



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 49 of 2008
PETERSON MAINA WANJIKUAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Makhandia, J.) dated 13th March, 2008

in

H.C.CR.C. NO. 8 OF 2006)

JUDGMENT OF THE COURT

Section 23 (3) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya, provides as follows: -

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not: -

- (a)
- (b)
- (c)
- (d)

(e) 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.”

The appellant, *Peterson Maina Wanjiku*, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code* and the particulars were that during the night of 23rd and 24th January, 2006, the appellant murdered *Luke Mwangi Karega*.

The trial of the appellant opened before Makhandia, J on 25th July, 2007. The learned Judge selected three assessors to aid him in the trial. As at that date the Criminal Procedure Code provided at **section 262** that:

“All trials before the High Court shall be with the aid of assessors.”

This section and the other provisions relating to trial with the aid of assessors were all repealed by the **Statute Law (Miscellaneous Amendments) Act, i.e Act No. 7 of 2007** which came into effect on 15th October, 2007. Purporting to rely on the provisions of the new Act, Makhandia J, on 21st November, 2007 made the following order, apparently with the concurrence of counsel for the appellant and counsel for the Republic: -

“In light of the recent amendments to the Criminal Procedure Code doing away with the need to have assessors in murder trials which amendments came into force on 15/10/07, I deem it unnecessary now to proceed with the trial with the assistance of the assessors. I accordingly discharge the same assessors with the gratitude of the court.”

As at the stage when the learned Judge was discharging the assessors, the trial of the appellant was at an advanced stage with ten witnesses having testified on behalf of the prosecution. After the discharge of the assessors, the prosecution recalled one witness (P.W.9) and then the last witness (P.W.11). The prosecution thereafter closed its case. In view of the provisions of **section 23 (3)** of the **Interpretation and General Provisions Act** which we have set out at the beginning of this judgment, we think the learned Judge was not justified in summarily discharging the assessors. The appellant was entitled to be tried with the aid of assessors and the deletion of **section 262** of the **Criminal Procedure Code by Act No. 7 of 2007** did not and could not have deprived the appellant of the right which had accrued to him when the new legislation came into force. That was the view taken by this Court in the case of **BENARD KINOTI M'ARACHI vs. REPUBLIC, Criminal Appeal No. 114 of 2008 (unreported)** where Sitati, J had applied the same reasoning as that of Makhandia, J. On both occasions, none of the learned Judges referred to the provisions of the **Interpretation and General Provisions Act**. In **BENARD's** case, the Court ordered a retrial.

We think the Court must take the same position in the present appeal. In the appeal before us, there was evidence upon which a reasonable tribunal properly directing itself, could well found a conviction. In the circumstances, we allow this appeal, set aside the conviction and consequent sentence of death and order that the appellant shall be tried afresh before another judge other than Makhandia, J. As this will be entirely a new trial, the appellant shall not be entitled to be tried with the aid of assessors, the new trial coming as it does, long after the abolition of trials with the aid of assessors. Pending the new trial, the appellant shall remain in prison custody. Those shall be the orders of the Court in this appeal.

Dated and delivered at Nyeri this 15th day of May, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR