IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 116 OF 2009

BETWEEN

WILSON UHURU BAJE ……..……APPELLANT
AND
REPUBLIC ……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Musinga, J.) dated 18th May, 2009

in

H.C.C.C. NO. 85 OF 2004)
****

JUDGMENT OF THE COURT

In an information dated 23rd November, 2004 and filed into the Court on 30th November 2004, the appellant, ***Wilson Uhuru Baje***, was arraigned in the superior court at Kisii on the offence of murder, the particulars of which were that:-

"On the 16th day of August, 2004 at Osiri village Kothidha sublocation in Homa Bay District within the Nyanza Province, murdered Anjelina Auma Uhuru."
He pleaded not guilty to the charge but after trial, he was found guilty and was convicted of the offence, and sentenced to death.

He was dissatisfied with that conviction and sentence and hence this appeal before us premised on home-made memorandum of appeal filed by the appellant in person and supplementary memorandum of appeal dated and filed by his advocate on 29th November 2010. Before us, Mr. Odhiambo Pascal, his learned counsel, abandoned the original grounds which we have referred to as home-made, and addressed us on the supplementary memorandum of appeal which raised three grounds of appeal namely:-

"1. That the court erred in convicting the appellant of the offence of murder in spite of the omission by the said court to comply with the mandatory provisions of section 200 (3) of the CPC, Cap 75 and it thus occasioned a grave miscarriage of injustice (sic).

2. The noble and learned trial Judge erred and misdirected himself in law in convicting the appellant of the said offence since there was a grave omission in compliance with the mandatory provisions of section 211 of the CPC, Cap 75.

3. The trial court gravely erred and misdirected itself in law by ignoring and failing to take into

account the appellant's unsworn statement of defence to the alleged offence and it thus wrongly convicted the appellant of the said offence."

The record shows that the appellant was produced in court on 30th November 2004. After several mentions, the hearing started on 6th February 2007 before Gacheche, J. The assessors were empanelled on that day and three assessors namely Christopher Aruya Monyoro, Saituna Anyango Saleh and Tabitha Nyaboke Omwenga were selected to assist the court in hearing the matter. This was in line with the provisions of the Criminal Procedure Code at that time as the amendment repealing those provisions had not been enacted. Gacheche J. heard five witnesses with the aid of those assessors and indeed on 8th November 2007 when the case came up for hearing but could not proceed because of the absence of defence counsel, her last order after adjourning the case was:-

"Assessors be paid allowances for the 2 days they sat."

Thereafter, the learned Judge, for reasons not recorded, ceased conducting the trial and Musinga J. took over the hearing of the case. The file was placed before him on 3rd April 2008 and after the learned prosecutor told him that only one witness remained before prosecution could close its case, the learned Judge's first order, which we may say, with respect, was unsolicited, was:-

"Hearing to proceed from where it had reached. Proceedings to be typed. Further hearing on 19th June 2008."

The case was not heard on that day as the defence counsel was absent. It was thereafter, for one reason or another, adjourned from time to time till 18th December, 2008 when the learned prosecutor closed the prosecution's case. Ruling was deferred to 10th February 2009 but was not delivered on that day and apparently the file was not availed in court on that day. On 18th May 2009, the matter came up for ruling on whether or not, a prima facie case had been established by the prosecution to warrant the appellant being put on his defence. As the ruling delivered by the learned Judge has been challenged on appeal we set it out in full below:-

"<u>Ruling</u>

Having perused the prosecution evidence on record, I find that a prima facie case has been established against the accused. He is now placed on his defence. The provisions of section 211 CPC are hereby complied with."

Dated this 12th day of February, 2009.

D. Musinga

Judge."

The appellant elected to give unsworn defence. He gave it and called no witness. We add that during all these appearances, and when the appellant gave his defence the record does not show that the assessors were summoned and were present either all of them or any of them. There is no mention of them by Musinga J. and no explanation was given for such glaring absence. After the appellant's defence, the appellant's counsel and state counsel made their submissions and there was no summing up to the assessors as is expected in all cases heard with the aid of assessors. The learned Judge thereafter delivered the judgment.

The above are what gave rise to the complaints in the supplementary grounds of appeal which are, on the main, three and which we will deal with first and depending on our decision on them, other matters will be considered.

On the first complaint that the learned Judge erred in law in taking over the hearing from Gacheche

J. and proceeding with the same without complying with the requirements of ***section 200(3)*** of the Criminal Procedure Code, the appellant is plainly right. There is nowhere in the record demonstrating that the learned Judge even appreciated the need to comply with that provision which states the trial Judge taking over a matter already partly heard by another court has to inform the accused of his rights under ***section 200*** of the Criminal Procedure Code which rights include the right to recall any witness he wishes to recall. This is an important provision and in our view, depending on certain circumstances, omission to comply with it would be prejudicial to the accused person. As we have stated, the learned Judge did find it unnecessary to comply with it and in the circumstances of this case, we are of the view that such omission was fatal, particularly as all prosecution witnesses had given evidence before Gacheche J.

The second problem is that the learned Judge, in putting the appellant to his defence, complied with ***section 211*** of the Criminal Procedure Code. This section was clearly not relevant as it is a section that is invoked only in trials before Subordinate Courts and not in trials before the High Court. In trials before the High Court, the relevant section is ***section 306***. This error though was not fatal as the provisions and tenor of both sections are the same and the effect, if complied with properly, is the same. However, it was an error and should have been avoided if only to help the courts subordinate to the superior court understand the difference and avoid confusion particularly that could be caused to the subordinate courts. In any case, a case as serious as that which was before the learned Judge called for strict application of the law both substantial and procedural.

Lastly, the trial started with the aid of assessors and in law had to continue with them till the end. We appreciate the fact that midstream the provisions of trial with the aid of assessors was removed from our Criminal Procedure Code, but that repeal, like most other legal provisions, did not have retrospective effect. It was, in our view improper for the learned Judge to drop the assessors and even worse, to fail to give any reasons as to why he did so. We will not go into facts of the case for what will be apparent hereafter.

For all the above reasons and as Mr. Gumo, the learned Assistant Director of Prosecutions also conceded the appeal on those grounds, the appeal is allowed and conviction set aside.

What next? Mr. Odhiambo Pascal and Mr. Gumo, were both of the view that an order for retrial would be fair in this case. Mr. Gumo said he could assemble the witnesses, most of whom are members of one family, and mount a successful retrial. The evidence on record shows that with proper prosecution, the person responsible for the death of the deceased can be brought to book. Although the offence took place in August 2004, the trial was completed on 18th May 2009 when the appellant was sentenced to death. Thus he has been in custody on account of the sentence for about two years only. All considered, we agree with both learned counsel that an order of retrial would be appropriate in the circumstances of this case. We order retrial of the appellant.

We order that the appellant be released into police custody and be arraigned in court within the next fourteen days of this date so that his retrial may commence. The retrial is to be without the aid of assessors and will proceed before a Judge other than Musinga J. Orders accordingly.

Dated and delivered at Kisumu this 28th day of July, 2011.

E. O. O'KUBASU
……..
JUDGE OF APPEAL

P. N. WAKI
……
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR