IN THE COURT OF APPEAL OF KENYA

AT NYERI
Criminal Appeal 310 of 2008

PAUL KITHINJI ……..……..APPELLANT

AND

REPUBLIC ……..RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Meru

(Emukule, J.) dated 13th November, 2008

in

H.C.CR.C. NO. 9 OF 2006)

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JUDGMENT OF THE COURT

The appellant, *Paul Kithinji*, was arraigned before the High court on an Information charging him with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code, particulars of which read as follows:

"PAUL KITHINJI: On 29th day of January, 2003 at Kitheo Location Kiriati sub-location in Meru North District within the Eastern province murdered PAULINE KARAMBU."

The appellant pleaded not guilty to the charge. He was tried with the aid of assessors, but after six witnesses had testified, the trial Judge, Lenaola, J, was transferred and was replaced by Anyara Emukule J. The latter took over the case on 21st April, 2008, and without complying with the provisions of *section 201 (2)* as read with *section 200* of the Criminal Procedure Code, he continued with the hearing from where his predecessor had reached. He received the evidence of a seventh witness, and heard the defence case. We note that when the trial started before Lenaola J, it was with the aid of assessors. However, when Anyara Emukule J took over, there is no indication on the record that the assessors were present. It is also clear that at the close of the defence case, the learned Judge heard submissions from both the state counsel and counsel for the appellant, after which he reserved his judgment without any summing up to the assessors.

In his judgment Emukule J found the appellant guilty of the lesser charge of manslaughter, convicted him of the offence and sentenced him to life imprisonment on 13th November, 2008. The appellant was aggrieved and hence this appeal.

When the appeal came for a hearing Mr. Makura, Senior State Counsel, addressed us and said he did

not support the appellant's conviction, because the trial Judge did not comply with the provisions of ***section 201 (2)*** of the Criminal Procedure Code. He then urged us to order a retrial. In his view a retrial is necessary because the appellant faced a charge of murder which in his view is a serious offence, and also because there is overwhelming evidence to support the charge.

Mr. Mwanzia for the appellant opposed a request for a retrial saying that proceedings giving rise to this appeal were a retrial as the appellant had earlier been charged for the same offence under **Criminal Case No. 40 of 2003,** but which case was terminated on 23rd September, 2004. He also submitted that the appellant had been in custody for over three years, and a retrial would be prejudicial to the appellant. It was also his view that the evidence against the appellant is weak.

Section 201 (2) of the Criminal Procedure Code provides that the provisions of ***section 200*** of the Act shall apply *mutatis mutandis* to trials held in the High Court. ***Section 200 (1)*** of the aforesaid provides as follows:

"**200 (1) subject to sub-section (3), where a magistrate after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-**

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial."

Sub-section (3) of the above section provides as follows:

"**(3) 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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.** (emphasis supplied.)

Sub-section (3), above, is worded in mandatory terms. The failure by the succeeding Judge to comply with it rendered all the proceedings before him a nullity. Likewise the learned Judge's failure to ensure the presence of the assessors before commencing the hearing, also, rendered the proceedings a nullity. We say so advisedly. We are aware that **by Act No. 7** of **2007**, Parliament amended part of the provisions of the Criminal procedure Code and these included ***sections 297, 298, 299*** and ***300*** relating to trials with the aid of assessors. These provisions were repealed without being replaced. No provision was made as to what would happen in cases where trials had commenced with the aid of assessors, but for one reason or another had not been concluded by the date the amendments came into effect, as in this case. In such a case it is our view that the hearing should continue with the aid of assessors notwithstanding the repeal of the provisions relating to the use of assessors. Emukule J. in our view thought that since the provisions relating to the use of assessors were repealed, then he did not need to continue the trial with them. In our view he erred, more so if consideration is given to the provisions of ***section 23 (3) (e)*** of the **Interpretation and General Provisions Act**, **Cap 2** Laws of Kenya, which provides as follows:

"**23.(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –**

(a) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

For the foregoing reasons we agree with Mr. Makura, that the appellant's trial was a nullity, and accordingly we quash his conviction for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code, and set aside the sentence of life imprisonment which was imposed on

him.

We have agonized over the question whether or not we should order a retrial. We have considered submissions made for and against a retrial. In view of the facts and circumstances of this case a retrial is necessary. We appreciate that the appellant was charged for the same offence in an earlier case, which was terminated and he was recharged a fresh. It is however noteworthy that the case was terminated before any witnesses testified. We agree with Mr. Mwanzia that the appellant has spent sometime in custody. It is, however, important to note that justice must look at both sides of the street. The charge against the appellant is by no means minor. The State through Mr. Makura says it will be able to get witnesses. We do not wish to doubt him. Whether or not to order a retrial is a discretionary power which the court exercises for the ends of justice, and we think the ends of justice here call for a retrial. In the circumstances we order that the appellant be presented before the superior court forthwith for retrial for the offence of murder contrary to ***section 204*** as read with ***section 203*** of the Penal Code, but before a Judge excluding Lenaola and Emukule JJ. It is so ordered.

Dated and delivered at Nyeri this 22nd day of May, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……**……..**

JUDGE OF APPEAL

J.G. NYAMU

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR