REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 194 of 2006

JULIUS MURIIRA ……..……. 1ST APPELLANT

PAUL MWITI MURIUNGI……..…. 2ND APPELLANT

SILAS GITONGA MURIUNGI ……..…… 3RD APPELLANT

GERVASIO GIKUNDI …… 4TH APPELLANT

AND

REPUBLIC …….....……..…….. RESPONDENT

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

Meru (Sitati, J) dated 25th July, 2006

In

H. C. Cr. C. No. 43 of 2002)

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JUDGMENT OF THE COURT

The first, second, third and fourth appellants in this appeal namely Julius Muriira, Paul Mwiti Muriungi, Silas Gitonga Muriungi and Gervasio Gikundi respectively were arraigned in the superior court at Nyeri on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge were that:-

"On the 22nd day of September, 2001, at Thuti village, Thangatha location in Meru North District within Eastern Province, jointly murdered JOSHUA KANGERIA BUNDI."

They each pleaded not guilty to the charge and the hearing of the case proceeded before the superior court (Sitati, J) purportedly with the aid of assessors. After the conclusion of hearing the prosecution case and the defence case, the learned Judge summed up the case to three assessors who on the same date gave a unanimous opinion which was that the appellant was guilty. In her judgment dated and delivered on 25th July, 2006 the learned Judge found each of the four appellants guilty as charged, convicted each of them and sentenced each to suffer death as provided by law. The appellants were not satisfied with their conviction and sentence and filed, through Elijah K. Ogoti and Company Advocates, "*Grounds of*

Appeal" dated 30th August 2007 challenging the convictions entered and sentences awarded by the learned Judge of the superior court. Later, on 12th May, 2008, each of them filed Supplementary Memorandum of Appeal through the same firm of advocates. Contents of the supplementary memoranda were the same. Because of what will be apparent later in this judgment, we reproduce the fifth and the sixth grounds of appeal herebelow. They read as follows:-

"**5. The Honourable Judge erred in law by passing a death sentence in respect of the 3rd accused (Silas Gitonga) who at the time of the offence was under age (minor).**

6. The learned Judge erred in law in not finding that no assessors were selected and their verdict was irregular."

At the hearing of the appeal, Mr. Ogoti, the learned counsel for the appellants addressed us at length on the above grounds of appeal and on other grounds. Mr. Orinda, the learned Principal State Counsel, conceded the appeal mainly on the above two grounds of appeal. We have considered the submissions, the record, and the law pertaining to the above two grounds. The record shows that the third appellant, Silas Gitonga was sentenced to death for the offence which took place on 22nd September, 2001. He was escorted to Dr. Nthanga, the then Medical Officer in charge, Miathene S.O Hospital on 29th September, 2001 for age assessment. His age at that time was assessed to be 16 years. Dr. Isaac Mwangi Macharia (PW5) gave evidence and produced the P3 in respect of Gitonga's examination for age assessment as Exbt. 3. In evidence Dr. Macharia stated:-

"***This form MFI 3 is in respect of Silas Gitonga who was taken for examination on 29th September 2001 under escort of Cpl. Wangila. He was found to be 16 years old and mentally normal."***

There was thus sufficient evidence to show that the third appellant was below the age of 18. The law as it was even before the Children Act was enacted and as it is now is that any person below the age of 18 years cannot be sentenced to death. Because of the other aspects of this appeal, we would take no action on this glaring error of the court at this stage. We hope that High Court Judges will avoid such elementary errors.

The next ground which we deem fit to deal with, as we have indicated above, is the way the superior court handled the case as regards the requirement for selection of assessors. Mr. Ogoti, the learned counsel for the appellants, submits and not without justification, that there was no evidence on record to show that the learned Judge of the superior court actually selected the assessors. Mr. Orinda says there was selection of the assessors as there were four people in court and the learned Judge heard the case with the help of three of the four meaning that she must have carried out selection of some sort although that is not apparent from the record.

Our perusal of the record shows that plea was taken on 30th July, 2002, when the first three appellants pleaded not guilty to the charge. Thereafter it came up for mention on several occasions until 23rd June, 2004 when it was fixed for hearing on 26th October, 2004. Throughout all that period of mentions no mention was made of the assessors let alone selecting them. On 26th October, 2004 when the case came up for hearing, the record shows that Mr. Muteti, the learned State Counsel, addressed the court as follows:-

"**MR. MUTETI**

I have received word on behalf of Mr. Muriuki that he will not be able to attend court today because he is sick. The case is also fixed for hearing tomorrow 27th October, 2004. The accused person has not been produced in court today and there is no explanation. There are some four assessors in court this morning as there has been no selection. I have three witnesses present in court."

The learned Judge's response to the State Counsel's submission reproduced above was as follows:-

"**ORDER**

1. Case SO for hearing on 27.10.2004

2. Production order to issue for the accused.

3. OCS Mikinduri to personally appear in court on 27.10.2004 together with original file exhibits and remaining witnesses on 27.10.2004.

4. The following three assessors Erastus Maina, Gideon M. Ikiara and Isaya Mungathia to be paid their allowances for today. ---"

The above is what Mr. Orinda refers to as constituting selection of assessors and he takes that view because although the State counsel had said there were four assessors, the learned Judge ended up naming three of those four present and directing that they be paid their allowances on that day which was a hearing date. We do not with respect agree. There is nothing to show that the learned Judge made any effort to find out from the four persons she was told were present for selection of assessors, in what way they were suitable to be appointed assessors. There is no evidence on record to show that any of the four was asked about his age, his profession, whether he had known any of the appellants before; whether he would serve as an assessor, whether he had in the near past served as an assessor and such like questions that would have led the court into ascertaining the suitability or otherwise of the three to serve as assessors so as to ensure that persons exempted under the now repealed **section 266** of the Criminal Procedure Code were not selected as assessors. In any event, it was not proper in our view to mention the three to serve as assessors in the absence of the defence counsel, Mr. Muriuki, who was not in court on that date according to the submissions of Mr. Muteti and even worse, in the absence of the accused persons who were also not in court on that date. We are not persuaded that the casual manner in which the learned Judge of the superior court stated that the three named assessors needed be paid their allowances amounted in law to selection of assessors. As the provision for trial by assessors no longer exists in law by dint of the repeal by the Criminal Procedure Act vide **Act No. 7** of **2007**, we need not set out the procedure of selecting assessors in this judgment save to state that as the case proceeded at a time when trials for murder charges before the superior court were done with the assistance of assessors, the trial in respect of the case resulting in these four appeals having proceeded without proper or any selecting of assessors was not in our view valid.

Further and even more important, although the learned Judge did not record presence of assessors and the appearance before her on the dates the case was heard, as she should have done, except on one occasion, nonetheless, she indicated their presence whenever the hearing was adjourned. Going by that, it is apparent that on 19th January, 2005, when PW5, Dr. Isaac Mwangi Macharia, the last prosecution witness was heard, the prosecution closed their case and counsel on either side made their submissions under **section 306 (2)** of the Criminal procedure Code, only two assessors were present. The record shows that at the end of the submissions the learned Judge recorded as follows:-

"***ORDER***

1. Ruling on 24.2.05

2. The two assessors present namely Isaya Mungathia and Gideon M'Ikiara to be paid their allowances for today.

3. Accused RIC"

Thus, it is apparent that the hearing of the case which started with three assessors proceeded on 19th January, 2005 with two assessors only. The learned Judge of the superior court did not record the reasons for dispensing with the presence of the third assessor Erastus Marica. She apparently proceeded

under the then **section 298 (1)** of the Criminal Procedure Code. Be that as it may, a ruling was delivered by the learned Judge on 24th February, 2005. On 6th December, 2005 the hearing resumed, and each appellant gave unsown statement. On that day, only two assessors attended court. The order by the learned Judge reads:-

"***ORDER***

1. ***Submissions on 7.2.2006***

2. ***Assessors present (two of them to be paid their allowances of today. (sic)***

3. ***Accused RIC."***

However, on 7th February, 2006, the record shows that all the three assessors were present in court. Mr. Muteti, said so and the learned Judge also recorded the same. The matter was coming up for submissions but the same was adjourned to 14th February, 2006. On that day the Coram was recorded as follows:

"***Coram***

R.N. Sitati Lady –J.

Mr. Muteti for the Republic

Mr. Muriuki for the Accused.

CC Kimathi

Assessors

1. ***Gideon Mworia Ikiara***

2. ***Isaya Mungathia Muronga***

3. ***Erastus Moija M'Itheya."***

On that day the two learned counsel made their submissions and summing up was reserved to 29th March 2006, but it was adjourned from time to time until 29th May, 2006 when it was done and immediately thereafter, all the assessors returned a unanimous opinion of guilty. That was delivered on their behalf by Gideon Mworia Ikiara.

It is clear from above that one assessor Erastus Monja M'Itheya who was absent on 19th May, 2005 and so did not hear the evidence of the Doctor (PW5) and did not also hear submissions by the learned counsel under ***section 306 (2)*** of the Criminal Procedure Code and was not there when the court made ruling under that provision of the Criminal Procedure Code, was nonetheless allowed back to the case, and participated in the proceedings ending up giving his opinion on whether or not the appellants were guilty of the offence. This was not proper in law. This Court has made its stand on that aspect very clearly on several occasions, that once an assessor absents himself and the court decides to proceed with the two remaining assessors as happened in this case, the court cannot allow that assessor to come back into the case and give his opinion on the guilt or otherwise of the accused. We think this principle is based on common sense that an assessor who has not heard some of the witnesses or who has missed out on some part or parts of the proceedings cannot be in a proper position to give an informed opinion on the entire case. In the case of **Abdullahi Abdalla Mukulu v. Republic**, Criminal Appeal No. 51 of 2003, this Court stated as follows:-

"***The second aspect we find disturbing is that the record shows that on 25th September, 2002 , the third assessor was absent and the Court dropped him and ordered the trial to continue with two assessors present, thus excluding the third assessor. …….***

The trial then continued with two assessors and the record shows that submissions were made by the learned defence counsel as well as by the learned Principal State Counsel in the presence of the two assessors. However on 13th November, 2002 the record shows that the hearing proceeded with three assessors present and indeed on 20th November, 2002 all the three assessors including the one who had been dropped gave their opinions to the Court. In our mind, this was not proper. Once one assessor had been dropped, he could not be allowed back to take part in the trial. This Court made that position clear in the case of JOSEPH MWAI KUNGU VS. REPUBLIC Criminal Appeal No. 68 of 1994 at Nakuru where the Court stated as follows:-

"***Before every trial opens in the High Court, the judge must select three assessors and at the beginning of every such trial, the assessors must be three. But if in the course of the trial, as it does happen that one assessor might, for some good cause, be unable to attend, he may absent himself as Robert Ombachi did in this case on 22nd June, 1992. If that happens and the judge decides to proceed with the remaining two assessors, that as we said earlier, is permitted under section 298 (1) of the Code. However, once the judge has taken the decision to proceed with two remaining assessors, the one who absented himself , whatsoever may be his or her reason for being absent, must not be allowed back to the trial. The same section 298 (1) requires that an assessor must attend throughout the trial."***

We need not say more. From the above, it will be clear that the trial before the superior court was a nullity. Mr. Orinda seeks a retrial and says the witnesses would still be available . Mr. Ogoti opposes retrial submitting that the appellants have suffered as they have been in incarceration for seven years. We have anxiously considered this aspect of the matter and the submissions before us. We have considered the evidence that is on the record, the period the appellants have been in police and prison custody. We have also considered the law. In the case of **Mwangi vs. R (1983) KLR 522**. this Court stated:-

"***A retrial should not be ordered unless the appellate Court is of the opinion that on proper consideration of the admissible, or potentially admissible evidence, a conviction might result. BRAGANZA V. R. (1957) CA 152 (CA), PYARDA BASSEN V. REPUBLIC (1960) EA 54."***

In our view, a retrial would meet the ends of justice in this matter. We allow the appeals, set aside the sentences of death in each case and order that Criminal Case No 43 of 2002 be heard afresh by a judge of the superior court other than Sitati, J. The hearing is to proceed under the Criminal Procedure Code as amended by **Act 7 of 2007** i.e. the retrial to proceed without the aid of assessors. Judgment accordingly.

Dated and delivered at Nyeri this 31st day of October, 2008.

R.S.C. OMOLO

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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.