REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

CRIMINAL APPEAL 106 OF 2009

BETWEEN
BOB AYUB "ALIAS" EDWARD GABRIEL MBWANA
"ALIAS" ROBERT MANDIGA……..……..……...APPELLANT

AND
REPUBLIC …….RESPONDENT

(An appeal from conviction and sentence of the High Court of Kenya at Kisii (Musinga, J.) dated 27th February, 2009

in

H.C.CR.C. NO. 57 OF 2005)
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JUDGMENT OF THE COURT

This is a first appeal. In law, we are enjoined to analyse and evaluate the evidence that was adduced at the appellant's trial a fresh and come to our own conclusion but bearing in mind that the trial court saw and heard witnesses and to give allowance for that. However, for what will be clear later in this judgment, we will not involve ourselves in that exercise and will not delve into the facts of the case save only as may be necessary for the conclusion that we will reach in this judgment.

The appellant ***Bob Ayub alias Edward Gabriel Mbwana alias Mandiga*** was arraigned in the High Court of Kenya at Kisii with an information that had him charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** both of the Penal Code. The particulars of the offence were that:-

"On the 16th day of September 2003 at Magenche Sublocation in Gucha District within Nyanza Province jointly with others already before court murdered Kefa Nyanchoka."

On 14th October 2005, he appeared for plea in the superior court. An advocate, Mr. K. Mogire was appointed by the Court to represent him. The plea was adjourned from time to time till 25th October 2006. On that day the record shows that the plea was taken and he pleaded not guilty to the charge. On the same day three assessors were selected to assist the court (Bauni, J as he then was). These were Richard Siro Omwanda, Grace Mangerere and Samson Ongeri Manyara. The hearing commenced on that day with the aid of those three assessors. After the first witness was heard fully, the prosecutor applied to have the information amended for the year to read 2003 instead of 2005. This was perhaps because the first witness was adamant that the offence took place in the year 2003 and not the year 2005 as appeared in the original information. There is nothing in the record to show that the court gave the defence counsel and the appellant opportunity to comment on that application. That application was allowed and the hearing proceeded with the assessors presumably still in attendance. Four witnesses were heard on that day and thereafter several adjournments were sought by the prosecution and readily granted till the learned Judge died before finalizing the matter. On 14th April 2008, the record shows that Musinga J. took over the hearing of the case. The following is the record of that day:-

"14.4.2008
Coram Musinga, J.
Cc Mohisa,
Mr. Kemo for State
Mr. Mogire for accused.

Court : ***The case will proceed from where Justice Bauni had reached. The proceedings should be typed. Further hearing on 3.7.2008."***

We observe that there was no entry in the record regarding the assessors. On 3rd July 2008, the case came up before Musinga J. for hearing. Again no mention was made of the assessors in the coram and there was nothing to indicate what had happened to them. The resumed hearing started at 2.30 p.m. and only one witness Dr. David Momanyi gave evidence. The prosecutor then closed its case and a ruling under ***section 306*** of the Criminal Procedure Code was reserved to 14th July 2008. The appellant was, on that day put on his defence and the learned Judge, in doing so purported to have complied with ***section 211*** of the Criminal Procedure Code. That provision relates to proceedings before subordinate courts. The correct provision for proceedings before the High Court is ***section 306(2)*** of the Criminal Procedure Code. The defence case was adjourned to 23rd September 2008 when the appellant gave an unsworn statement in his defence. Thereafter, submissions were made on 7th October 2008 and judgment was reserved to be delivered on 10th November 2008. That was not to be. It was delivered on 27th February 2009. There was nothing in the record to indicate that there was any summing up of the case to the assessors. Neither was there any record of their opinions having been given to the court before judgment. In fact, even the judgment of the court delivered on 27th February 2009 in which the appellant was found guilty as charged, convicted and sentenced to death; does not mention anywhere what happened to the assessors who had been selected at the commencement of the trial and who, at that time, before the amendment to the Criminal Code, were an integral part of the trial.

The appellant was dissatisfied with the conviction and sentence and hence this appeal in which he filed in person four grounds of appeal and Mr. Menezes who later came on the record for him mid-way raised 13 grounds of appeal in a supplementary memorandum of appeal on 25th February, 2010. At the prompting of the court, Mr. Menezes argued only three of those 13 grounds of appeal. The grounds he argued were the third ground which stated:-

"A cardinal principle of law i.e. section 200 of the Criminal Procedure Code was not adhered to at the time Honourable J. D. Musinga took over the hearing from where the late Justice Bauni had left off."

and the 9th and 10th grounds which were:-

"9. That the learned trial Judge erred in law in not establishing that all assessors or at least 2 of them were always present at the trial to its conclusion.

10. That learned trial Judge erred in dismissing the assessors (if he so did) without recording the event."

In his submission before us, Mr. Menezes, on the main highlighted those three points by referring us to the record and urged us to allow the appeal. Miss Oundo, the learned Senior State Counsel conceded the appeal on grounds that the trial court, having started the trial with the aid of assessors, should have proceeded with them even after the amendment to the Criminal Procedure Code that did away with trials with the aid of assessors. She however sought a retrial.

We have considered the record, the submissions and the law. In our view, the trial of the appellant was vitiated, and three grounds support our view. Firstly, the trial began with the aid of assessors and midstream, the court either dismissed the assessors but never said so or just forgot all about the assessors such that at the end, no summing up to assessors was done and their opinions were not sought and recorded by the court, and no mention of that was made in the record. It is not easy to understand what happened but even if we were to accept that part of the hearing took place after the provisions for trial with the aid of assessors in the Criminal Procedure Code had been repealed through amendment by Act No. 7 of 2007, that did away with the assessors, still the law is clear that when the trial started on 14th October 2005, the provision of the assessors was still part of the law and if the repeal of that law was carried out after the trial had began then the provisions of ***section 23(3)(e)*** of the Interpretation and General Provisions Act Chapter 2, Laws of Kenya were to be applied and the trial should have continued with the aid of assessors to the end.

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 shall be three."

Under ***section 298*** of the Criminal Procedure Code before it was amended, the trial could proceed with the aid of two assessors, but only if one assessor was from any sufficient cause, prevented from attending throughout the trial or absented himself, and it was not practicable immediately to enforce his attendance. In such a case, the absence of that one assessor would be recorded in the proceedings. If, however, two or more assessors were unable to attend or absented themselves then the proceedings would be stayed and new trial would be held with the aid of fresh assessors. In the case before us, the record is absolutely silent as to what happened after the assessors were selected and the trial commenced. In the case of ***Monica Otieno Ogola vs R. Criminal Appeal No. 240 of 2006***, this 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. Dupra distinguished.")

The trial of the appellant in this case was plainly unlawful and it infringed on the appellant's right to a fair trial as envisaged at the time. This ground alone would be enough to have the trial rendered a nullity; but before we declare it a nullity, there are the other two aspects which we think were equally not adhered to and affected the fair trial of the appellant. One of these which is our second ground for declaring the trial a nullity is that after Bauni J. had heard four witnesses, he died and Musinga J. took over the hearing of the case. This was presumably done under ***section 201(2)*** as read with ***section 200*** both of the Criminal Procedure Code as amended. ***Section 201 (2)*** enjoins the trial Judge taking over a partly heard Criminal trial to comply with the provisions of ***section 200*** of the Criminal Procedure Code. It says:-

"*The provisions of* ***section 200*** *of this Act shall apply* ***mutatis mutandis*** *to trials in the High Court."*

Section 200 (3) states:-

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused of that right."

The record before us, the relevant part of which we have reproduced above, clearly shows that Musinga J. did not comply as was required of him, with the provisions of ***section 200(3)*** of the Criminal Procedure Code which as per ***section 201 (2)*** was to apply *mutatis mutandis* in this case. He did not explain to the appellant his right to demand the recall and rehearsing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that ***section 200*** was complied with is hollow without any evidence from the record.

The third ground is that at the close of the prosecution's case, the learned Judge of the superior court did put the appellant to his defence pursuant to ***section 211*** of the Criminal Procedure Code. That section applies to trials before the subordinate courts and not trials before the High Court. The correct provision was ***section 306(2)*** of the same Code. We however, make haste to state that this error was in our view a minor one as the manner of compliance with ***sections 211*** and ***306(2)*** are in any case the same and the appellant could not have been prejudiced by court's compliance with the wrong section for the message was in any event conveyed. The error is curable under ***section 382*** of the Criminal Procedure Code.

For the above reasons, we declare the trial of the appellant in the superior court a nullity.

What next? Miss Oundo sought a retrial and stated that witnesses would be available and such a retrial would be successfully mounted. Mr. Menezes left it to us but sought an order that the appeal as a whole be allowed.

We have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by this Court. In the case of ***Muiruri vs. Republic (2003) KLR 552*** this Court held inter alia as follows:-

"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 mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

In this case, human life was lost and the law must also consider the victim and those affected. The appellant was convicted on 27th February 2009, one year back. The witnesses are still available and a proper retrial can still be mounted. On these grounds, we think it will be in the interest of justice and of the appellant that a retrial be ordered.

In the upshot, the appeal is allowed. The conviction and sentence of death imposed upon the appellant are set aside. He shall be retried by any Judge of competent jurisdiction other than Musinga J. The trial shall proceed under the provisions of the law after the repeal of the sections relating to the assessors by Act No. 7 of 2007. We direct that the appellant be remanded in

police custody for production before the trial court within 14 days of this judgment and we further direct that his trial be concluded expeditiously.

Those shall be the orders of the Court.

Dated and delivered at Kisumu this 30th day of April, 2010.

S.E.O. BOSIRE
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JUDGE OF APPEAL

P. N. WAKI
……..
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
……..
JUDGE OF APPEAL

I certify that this is a truecopy of the original

DEPUTY REGISTRAR