REPUBLIC OF KENYA

COURT OF APPEAL OF KENYA AT NAIROBI

CRIMINAL APPEAL 269 OF 2006

CHARO KATANA KITSAO……..……..….APPELLANT

AND

REPUBLIC…….……..…..RESPONDENT

(Appeal from judgment of the High Court of Kenya at Malindi (Khaminwa, J.) dated 28th June, 2004

in

H.C.CR. C. NO. 4 OF 2001

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JUDGMENT OF THE COURT

The appellant in this appeal Charo Katana Kitsao was charged before the superior court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the Information were that on the 2nd day of February, 2000 at Mikuyuni Village in Gorashi Location within Malindi District of the Coast Province, he murdered Ngumbao Kitao Dunda. He pleaded not guilty but after trial, the learned Judge of the superior court (Khaminwa, J.) found him guilty, convicted him and sentenced him to death according to law. He was not satisfied with that conviction and sentence and moved to this Court on appeal citing six grounds which he filed in person. Later, he was represented by a firm of Advocates namely, Oguk & Company and the firm filed on his behalf supplementary Memorandum of Appeal in which four grounds were cited. For the purposes of this judgment, we view the third ground of appeal in the Supplementary Memorandum of appeal as important. It states:-

"3. That the learned trial Judge erred in law by failing to sum up the evidence to the Assessors and give them proper directions as required in law before receiving their verdict. The trial was a nullity for failure to comply with the laid down procedure"

When the appeal came up before us for hearing, the learned Principal State Counsel Mr. Ogoti conceded the appeal on the ground that the learned trial Judge, after hearing the entire case did not sum up the case to the assessors as she was required by law to do. He submitted that that omission amounted to a mistrial. He however sought a retrial, stating that the prosecution would avail the witnesses for the retrial and that the evidence as can be viewed from the record would likely secure a conviction if a retrial was ordered. Mr Oguk, the learned counsel for the appellant while agreeing that the trial before the superior court which resulted in the appellant being convicted was a nullity, nonetheless submitted that a retrial should not be ordered as the appellant has been deprived of his liberty now for close to seven years from

9th February, 2000 when he was arrested to the date of hearing this appeal.

Part IX of the Criminal Procedure Code deals with procedure in trials before the High Court. Sections 262 and 263 set out the mode of trial. They state as follows:

"262. All trials before the High Court shall be with the aid of assessors.

263. When the trial is to be held with the aid of assessors, the number of assessors shall be three"

Section 322 (1) states

"When, in a case tried with Assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record that opinion."

Although by its use of the word "may" the above provision gives the court the discretion to sum-up the evidence to the assessors before requiring the assessors to state their opinions, by usage and case law, summing-up to the assessors is no longer a discretionary matter, for if the court requires the assessors to be of any use to it, the assessors must make informed opinion which they can only do upon the court summing up the entire evidence to them and at the same time directing them on issues of law; that the summing- up must not only be done but must be seen to be done. Summing up to the assessors has gained the force of law and is now a must. In the case of Joseph Mwai Kungu vs. Republic, Criminal Appeal No. 68 of 1993 (unreported) this Court stated as follows:

"We would, for our part, now emphatically assert that the practice of summing-up to the assessors is a thoroughly sound one and has been followed for so long that it has acquired the force of law. That is what this Court, was saying in LELEI'S case and we would add that the practice is so well established that if a trial Judge is to depart from it, then there must be some special and compelling reason for doing so."

In other words, there must be on record evidence that summing-up to the assessors was undertaken or that there was some special and compelling reason why that was not done.

In the record before us, the learned Judge after hearing the entire prosecution case and the statement in defence by the appellant stated as follows:

"The summary of the evidence is this(sic) given to the assessors. The assessors are requested to give their opinion."

And the learned Judge proceeded to record each assessors opinion.

It is clear to us and we agree with both learned counsel, that there is no tangible evidence that the learned Judge summed up the evidence that was before her to the assessors. There is no such written summary in the record and no special or compelling reason has been given for failure to do so. That being our view of the matter, we agree that the entire trial was a mistrial. We quash the conviction and set aside the sentence.

The next matter to consider is whether to order a retrial or not. Mr Ogoti is pressing for a retrial stating as we have stated earlier, that the witnesses would be readily available and thus the appellant would not be prejudiced as the retrial would not take a long time to be concluded. Mr Oguk, on the other hand submits that the offence took place on 2nd February, 2000, the appellant was arrested on 9th February, 2000 and since then has been either in custody awaiting trial or in prison awaiting the outcome of this appeal, but either way he has been deprived of his liberty for all that time which is close to seven years. He is opposing an order for retrial.

We have considered the record before us, the submissions by the learned counsel for the appellant and

the Principal State Counsel as well as the law. This Court has in several decisions considered the same question of when and when not to order retrial. In the case of Pascal Ouma Ogolo vs. Republic – Criminal Appeal NO. 114 of 2006 (unreported) it stated as follows:-

"We have considered whether or not we should order retrial. The alleged offences were committed on 9th February, 2000 and the appellant has already been in custody for 5 years. The main critical issues amongst others at the hearing of the first appeal by the superior court were as by identification and recognition in the circumstances in which the State Counsel and the court found out(sic) to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr Musau that this is not a suitable case in which to order a retrial."

In that case, it had been submitted on behalf of the state that the case was not suitable for retrial because even if retrial was ordered, it would be futile as it was not certain that the relevant witnesses would be traced to mount a successful retrial. In the case of Ahmed Sumar vs. Republic [1964] E.A 481, the predecessor to this Court stated at page 483 as follows:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view follow that a retrial should be ordered."

It continued on the same page at paragraph 11 and stated further:-

"We are also referred to the judgment in Pascal Clement Braganza vs. R [1957} EA 152 In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."

Lastly, on the decisions of this Court, in the case of Bernard Lolimo Ekimat vs. R. Criminal Appeal No 151 of 2004, (unreported) this Court made what may appear to be a summary of the principles when it stated:

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

In this case before us, the learned Principal State Counsel states that witnesses are not only traceable but would be availed immediately on the order for retrial. The circumstances giving rise to the trial in the superior court being declared a mistrial were occasioned by the error on the side of that court. A person lost his life and it is only proper that whoever could have been responsible be brought to book. We do accept that the appellant has not enjoyed liberty for close to seven years but when this is considered against the need for justice and the assurance of the Principal State Counsel that witnesses are going to be available for an early disposal of the retrial, what commends itself to us is an order for retrial. Unlike in the case of *Fundi Reuben Ngala v. Republic Cr. Appeal No. 268 of 2006 (unreported)* the recorded evidence available might well sustain a conviction.

The totality of all the above is that we order a retrial of the appellant before another competent court. The appellant will be produced before the superior court at Malindi for his retrial within the next fourteen (14) days of the date hereof. That is the judgment of the Court.

Dated and delivered at Mombasa this 26th day of January 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR