IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 42 OF 2008

BETWEEN

PETER NGATIA RUGA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J) dated 12th February, 2008

in

H.C.CR.C. NO. 28 OF 2006)
****
JUDGMENT OF THE COURT

This is a first appeal. The appellant ***Peter Ngatia Ruga*** was, in an information dated 10th August 2006, arraigned in the superior court 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 night of 5th and 6th day of April 2006, at Gitero village in Nyeri District within Central Province, murdered Joseph Ndonga Kingori."

He pleaded not guilty, but after a trial, part of which was conducted with the aid of assessors, the learned Judge of the superior court, (Kasango J.) found him guilty as charged, convicted him and after giving him opportunity to mitigate, sentenced him to suffer death as per by law provided.

He was not satisfied with that conviction and sentence and hence this appeal before us premised on seven grounds which are in a summary, that his rights under the Constitution of Kenya were violated as he was detained in police custody for a period in contravention of the provisions of ***section 72 (3)*** of the same Constitution; that the conviction was entered against him notwithstanding that there was no proof of malice aforethought established against him; that the conviction proceeded against him despite lack of proof of the cause of death; that the superior court erred in relying on the evidence of the dying declaration by the deceased without ascertaining its probative value and that inconsistencies in the evidence before the superior court were not resolved.

Before us, Mr. Kaigai, the learned Senior State Counsel, submitted that because the trial court started the trial of the appellant with the aid of assessors, but midstream abandoned the same assessors and proceeded to the end of the trial without their input and without their opinions, the entire proceedings was vitiated and the judgment of the trial court could not stand. He however sought a retrial. Mr. Mwangi, the learned counsel for the appellant while appreciating that the trial before the superior court was vitiated because of the failure by the learned trial Judge to proceed with the aid of the assessors to the end of the trial, objected to the order of retrial sought by Mr. Kaigai. His objection was on grounds that the charge was defective; that the appellant was not produced in court for his trial within the period specified under the provisions of ***section 72 (3)*** of the Constitution; that the evidence tendered particularly by the material witnesses was weak and that in any case, the mistake that had led to the trial being vitiated was committed by the prosecution.

On reasons that will be apparent later in this judgment, we will not set out the full facts of this case, neither will we discuss the merits of this appeal.

The record shows that, in respect of the murder trial, the appellant was produced in to the superior court on 10th August

2006 and plea was fixed to be taken on 16th August 2006. On that date, plea was taken and the appellant pleaded not guilty. Hearing was fixed to proceed on 27th March 2007. Before hearing commenced, three assessors, namely Nancy Njoki Ihuthia, George Wanjigo Wanyaga and Charles Waihenya Ndirangu were selected to help the learned Judge in hearing the case. Immediately thereafter, on the same day hearing proceeded and three witnesses testified. The assessors selected on that day attended the hearing. It was adjourned to 25th April 2007 for further hearing. All three assessors were present on 25th April 2007. Two witnesses were heard. Hearing was adjourned to 24th May 2007. On that day, the last witness was heard, and the prosecution closed its case. All the three assessors were present. Ruling as to whether the appellant had a case to answer was reserved and was delivered on 2nd July 2007. At the close of the proceedings on 24th May 2007, the learned Judge, in recognition of the presence of the assessors on that day and their role made an order as follows:-

"The civilian witnesses and assessors to be paid for today."

On 2nd July 2007, when the court ruled that a prima facie case had been made against the appellant and put him to his defence, the assessors were present. Defence hearing was fixed to proceed on 16th October 2007. On 11th October 2007, the matter was mentioned before Makhandia J. who took it out of the hearing list for 16th October 2007 and fixed it for hearing on 30th October 2007. On 30th October 2007, the record shows that the matter came up for hearing before Kasango J. and was for other reasons adjourned to 13th December 2007 for hearing. A further order was made by the court as follows:-

"Assessors (1) Charles Wahenya Ndirangu, (2) George Wanjigo Wanyaga (3) Nancy Njoki Ihuthia shall be paid for attending today."

However, on 13th December 2007 when the matter came up for defence hearing, there was no record of the presence or otherwise of the assessors. The appellant tendered his defence by giving unsworn statement. The learned Judge made no comment on the absence of the assessors. The defence hearing proceeded as if it was proceeding without the assistance of the assessors. After the defence statement, submissions were made by the defence counsel and the Principal State Counsel, all in the absence of the assessors and no reference whatsoever was made of the assessors. Thereafter, the learned Judge, without summing up to the assessors and seeking their opinions, proceeded to pronounce judgment.

Thus, though the hearing started with aid of the assessors and continued with their aid till the close of the prosecutions case, thereafter assessors never featured anywhere in the record and the court never stated the reasons for their having been withdrawn, if they were indeed withdrawn. The trial court did not seek their opinions and in her judgment no reference whatsoever was made of the existence of the assessors at one time during the hearing of the case.

We are aware that pursuant to Act No. 7 of 2007, trial with the aid of assessors was repealed and removed from our statutes, but the trial in respect of this appeal began as we have stated, on 10th August 2006 long before the provisions for trial with the aid of assessors were repealed and that being the case, by virtue of the provisions of ***section 23 (3) (e)*** of the Interpretation and General Purposes Act, Chapter 2, Laws of Kenya, which was applicable, the trial should have continued with the aid of assessors to the end. As the learned Judge never stated why she abandoned the assessors' midstream, we cannot for certain say that was done because of repeal of the provisions on trial with the aid of assessors. We have mentioned this only as what we think might have acted in the mind of the court to take such a drastic act, but she may well have had her reasons for doing so.

Whatever reasons necessitated her doing away with the assessors midstream, one matter is certain, and that is that on matters that fell under the provisions of the trials with the aid of the assessors, the law required that the number of the assessors be three and that number was to remain so throughout unless an assessor was to the satisfaction of the court prevented for any sufficient cause from attending throughout the trial or that he absented himself and it was not practicable immediately to enforce his attendance. If two assessors were not able to attend court for trial of an accused person, then such a trial had to start *de novo*. Once any part of the hearing had proceeded in the absence of an assessor, he could not be allowed to attend and continue with the rest of the hearing. 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 trial 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 thereafter an infringement of that right. The third assessor returned to hear the summing up and to give his opinions in the trial but that was of no consequence. The death blow had been inflicted on the trial as a whole."

In the case of ***Cherere Gikuli vs. Republic (1954) 21 EACA 304***, it was held as follows:-

"1. A trial which has began 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 is not practicable

immediately to enforce his attendance (Muthemba s/o Ngonchi vs. R Dupra) distinguished."

In the recent past, in the case of ***Bob Ayub "alias" Edward Gabriel Mbwana, alias Robert Mandiga v. Republic , Criminal Appeal No. 106 of 2009,*** decided by this Court on 30th April 2010 at Kisumu, a similar situation arose. Facts were the same. Hearing began with the aid of assessors but midstream they were abandoned but without any reasons being assigned for such action by the superior court. This Court stated:-

"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 provisions 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 Purposes Act Chapter 2, Laws of Kenya were to be applied and trial should have continued with the aid of assessors to the end."

We have said enough to show that the trial in this appeal was vitiated.

We declare the trial of the appellant in the superior court a nullity.

What next? Mr. Kaigai seeks retrial and says witnesses are there and a successful retrial can be mounted. Mr. Mwangi opposes retrial on grounds that the mistake resulting into the mistrial was by the prosecution. With respect, that is not true.

We have considered many decided cases on principles that would guide the court when considering whether or not to order retrial. Some of these are cases such as ***Ahmed Sumar vs. Republic (1964) EA 481, Pascal Ouma Ogola vs. Republic, Criminal Appeal No. 114 of 2006,*** and ***Muiruri vs. Republic (2003) KLR 552.*** The principles in all those cases are as spelt out in the decision of this case in the case of ***Bernard Lolimo Ekimat vs. R Criminal Appeal No. 151 of 2004 (UR)*** where this Court stated:-

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

In this case, life was lost; the appellant has been in custody for about four years. Witnesses are available and successful retrial can be mounted. In those circumstances, what commends itself to us is to order a retrial and we do so.

The upshot is, that the appeal is allowed. The conviction and sentence of death imposed upon the appellant by the trial court are set aside. He shall be retried by any Judge of competent jurisdiction other than Kasango J. The trial shall proceed 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 will proceed without assessors. We direct that the appellant be remanded in police custody for production before the trial court within fourteen (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 Nyeri this 21st day of May, 2010.

P. K. TUNOI
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

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

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

DEPUTY REGISTRAR