**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 454B OF 2007**

**MUTUA KIMINZA …….APPELLANT**

**AND**

**REPUBLIC ……..……..RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Machakos (Wendoh, J.) dated 27th October, 2006***

**in**

**H.C.CR.C. NO. 61 OF 2004)**

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**JUDGMENT OF THE COURT**

***Mutua Kiminza*** (the appellant) and his elder brother ***John Kiminza*** were arraigned before the superior court (Wendoh J) for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars in the Information filed by the Attorney General were that the two:

**"On the night of 9th and 10th August, 2003 at Mwang'a village, Kaluva sub-location, Nzangathi location in Kitui district of the Eastern province, murdered JOSEPH MWOVA MUSYOKA."**

John Kiminza died shortly before the trial commenced and the case against him was marked as abated. The appellant was however tried and eventually convicted for the offence and sentenced to suffer death as by law prescribed. He was aggrieved by his conviction and now comes before us on first appeal. Three grounds of appeal were raised and argued by learned counsel for him Mr. A.O. Oyalo, as follows:

*"1. That the learned trial Judge erred in law in that in her summing up, she did not explain to the assessors what constitutes the offence of manslaughter although she told them that one of the possible verdicts which they could arrive at was the said offence.*

*2. That the learned trial Judge erred in law and in fact in that she convicted the appellant of the offence of murder although the evidence on record could only support the offence of manslaughter.*

*3. That the learned trial Judge erred in law and in fact in that she allowed one of the assessors namely Mary Syombua Kioko to take part in the trial after some witnesses had given evidence in her absence."*

For purposes of this appeal, we need only consider ground no. (3) and in view of the orders we propose to make, we refrain from full exploration of the facts on record to arrive at our own conclusions in the matter, as we would ordinarily do on a first appeal. The submission made on that ground by Mr. Oyalo was that the conduct of the trial in the absence of one assessor was a fundamental defect which vitiated the entire trial. Learned State Counsel Mr. Mule, on the other hand conceded that one of the assessors was absent during a part of the proceedings and no reasons were assigned for such absence. That, however, in his view did not affect the trial since the assessor who was excluded did not participate in the summing up or in giving any opinion to the court. We cannot, with respect, agree with the submissions of learned State Counsel.

The facts on record show that three assessors were appointed to assist the trial court in the trial. Those were James Kyalili, Mary Syombua Kioko, and Beth Mutua. Their appointment was in accordance with ***section 297*** of the Criminal Procedure Code, which was applicable at the time, and was couched in mandatory language. The appellant was entitled to expect that he would have the benefit of all those assessors sitting throughout the trial and in the end giving their opinions to the trial court before any verdict in the case was made. The record however shows that after the first prosecution witness testified in the presence of all three assessors and the trial was temporarily adjourned for further hearing the same day, one of the assessors, Mary Syombua did not show up. No inquiry was made on her whereabouts or any reasons assigned for it. The trial Judge simply proceeded with the trial after noting the assessor's absence. Another prosecution witness was heard and the trial was adjourned to a different date. On the resumed hearing, the missing assessor reappeared and again, without making any enquiries or receiving any explanations, the trial Judge proceeded with the trial, the assessor's presence notwithstanding. The assessor remained present when five more prosecution witnesses testified and the prosecution case was closed. It was adjourned for the hearing of the defence case. At the resumed hearing, the same assessor absented herself again and the only remark made by the learned Judge was:

*"Proceeding to go on with 2 assessors."*

The assessor made no other appearance in the trial**.**

***Sections 262*** and ***263*** of the Criminal Procedure Code as applicable at the time were clear and mandatory. They provided as follows:

**"262. All trials before the High Court shall be with the aid of assessors.**

**263. When the trial is to be held with the aid of assessors the number of assessors shall be three."**

There can be no doubt, however, and the law provided for it, that a trial could proceed in the absence of one assessor, but the exclusion of that assessor must accord with the provisions of ***section 298*** of the Criminal Procedure Code. It provided as follows:

**"298 (1) If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors.**

**(2) If two or more of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors."**

We are satisfied in the case before us that there was no attempt made by the trial court to enquire into the absence of one assessor in an effort to comply with the provisions of that section. The consequence of that omission has been stated in many decisions of this Court but we take it from **Maurice Otieno Ogola v. R Cr. appeal No. 240/06** where the court stated:

**"In the case of Dickson Mwaniki M'obici and another vs. Republic, Criminal Appeal No. 78 of 2006, (ur) this Court stated the law as follows:**

**"We stated the law on trials with the aid of assessors at the beginning of this judgment. It is evident that the trial proceeded without one assessor at some stage and there was no reason given as required under section 298 of the Criminal Procedure Code. The appellant was entitled to have the entire evidence tendered by the prosecution, as well as their own evidence, heard and evaluated by three assessors. That there were only two assessors when the appellant testified and no reasons were given for the absence of the third assessor was a fundamental departure from that 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 a whole. The predecessor of this Court considered the effect of such anomaly in Cherere Gikuli vs. R., (1954) 21 EACA 304 and held:-**

**"(1) 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 (ubi supra).**

**(2) To be within section 294 aforesaid, one of the two conditions must be satisfied, viz, either that the absent assessor is "for any sufficient cause prevented from attending throughout the trial" or that he absents himself and it is not practicable immediately to enforce his attendance. (Muthemba s/o Ngonchi vs. R. (Supra distinguished.")**

The trial of the appellant in this case was unlawful and it infringed on the appellant's right to a fair trial as envisaged at the time. The fact that the missing assessor did not participate in the summing up or in giving her opinion is not curative of that fundamental defect in the trial. The trial was rendered a nullity and we so declare it.

Should we order a retrial?

The relevant principles to consider have been stated severallyby this Court. In **Muiruri vs. Republic [2003] KLR 552**, the Court held:-

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

**4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakesleading to the quashing of the conviction were entirely the prosecution making or not."**

It was also held in **Mwangi vs. Republic [1983] KLR 522**

**"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."**

We have considered this appeal in the light of those principles and it is our view that an order for retrial would meet the ends of justice.

In the upshot the appeal is allowed on ground 3 alone. We set aside the conviction of the appellant and the sentence imposed on him. He shall be re-tried by any court of competent jurisdiction other than Wendoh J. Needless to say the retrial shall abide by the provisions of the law existing after the repeal of the sections relating to assessor by **Act No. 7 of 2007**. We direct that the appellant be remanded in custody for production before the trial court within 14 days of this judgment and that his re-trial be concluded expeditiously.

Those shall be our orders.

***Dated and delivered at Nairobi this 5th day of March, 2010***.

**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**