the three assessors, Mr Joseph Wanjohi sought the court's permission to travel to South Africa, whereupon the court excused the assessor and further ordered the trial to proceed with the remaining two assessors on 9th October, 2003, at which point PW8 took the

witness box and completed giving his evidence on 13th November, 2003 in the absence of the third assessor Mr Joseph Wanjohi. On 25th November, 2003 the trial court noted that Mr Wanjohi had come back to the country but was not present on that day. The assessors' absence resulted in an adjournment of the proceedings to 11th December 2003, when he was present and the appellant in his defence gave unsworn statement and the defence case was closed. Thereafter as per the practice then prevailing, counsel made their submissions and the court summed up the case to the three assessors. Following a unanimous opinion by the assessors, Mr Wanjohi read out the assessors' verdict on 3rd March 2004 in which they returned a verdict that the appellant was guilty of murder as charged. Mr Nyende, learned counsel for the appellant submitted that the trial was a nullity because the court, even after excusing the absence of one the assessors, as it was perfectly entitled to do, went on to allow him to join the other two after the evidence of PW8 had been given in his absence. At this point in the hearing of the appeal, Ms Nyamosi learned Senior State Counsel rose to address the Court. She graciously conceded the lapse concerning the assessor and also quickly added that the defect was fatal to the trial. However, she submitted that although the appellant had been confined in custody for close to ten years it would be in the interest of justice and in particular the victims of the crime who included family members of the deceased to order a retrial. She added that she was confident that witnesses would still be availed and in her view it was apparent from the record that despite the lapse concerning the assessors the evidence on record was overwhelming. She further stressed that the irregularity concerning the assessors was not attributable to the prosecution.

While accepting the concession, Mr Nyende all the same, opposed a retrial on the ground that the appellant had been in custody for ten (10) years and in his view a retrial after such a long period was unacceptable in our system of justice. He buttressed the point by submitting that the ten years the appellant had been in custody had in his view adversely affected his ability to mount a defence and a retrial might in the circumstances give an opportunity to the prosecution to fill in any gaps in the evidence.

Aware that we are not in uncharted waters, we consider it necessary to take into account the principles which have so far guided this Court on the broad subject of retrials especially in murder cases. As far as the irregularity in this case is concerned we are of the view that it is on all fours with that in, ***Mwangi v Republic*** ***[1983] KLR 522.*** In that case too one assessor was absent when vital evidence was being given and his subsequent reappearance to read an assessors unanimous opinion, constituted an incurable irregularity as per the law then prevailing. It violated ***section 26*** of the Criminal Procedure Code. We are of the view that holdings 7 to 12 in the ***Mwangi case*** (supra) apply to the matter before us and it is important to reproduce them in extenso:

"(7) Section 262 of the Criminal Procedure Code requires all trials before the High Court to be with the aid of assessors. This means that they must be present throughout the trial, save only when the admissibility of evidence intended to be addressed is challenged or a point of law otherwise arises. The part of the trial relating to evidence of the witnesses dealing with a most important aspect of the case against the first appellant namely how he had come to be in possession of the property said to belong to one of the deceased was without the aid of assessors and therefore contravened section 262.

(8) It is necessary that all the evidence on whether the prosecution case is based should be given in the assessors' presence. The prosecution cannot rely on the evidence given in a trial within a trial in the absence of the assessors to establish any of the essential facts of their case.

(9) The part of the trial which was held in the absence of the assessors constituted a fatal irregularity in the conduct of the trial which offended section 262 of the Criminal procedure Code and the appellant did not get a satisfactory trial. An order for a retrial is the proper order to make when an accused person has not had a satisfactory trial.

(10) 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.

(12) The High Court ought, in a trial with the aid of assessors, not to accept a representative opinion

by one of the assessors, even if such opinion is agreed upon by the other two assessors by way of a mere confirmation – section 322(1) of the Criminal Procedure code. When two of the assessors told the trial Judge that they had selected the third assessor to speak on their behalf, the Judge should have asked them to state their own opinions orally and, if necessary allowed them to retire again to enable them to form an individual verdict. However, since all the assessors had spoken to the Court there was no miscarriage of justice occasioned and the irregularity was curable by section 382 of the Criminal Procedure code."

Again in the case of ***<u>Muiruri v Republic</u> [2003] KLR 552*** the relevant principles on whether to order a retrial were set out in holdings 3 and 4 as follows:-

"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

3. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegality 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 the prosecutions making or the courts."

In the case before us the learned counsel did submit that the defence was likely to be disadvantaged in mounting its defence because of the effluxion of time. However, he did not demonstrate how the appellant would be disadvantaged. Although he did not specifically mention the principle of law he was relying on, we are of the view that it would indeed be a guiding principle in the determination as to whether to order a retrial in a suitable case. The principle is called the ***equality of arms*** which simply means that both the prosecution and the defence should as much as is practicable enjoy equality of facilities and opportunities. It is a principle of fairness. In this case it has not been shown how the balance would tilt ***against*** the defence if a retrial were to follow. The appellant for instance did not call any witnesses which might not be availed for the retrial for instance.

The upshot is that the appeal is allowed. The conviction is quashed and sentence of death imposed upon the appellant by the trial court is set aside. We order that the appellant be presented to the High Court to be retried by any Judge of the superior court other than Rawal, J. In the meantime the appellant shall remain in prison as a remand prisoner. We further order that the trial proceeds under the provisions of the law obtaining after the repeal of sections relating to the trials with the aid of assessors by Act No.7 of 2007 i.e. it proceeds without assessors. We direct that the appellant be produced before the trial court within 14 days of this judgment and we further direct that his trial be concluded expeditiously on priority basis.

It is so ordered.

DATED and delivered at Nairobi this 18th day of March 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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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