**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 52 OF 1998**

**ALEX KIOKO KANYINGI .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(*An Appeal from a conviction and sentence of the High Court of Kenya***

***at Machakos (Mwera, J.) dated 10th November, 1998***

**in**

**H.C. Cr.C. No. 28 of 1998)**

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## JUDGMENT OF THE COURT

***Alex Kioko Kinyingi***, the appellant, was charged with two counts of murder contrary to ***section 203*** as read with ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were that on the night of 23rd and 24th day of December, 1995 at Tulia Market Mutonguni Location in Kitui District of the Eastern Province he murdered ***Peter Mwangi Ndatha*** and ***Alexander Mutua Ngalai.*** As is the established practice where there are more than one murder charges against an accused person, the State in the case the subject of this appeal opted to prosecute the appellant with Count I which related to the murder of *Peter Mwangi Ndatha*; the deceased. On the night of the incident, there was a discotheque at Mutonguni Mountain Bar. The deceased and the appellant were amongst the patrons present. The appellant and *Festus Mutua Kasuvi (*PW1) another patron had a disagreement and they went out as if in preparation for a duel. They then engaged in shoving each other and *Chief Julius Kimwele (*PW2) who was in an adjacent bar on Plot No. 22, otherwise known as Muthanja's Bar was alerted. He came out of the bar, took a whip from his car and whipped both the appellant and PW1. They separated and ran away in different directions. In the process the appellant's shoes were left at the scene. They were picked by a passerby and handed over to PW2.

It appears after the appellant ran away from the scene of the fight with PW1, he went to his house of Muthale Chief's Camp, armed himself with the gun and came back to Mutonguni Mountain Bar where he indiscriminately shot at the bar killing the deceased and injuring many others. Those injured included PW1, *Harrison Mutua Kimele* (PW4), *Silas Kyalo Kavisu* (PW5) *Joshua Nzue Nzelu* (PW6*), Cosmas Mutisya* (PW7) and *AP. Constable Musa Chebii* (PW10). All of them testified in the case as to what happened on that night and the shooting at the bar but did not identify the person who fired the shots except for PW1 who alleged the appellant had shot the man who came and hid at the same place he, PW1, had hidden. He did not give the name of that person. And apart from the evidence adduced by those who were at the discotheque and who sustained injuries from the shooting as above, the superior court also received evidence of *William Lubang'a* (PW3), the ballistics expert (firearms' examiner) who examined the appellant's G3 rifle No. 659601, 18 rounds of ammunitions, 13 fired cartridges and one fired rifle bullet and made a report thereon which he produced as part of the prosecution evidence. The court also received the evidence of *Ag. IP. Sammy Musili* (PW11) who received a report of this incident on 24th December, 1995 and started preliminary investigations. He went with some officers to the scene of the shooting. He is the one who collected all the exhibits which were later taken to PW3 for examination as aforesaid. He also went to the house of the appellant at Muthale AP's Camp where he was joined by the Kitui Divisional Police Commander, a ***Mr. Saina*** and the District Criminal Investigations Officer, a ***Mr. Kimeu*** where they arrested the appellant and took him to Kitui Police Station where he was charged with murder, as herein before stated.

When placed to his defence, the appellant elected to give sworn evidence and referred to his routine on 23rd December, 1995 when he was off duty and how he took liquor from 10.00 a.m. to 11.00 p.m. at Flamingo and Mountain bars. He saw the deceased, PW1, PW2 and PW10 also drinking there. He then recounted his encounter with the PW1 and how PW2 intervened and whipped him with a stick. He testified that he ran away to his room leaving his shoes at the scene. Then he armed himself and came back to the scene to collect his shoes but when he was looking for them he heard people laughing in the vicinity and suddenly he fired shots without knowing what was going on. He did not aim the shots at anybody and had no intention to look for and kill PW2 although if he intended this he would have done it because on his way back to the scene to look for his shoes he passed by the said PW2's house. During cross-examination he said that he had no intention to kill PW1 either.

The learned Judge of the superior court *(Mwera, J.)* in his judgment rendered himself thus:-

***"Looking at the charge and caution statement first, it was not repudiated; the accused told I.P. Miheso that he did not kill Peter with malice. That the accused fired bullets that killed him and (because) the Chief had whipped him. That is that the court has said above. For whatever reason that the accused fired, he did so soberly and Peter was killed in the process.***

***The statement under inquiry (exhibit P3) does not deviate much from the evidence of Chief Kimwele (PW2) as seen side by side with that of Kasumbi. It begins with the drinking, the quarrel, the whipping and the lost*** *(sic)* ***of accused shoes as he fled. He told I.P. Miheso (in exhibit P2) that he shot about because the Chief whipped him. He said in (exhibit P3) statement under inquiry that when he came back from Muthane now armed, he looked for the Chief. He did not find him. The accused would have killed him.***

***All evidence seen side by side makes the statement under inquiry admissible. This court is not relying on it to convict. It is satisfied from all evidence rendered that the accused murdered the deceased herein as charged and is accordingly convicted."***

The appellant was not satisfied with his conviction by the superior court and has lodged this appeal to this Court. He relied on five grounds in his home-drawn petition of appeal filed herein on 2nd December, 1995. The appeal was placed before this Court for hearing on 16th February, 2010 when ***Mr. Mogikoyo***, learned counsel for the appellant submitted on his behalf and relied on the grounds in the appellant's petition of appeal which he condensed, while ***Mr. Kaigai***, Principal State Counsel submitted on behalf of the State. According to Mr. Mogikoyo, the offence against the appellant was not proved on the required standards because no doctor appeared to produce the postmortem report and/or to explain the

deceased cause of death. He stated that no witness saw the appellant shooting the deceased nor was there any evidence to link the death of the deceased to the shooting at the bar on the night of 23rd December, 1995. Mr. Mogikoyo submitted that the appellant's evidence that he had been drinking for the whole day and that when he indiscriminately fired shots he did not know what he was doing, was not shaken; hence he had no malice aforethought to kill the deceased. According to the counsel the case of murder framed against the appellant was not proved beyond any reasonable doubt and that if there was any case against him then it was probably one of manslaughter. The counsel referred to the number of assessors who were reduced from 3 to 2 when one of them failed to turn up and said since the superior court did not inquire as to his whereabouts or why, this caused a mistrial of the case but that considering the period the appellant had remained in custody it was not appropriate to order a retrial.

Mr. Kaigai supported the conviction but for a lesser offence of manslaughter because of the issue of drunkenness raised by him. According to him there was no mistake when the learned Judge of the superior court proceeded with the case with the aid of two assessors instead of three.

This is a first appeal, and as such this Court has a duty of re-considering and re-evaluating the evidence adduced in the superior court in order for it to form its own opinion if that evidence could sustain the appellant's conviction, giving due allowance that this Court had no opportunity to see and hear the witnesses testify as the superior court did. See ***Okeno v. R. [1972] EA 32*** and ***Mwita v. R. [2003] KLR 301.*** We have recounted the evidence advanced before the superior court save the evidence of *Meshack Onyango* (PW12) who took the inquiry statement from the appellant. That statement was retracted by the appellant and was subjected to a trial within trial after which the learned Judge ruled that it was made by the appellant voluntarily and admitted it as part of the prosecution case against the appellant. Another statement taken from the appellant by *IP. Ezra Miheso* (PW13) was that of charge and caution. The defence counsel did not object to the production of that statement as part of the prosecution evidence against the appellant. In that statement the appellant denied killing the deceased Peter Mwangi Ndatha and that he learned of the deceased death at the Police Station.

There was a postmortem examination carried out on the deceased body by ***Dr. Mutunga***. The doctor's observation on the report was that the deceased died due to 2nd degree cardio-pulmonary arrest with heavy bleeding due to a ruptured bladder. The doctor did not appear in court to produce that report and to explain what might have caused these injuries. It was PW12, a police officer, who produced it as an exhibit in the case.

The superior court failed to take notice of the issue of assessors. During the trial of the case subject of this appeal up to the delivery of judgment, the procedure at the time was that the High Court hears murder cases with the aid of assessors; see ***section 262*** of the Criminal Procedure Code; now repealed. By ***section 263*** of the same Code, also repealed, the number of assessors at every sitting was to be three. Also by ***section 273*** of the same Code, also repealed, an assessor, once appointed, had to appear at every sitting he is so appointed unless he/she was discharged by the court or had a lawful excuse to be absent. In the case the subject of this appeal three assessors were appointed on 21st July, 1997 to aid the court. They were ***Julius Mbaluka, Stephen Maingi*** and ***William Kilonzo***. They sat on 21st July, 1997 and 22nd July, 1997 but thereafter only two assessors appeared. They were Julius Mbaluka and William Kilonzo. No inquiry was made to find out why Stephen Maingi was unable to attend. The two assessors present then sat on 6th October, 1997 but on 7th October, 1997 no assessor attended though the case proceeded and it would appear they appeared in the course of proceedings. It was not indicated how many came and at what stage of the proceedings. On 11th November, 1997 two assessors were present. Thereafter it was either one or two assessors present or sometimes – like 24th August, 1998, none at all, until the conclusion of the case. In spite of this the trial continued as if the assessors were present. This was contrary ***sections 263*** and ***273*** of Code aforesaid. In our view this was a fatal flaw in the hearing of the appellant's case, for which we find no cure. In view of this serious defect in the prosecution of the appellant's case in the superior court the appellant's trial must be declared a nullity. As the learned Principal State Counsel told us that the State would be in a position to mount a retrial as the witnesses would be available we think this is a proper case for a re-trial. Consequently we direct that a re-trial be held. Meanwhile the appellant will be held in custody and be produced before the superior court within 14

days from the date hereof.

Dated and delivered at Nairobi this 7th day of May, 2010

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**P. N. WAKI**

**……**

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

**……**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**