IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 114 of 2008

BENARD KINOTI M'ARACHI……..APPELLANT

AND

REPUBLIC…….RESPONDENT

(Appeal from a judgment and sentence of the High Court of Kenya at Meru (Sitati, J) dated 18/1/2008

in

H.C.CR.C. NO. 175 OF 2003)

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JUDGMENT OF THE COURT

The appellant ***BENARD KINOTI M'ARACHI*** (herein appellant) was tried and convicted by the superior court *(Sitati, J)* of the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, and sentenced to death.

The particulars of the offence alleged that on the 20th day of September, 2003 at Kiruai village in Chugu sub-location within Meru Central District of the Eastern Province, he murdered one PACRASS ***MUTUA MBUGI.*** The trial was with the aid of assessors, as the law required then. Several prosecution witnesses gave evidence. The appellant gave an unworn statement in defence and denied the offence of murder, but the learned Judge of the superior court found that he was guilty of the offence charged when she said:-

"***In the result, I find the accused guilty of the offence of murder and convict him accordingly. It is so ordered"***

She subsequently sentenced him to death.

The appellant was aggrieved by the superior court's finding, and filed the present appeal where he cited seven grounds of appeal namely:-

"***1. That the learned trial Judge erred in law in failing to consider that section 72(3)(b) and 77(1)(2)(a)(b)(c) of the constitution of Kenya was contravened.***

2. That, the learned trial Judge erred in law in failing to adhere and confine (sic) with the laid laws of section 169(2) and section 168(2) CPC Cap 75 L.O.K. in the judgment as a result the same was

and is invalid.

3. That, the learned trial Judge erred in law in failing to indicate the composition of the court on the 27th October, 2005 at 2.35 P.M. hence flouting section 85(2), and 88 of the C.P.C. rendering the entire proceeding a nullity.

4. That the learned trial Judge erred in law and in facts in basing her conviction and sentence upon circumstantial evidence that fell short of satisfying the three laid tests.

5. That the learned trial Judge erred in both law and facts in that she did not take into account that witnesses who were withheld and not summoned by the prosecution would have given evidence in favour of I the appellant.

6. That, the learned trial Judge erred in law and facts in relying upon evidence that was meted by numerous discrepancies and inconsistencies of great significance that were prejudicial to 1 the appellant.

7. That, the learned trial Judge erred in law and in facts in that she failed to sufficiently consider the defence put forth by I the appellant herein."

The main ground argued by *Mr. Muthui Kimani*, learned counsel for the appellant was that as at the time of the trial of the appellant, trial with the aid of assessors who had to be three in number, was part of the substantive law, yet the court records show inconsistencies in this regard. Because of this, he urged the court to find that the trial was not regular and the same should be nullified and the conviction set aside. He prayed the Court not to send the appellant for retrial as there was no sufficient evidence on record to warrant his conviction in the first place, and secondly, that re-calling some witnesses will be difficult as they have since retired. *Mr. Muthui* submitted further that the appellant's constitutional rights were breached as the trial took about five years to conclude. He said that these are some of the circumstances that may vitiate an order for a retrial.

Mr. Orinda Principal State Counsel conceded that the Court record shows that the trial with the aid of assessors was not consistent and that made the trial a nullity, not a mistrial. He therefore urged the Court to order a retrial, and stated that the witnesses are family members who can be found easily. The error which occurred in this case, according to *Mr. Orinda*, should not be visited on the prosecution as it arose from the court. But *Mr. Muthui,* pointed out that the prosecution asked for adjournment several times during the trial to get witnesses, and even some, particularly the doctor had to be brought to court under a warrant of arrest to testify, and for that reason, he urged the Court to release the appellant and not send him for a retrial.

This is a first and final appeal and this Court has a duty to reconsider the evidence which was adduced before the superior court, evaluate it and draw its own conclusions giving due allowance to the fact that it has neither seen nor heard the witnesses - see ***OGETO V REPBULIC*** **(2004) 2 KLR 14,** ***OKENO V REPUBLIC*** **[1972] EA 32** and ***NGUI V REPUBLIC [1984] KLR 729.***

This Court said in ***MUTUA MUTISYA V REPUBLIC***, Criminal Appeal NO. 43 of 2006 (unreported):-

"***Nevertheless a Court of Appeal will not normally interfere with findings of fact by the trial court, unless they are based on no evidence or misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision - CHEMAGONG V REPUBLIC [1984] KLR 611 and KIARIE V RPEUBLIC [1984] KLR 739."***

As stated earlier, the decision of the superior court is challenged mainly on the ground that the trial was at some stage conducted without the aid of assessors and was therefore in breach of ***Sections 262*** and ***263*** of the Criminal Procedure Code which provided in mandatory terms at the time, that all trials shall be with the aid of three assessors subject to the qualification in ***Section 298(1)*** of the Criminal Procedure Code, which provided that:-

"***If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors."***

In the present appeal, the learned Judge's record shows that the three assessors were selected on 26/10/2005 and the trial commenced the following day, 27/10/2005, in the presence of the three. The deceased's widow ***Mary Ruiringa Mutua, PW1*** (hereinafter Mary) gave evidence of how her late husband left the house on the evening of 20th September, 2003, at about 7 p.m. armed with a panga and a torch and soon thereafter she heard screams, rushed to the scene and found him lying on the ground. She tried to lift him, but he was not steady and was bleeding from the head. He was rushed to the hospital where he died that same evening. *Mary* identified the appellant as the deceased's step brother and talked of a land dispute that was going on in court amongst these family members, i.e. the appellant, the deceased and their father.

The deceased's second wife, ***Anna Mutua PW2,*** (hereinafter Anna) gave evidence the same day. She too heard screams soon after the deceased had left home on the evening of 20th September, 2003, armed with a panga and a torch. She rushed to the scene like *Mary*, and found the deceased on the ground bleeding. He was rushed to the hospital from where he died at night.

Three other witnesses gave evidence the same day, namely ***Boniface Jore Mwiti, PW4*** (hereinafter Boniface), and ***Patrick Murithi Mutua, PW5*** (hereafter Patrick), both sons of the deceased and ***George Koome, PW6*** (hereinafter George) a neighbour of the deceased.

The trial was adjourned thereafter and resumed on the 7th February, 2006. Once again all the three assessors were present when evidence of ***Dr. Henry Njue Njiru, PW7,*** (hereinafter Dr. Njiru) relating to the cause of death was recorded before the case was adjourned.

The trial proceeded once again on 27th March, 2006, with the aid of only two assessors following the ruling of the learned Judge, who also discharged the 3rd assessor, one *Elias Kimathi* who had failed to appear in Court on that day. Only one witness gave evidence, ***Kenneth Mwenda PW8*** (hereinafter Kenneth). He is a cousin of the appellant as their mothers are sisters. He too arrived on the scene and found the deceased lying on the ground bleeding. The appellant was also at the scene.

The trial finally resumed on the 7th June, 2006. None of the prosecution witnesses turned up to give evidence and at 2 p.m. the prosecution closed its case. Surprisingly all the three assessors were present in court that day and participated in the trial. The learned Judge ruled that the appellant had a case to answer, and complied with ***section 211*** of the Criminal Procedure Code. The appellant gave an unsworn statement in defence, and the learned Judge gave a date for submissions and directed that the three assessors be paid their allowances for the day.

Both the appellant's counsel and the prosecution made their final submissions on 17th August, 2007. Once again all the three assessors were present in court. The learned Judge recorded their names and thereafter gave a date for the summing up of the case to the assessors. However, that procedure was abandoned by the learned Judge when the legal requirement on trial with assessors was abolished before the completion of this trial. This is apparent from the learned Judge's first sentence in the judgment dated 18th January, 2008.

She said:-

"***The enactment and operationalisation of the STATUTE LAW (Miscellaneous Amendments Act 2007) abolished the role of assessors in murder trials with effect from 15.10.2007. As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that this decision not to sum up does not and will not prejudice the accused person herein. The assessors who have sat with me during the trial are forthwith discharged. They are, however, entitled to payment of***

attendance allowances incurred to date".

With the greatest respect to the learned Judge, we find that this was a misdirection as the trial commenced when the law requiring trial with assessors was in force, and the assessors had taken part throughout, though not all three were present all the time as we have pointed out. In these circumstances, the assessors were entitled to give their opinions, notwithstanding the enactment of the Statute Law (Misc. Amendment) Act, 2007, which abolished the role of assessors in murder trials from 15.10.2007. Further and most important, the decision by the learned Judge to discharge one assessor on 27th March, 2006, for failure to appear in court, and subsequently allow him to resume and take part in the trial from 7th June, 2006, breached the provisions of ***section 298(1)*** of the Criminal Procedure Code and thus rendered the trial a nullity, as was submitted by *Mr. Orinda,* Principal State Counsel.

In the result we allow this appeal, quash the conviction and set aside the sentence. However, given the facts and circumstances of the alleged offence said to have been committed against a family member, presumably because of a land dispute, and most of the witnesses being family members, we hereby order a retrial before a Judge of the superior court other than *Sitati, J.*

DATED and DELIVERED at NYERI this 5th day of December, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. ALUOCH

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR