REPUBLIC OF KENYA

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IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 268 of 2000

FUNDI REUBEN NGALA ……..……. APPELLANT

AND

REPUBLIC ……RESPONDENT

(An Appeal from a conviction and sentence of the High Court of Kenya at Malindi (Ouko, J.) dated 6th July, 2005

in

H.C.CR. CASE NO. 7 OF 2003)

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JUDGMENT OF THE COURT

This is the first and last appeal by *Fundi Reuben Ngala* who was convicted by the superior court (Ouko, J.) for the offence of murder contrary to *section 203* as read with *section 204* of the *Penal Code*. It had been alleged in an Information filed by the Attorney General that the appellant had on the 21st day of December, 2002 at Saba Saba village in Vitengeni Location within Kilifi District of the Coast Province murdered *Festus Kazungu Wara* (hereinafter *"the deceased"*). Upon his conviction, the appellant was sentenced to suffer death as by law provided.

Although the appellant has raised some six grounds in his memorandum of appeal which he drew up in person, and learned counsel for him Mr. Kadima was prepared to argue them, the matter that takes primacy and was raised by the Court is the conduct of the trial with the assistance of assessors. This is a matter that this Court has examined many times in the past and we are disturbed that some superior court Judges, mercifully only a few of them, still do not get it right. As recently as 13th October, 2006, we had occasion to state as follows: -

"Section 262 and 263 of the Criminal Procedure Code provide in mandatory tone that all trials before the High Court shall be with the help and aid of three assessors, unless under section 298, an assessor is prevented from attending throughout the trial or absents himself and it is not practicable immediately to enforce his attendance. In such case the trial may proceed with the remaining two assessors. The system has however, lately received considerable criticism and may well be reviewed by Parliament in a Bill pending before it. Nevertheless, it has served its purpose since its introduction in criminal trials in 1930 and the purpose was stated by this Court in Kinuthia v R [1988] KLR 699 at page 702 as follows: -

"The purpose of the Assessors is to make sure that, as far as possible in the most serious cases which are

tried by the High Court, the decisions of fact have a broad base conforming with the notions of that part of society to which the accused person belongs. The Assessors are of special value in determining what action amounts to provocation. They are also of great importance in assessing contradictory stories of what occurred in a particular case, and they may be able to guide a Court as to the manners and customs, and so to the truth of what the witnesses have said. It is therefore right and proper that the trial should be with the aid of assessors, in the full sense; they should be allowed to ask the witnesses questions; they should have exhibits and reports shown and explained to them; and they should give their opinions in general and on special points as the circumstances of a case require."

That was in Dickson Mwaniki M'Obici & Anor vs. Republic Cr. Appeal No. 78/2006 (ur). In the same case we also stated: -

"We stated the law on trials with the aid of assessors at the beginning of this judgment. It is evident that the trial proceeded without one assessor at some stage and there was no reason given as required under section 298 of the Criminal Procedure Code. The appellants were entitled to have the entire evidence tendered by the prosecution, as well as their own evidence, heard and evaluated by three assessors. That there were only two assessors when the appellants testified and no reasons were given for the absence of the third assessor was a fundamental departure from that procedure and therefore an infringement of that right. The third assessor returned to hear the summing up and to give his opinion in the trial but that was of no consequence. The death blow had been inflicted on the trial as a whole. The predecessor of this Court considered the effect of such anomaly in Cherere Gikuli v R [1954] 21 EACA 304 and held: -

"(I) A trial which has begun with the prescribed number of assessors and continues with less than that number is unlawful unless the case can be brought precisely within section 294 of the Criminal Procedure Code (*ubi supra*). (2) To be within section 294 aforesaid one of the two conditions must be satisfied, viz, either that the absent assessor is "from any sufficient cause prevented from attending throughout the trial" or that "he absents himself and it is not practicable immediately to enforce his attendance." (Muthemba s/o Ngombe v. R. supra, distinguished.)"

The same Court also stated that where an assessor who has not heard all the evidence is allowed to give an opinion on the case the trial is a nullity. See Joseph Kabui v R (1954) 21 EACA 260 and Bwenge v Uganda [1999] 1 EA 25, a decision of the Court of Appeal, Uganda."

Two years earlier on 28th January, 2004 the Court, differently constituted in Abdullahi Abdalla Mukulu v Republic Cr. App. No. 51/2003, stated: -

"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, whatever

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 cite those cases *in extenso* to underscore the fact that there is no dearth of authorities on the manner in which trials, which the law requires must be conducted with the aid of assessors, ought to be conducted. What transpired in the matter before us?

We observe, firstly, that the offence was committed on 21st December, 2002 and the appellant was arrested the following day on 22nd December, 2002. The Information on the offence of murder was however filed by the Attorney General on 12th June, 2003 and the appellant was apparently taken to court for the first time on 5th September, 2003 when the date for plea was taken. There is nothing in the record before us to explain the whereabouts of the appellant between the date of his arrest and the date of his arraignment in court. On the face of it, there was a grave violation of the appellant's right to a fair trial, but that issue has not been raised or canvassed and as stated, there is no material before us to form a basis for a firm finding.

Be that as it may, the trial commenced on 23rd July, 2004 after selection of three assessors to assist the learned trial Judge. Subsequent thereto there was a proper conduct of the trial until the 4th November, 2004 when the 2nd assessor did not attend court. The learned Judge made the following order: -

"One assessor cannot be traced – Assessor No. 2 is said to have travelled and will not return to town until 10.11.2004. In the circumstances, it is ordered that trial proceeds with the assistance of 2 available assessors."

He then proceeded to record the evidence of the Investigating Officer, *Pc Kea Rashid* (PW8), who was fully cross-examined by the appellant's counsel. The last witness for the prosecution, PW9, *Dr. Michael Peter Mwita* (PW9), was not called to testify until 18th January, 2005. On that day the missing 2nd assessor appeared and took part in the trial. The prosecution case was closed and the matter was set down for submissions on 8th February, 2005. On that day the 3rd assessor was bereaved and had reportedly travelled upcountry. The court made the following order: -

"In the circumstances, the case to proceed with the assistance of two assessors."

The submissions of both counsel on no case to answer were completed without the 3rd assessor and the ruling was delivered on 3rd March, 2005 in his absence. When the appellant commenced his evidence in his defence on 8th June, 2005, the 3rd assessor re-appeared and participated in the trial. The learned Judge then summed up the case for all three assessors on 28th June, 2005 before each one of them gave their opinions later that day, followed by the judgment on 26th July, 2005 when only two of them attended and were discharged after judgment.

It is clear from the recital of those facts that the trial was not conducted in accordance with the law and, quiet correctly, learned Principal State Counsel Mr. Ogoti, conceded that there was a mistrial. On the authorities, the trial was rendered a nullity and there cannot therefore be an appeal before us for consideration on the merits.

Mr. Ogoti then sought to persuade us that we ought to make an order for a retrial. He submitted that there would be no prejudice to the appellant since all the witnesses would be made available expeditiously and there would be no delay in finalising the trial now that there was a permanent resident Judge in Malindi Law Courts. In his view, there was sufficient evidence to lead to the conviction of the appellant. For his part, the appellant's counsel Mr. Kadima would have none of such suggestions. In his view, a retrial would not be in the interests of justice considering that the appellant has been in custody for more than four years. There was no guarantee, despite the optimism expressed by State Counsel, that all the witnesses would be readily available and that there would be no lengthy retrial thus compounding the agony already undergone by the appellant. At all events, he submitted, the material upon which the

appellant was convicted in the abortive trial cannot, on proper consideration, found any conviction, even if a retrial was ordered.

Whether or not a retrial shall be ordered is within the discretion of the Court and will be dictated by the circumstances in each case. Ordinarily a retrial would be the appropriate order to make where there are fundamental irregularities which would result in a miscarriage of justice which is not curable under *section 382* of the Criminal Procedure Code. We have already expressed our concern at the apparent delay in bringing the appellant before court for his trial. A large part of the period taken in the abortive trial, from arrest to judgment, is essentially unexplained inaction. Secondly, the optimism expressed by Mr. Ogoti about an expeditious retrial is simply that – optimism. Considering that he became aware of the irregularities in the trial when the court raised them at the hearing of the appeal, he had no time to confirm the availability of witnesses and we have no information on the volume of work before the resident Judge in Malindi. More importantly, it is our duty to examine the material presented or likely to be presented to the court and to form an opinion as to whether a conviction might result. In Mwangi V. R [1983] KLR 522, this Court stated: -

"A retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible; or potentially admissible evidence, a conviction might result: Braganza v R [1957] EA 152 (CA)' Pyarala Bassan v Republic [1960] EA 854."

What material did the prosecution lay before the court?

On the 20th December, 2002, there was a wedding party at the home of *Pastor David Msena Ngala Ponda* (PW3) in Vitegeni village Kilifi. His daughter was getting married. There were many people, music and merrymaking. Among them were the deceased and his brother *Macdonald Garama Wara* (PW1) who were related to the bridegroom. The deceased was busy mingling with the crowd and at some stage sought out some photographers who took a photo with PW1 before disappearing again into the crowd. At about 2.30 a.m. on 21st December, 2002, PW1 went out looking for his wife within the compound and in the process bumped into the deceased who was having an argument with another person. The person was accusing the deceased of having stepped on a certain woman. PW1 tried to offer apologies on behalf of the deceased at the same time pushing him back but the deceased moved towards the other person intending to head-butt him. The person however drew a knife and stabbed the deceased once on the left side of his neck. The deceased ran towards PW1 crying that he was dying. PW1 moved him to a lighted place for first aid but he collapsed and died. A postmortem report conducted by *Dr. Michael Peter Mwita* (PW9) revealed that the sharp object that pierced the left side of the deceased's neck had severed the carotid artery thus resulting in massive haemorrhage which was the cause of death. According to the evidence-in-chief recorded from PW1, the person who was quarrelling with the deceased, and the person who produced a one-foot knife and stabbed him, was the appellant. PW1 had seen him once before in his life and the stabbing took place in an area where there was light but not very bright light.

PW1 was the only person who was well-placed to link the appellant with the offence and he did not say he was present at the scene with anyone else. His evidence that he was able to identify the appellant however crumbles when he states as follows in cross-examination: -

"The incident was on 20th night – 2.30 a.m. I recorded my statement to the police where I stated that I did not know the accused. I also stated that I did not see the suspect clearly. I also stated that I would not be able to identify him. The suspect was in long trousers and a yellow jersy. I informed the police that I would only be in position to identify the suspect if dressed in the manner he was dressed during the incident. This was my second time to see the accused. My position is that I did not see the suspect clearly. I can only identify the suspect if dressed in the same shirt and trousers as that night. There was only dim light where the incident occurred that is why I had to move the deceased to where there was light. The suspect aimed the knife at me but I dodged and stabbed the deceased. I do not know the woman is alleged the deceased stepped on. I cannot recognize her even today. I did not see her clearly because there was no sufficient light. I do not know if she had any relationship with the deceased. I do not know who took the knife to the police."

Charo Kazungu Mwaro (PW2) who was a nephew to the deceased and PW1, attempted to support PW1 by asserting that he, Mwaro, was present at the scene and stood very close to the appellant as he quarreled with the deceased when he identified him through bright light provided by a power generator. But he never saw the stabbing or the knife used. He said in part: -

"I was able to see the accused clearly as I came close to him as he was arguing with the deceased. There was a power generator and I was able to see him with the light from the generator. I was not there when the deceased was stabbed. There were many people at the party. It is true that the light was not sufficient enough to enable one to see the details of the incident. If the deceased was moved from the scene, it was not because there was no sufficient light. I have stated in my statement to the police that when I returned I found the deceased had been moved to a place where there was light. I do not know the person who was arguing with the deceased. I did not see him after the incident. I did not see knife.

On proper consideration of the two versions presented by PW1 and PW2 there was no consistency and therefore no proper basis for a finding that the appellant was identified beyond reasonable doubt.

The other recorded evidence from six other witnesses takes the case no further. PW5 and PW6 merely identified the deceased's body for postmortem. PW7, *Pc Nyongesa* of Makupa Police station merely rearrested the appellant who was brought to the station by one *James Mkutano*, a member of the public who was not called as a witness. *APC Noel Kalume* (PW4) from the D.O's office was given a knife when he visited the scene the same morning but could not tell where the knife came from or who gave him. Lastly there was the investigating officer *Pc Kea Rashid* (PW8) who merely visited the scene and drew a sketch map and took the deceased's body to the mortuary. He was also given the knife by PW4 but did nothing more about it. He stated: -

"I cannot confirm that the scene had been interfered with. The knife had been collected from the scene. I did not get to know who collected the knife. I did not try to connect the knife with the murder of the deceased. I did not see blood stains on the knife. The knife was not taken for analysis. I only collected the body from the scene."

No attempt was made by the investigating officer to follow up the description of the assailant which was given by PW1. When he was taken to the police station by a member of the public, and before the court, the appellant said he was a student at Kisauni Polytechnic and he comes from a polygamous household of 10 boys and 15 girls. Four of the boys carry similar names and he could have been mistaken for one of the others. He had been sent by his father on 15th December, 2002 to visit a sick aunt some 40Kms away and only returned home on 21st December, 2002. He never attended any wedding and was not involved in any quarrel with any one. That was essentially an *alibi* which the prosecution did nothing to disprove. The law on *alibi* defence is clear and we take it from Sekiteleko vs. Uganda [1976] EA 531 where it was held: -

"(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (*R v. Johnson*, [1961] 3 All E.R. 969 applied; *Leonard Aniseth v. Republic* [1963] E.A 206 followed);

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;"

The alibi raised by the appellant was a specific defence but it was ignored and therefore remains totally unchallenged.

We have said enough, we think, to justify the view we take in this matter that the material that was placed before the court is insufficient to lead to the conviction of the appellant even if we ordered a retrial. We have not been made aware of any other potentially admissible evidence that would change the equation. In the result we are not inclined to order a retrial in the matter.

In all the circumstances we quash the conviction of the appellant for the offence of murder and set

aside the sentence of death imposed on him. We further order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

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

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR