REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 240 of 2006

MAURICE OTIENO OGOLA ……. APPELLANT

AND

REPUBLIC ……..……..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Tanui J.) dated 15th March 2006

in

H.C.CR.C. NO. 40 OF 2004)

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JUDGEMENT OF THE COURT

The appellant in this appeal **Maurice Otieno Ogola** was arraigned before the superior court on an information dated 27th May 2004, in which he was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence are that on 29th April 2004 at Bar Chando sublocation in Bondo District within Nyanza Province, he murdered Linet Auma. He pleaded not guilty to that charge, but after the full trial with the aid of assessors in which eight prosecution witnesses were called and the appellant also gave a statement in his defence, the appellant was found guilty as charged, convicted and sentenced to death as provided under the law.

He felt dissatisfied with that conviction and sentence and has come to this court on appeal. In what he calls Notice of Appeal lodged at the Kisumu Sub-Registry of this court on 28th March 2006 he raises matters that we do not consider relevant. However, later a counsel was assigned to him by the Court and that learned counsel, Gilbert Obure Oguso, filed a Supplementary Memorandum of Appeal dated 14th March 2006. From what will be apparent later in this judgment, it is unnecessary to consider the four grounds raised in that Supplementary Grounds of Appeal.

As we have stated, the trial before the superior court proceeded with the aid of assessors. The procedure as regards the trial with the aid of assessors is provided in **sections 262** and **263** of the Criminal Procedure Code. These provisions are 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"

These are followed by other provisions on selection and attendance of such assessors**. Section 298** of the code, states:

"**298.(1) If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is for 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.**

(2) If two or more of the assessors are prevented from attending; or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors:"

In this appeal, the record shows that on 10th June 2004, the information was read and explained to the accused person in Luo language and he pleaded not guilty to the charge contained in the information. The hearing was fixed to proceed on 25th and 26th October 2004. On 25th October 2004 six people appeared for selection as assessors and three were selected as assessors to help the learned Judge in hearing the case. These were **Dominic Waga**, **Gilbert Osodo** and **Martin Oindo**. After selection of the assessors the hearing was adjourned and resumed on 26th October 2004 with all the three assessors present. After hearing four witnesses, the prosecution applied for adjournment and the hearing was adjourned to 1st December 2004 for further hearing. It was not heard on that date and was adjourned to 9th February 2005 when again it was not heard. Eventually on 24th February 2005 the hearing resumed and on that day, only one witness was heard. All assessors were present. The case again proceeded to hearing on 27th April 2005 when one witness was heard. All the assessors were present, it was adjourned to 29th June 2005. On that day all assessors were present and the prosecution closed its case after the last two prosecution witnesses were heard. The learned Judge made a ruling pursuant to **section 306(2)** that a prima facie case had been made out against the appellant to warrant him to answer by way of a defence. The hearing was thereafter adjourned on two other occasions and resumed on 29th September 2005. On that date the record shows as follows:

"**29.9.2005**

Coram:Tanui Judge

Mutai for State

Adiso for accused

Accused person present

cc Raymond

All Assessors

Adiso: The accused will give unsworn statement and will not call any witness.

COURT: It is clear that there are only 2 assessors present.

ORDER: Let the case proceed with assistance of 2 assessors."

Thereafter, the appellant gave evidence and closed his defence and the hearing was adjourned. Further hearing again resumed on 14th March 2005.

On that day the record reads that all assessors were present, learned state counsel and learned counsel for the appellant made their submissions. All assessors were also recorded as present on the date the learned Judge summed up the case for them. That was on 2nd March 2006. On that date, after summing up, the learned Judge recorded the opinion of each of the three assessors including the one assessor who was absent when the appellant gave his evidence in defence of the case against him. The record reads:

COURT: Case summed up (sic) to the assessors who advised the court as follows:

1st Assessor – The accused is not guilty. The place was a den of changaa it was not easy to identify the accused. There was no person who saw accused stab the deceased. Weapon was produced.

2nd Assessor – The accused is not guilty

3rd Assessor- The law does not allow hearsay. The accused was never seen by the principle(sic) witness."

Thereafter the learned Judge delivered judgment on 15th March 2006. In that judgment, he found the appellant guilty of the offence and convicted him. He thus disagreed with the unanimous opinion of the assessors, but he did not give any reason for doing so much as in law he was entitled to come to a different conclusion from the opinion of the assessors.

It will be clear from what we have stated above and the parts of the record we have reproduced above that one assessor was absent for part of the case and that was an important part of the case namely the part when appellant gave his defence. That assessor, having been absent, was nonetheless later admitted back and participated in the hearing and summing up and gave his opinion on the entire case.

In the case of **Dickson Mwaniki M'obici and another vs. Republic** Criminal Appeal No.78 of 2006, (ur) this court stated the law as follows:

"**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 appellant was 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 appellant 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 vs. R. (1954) 21 EACA 304 and held:**

"***(1) 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 "for 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 Ngonchi vs. 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 vs. R**. (1954) 21 EACA 260 and **Bwenge vs. Uganda (1999) 1 EA 25"**

The position in this case is the same. One assessor who never heard the defence of the appellant was allowed to give his opinion on the entire case. That rendered the trial a nullity. Further, as we have stated the record shows that the learned Judge in taking a different line in his judgment from that of the assessors he did not give any reasons for his departure from their opinion. In the case of **Dickson**

Mwaniki M'obici and another vs. Republic (supra), this court stated further as follows:

"**Even if the trial was completed with the three assessors as by law provided, which it was not, it still opened itself to the valid criticism made by Mr. Kiage that the assessors were sidelined. What they had to say was as important as what the court ultimately decided even if it was not binding on it. The failure to give reasons for departure from the opinion expressed by the assessors is another vitiating factor in the trial."**

Thus there were two vitiating factors in the trial that went on before the superior court which trial is the subject matter of this appeal.

What then is the consequence of such transgressions of the procedure? Mr. Musau, the learned Principal State Counsel pleads for a retrial. Mr. Oguso, the learned counsel for the appellant agrees with Mr. Musau. We have agonized over whether or not to order a retrial in this matter. In the case of **Muiruri vs. Republic** (2003) KLR 552, the court considered a similar situation and held as follows, *inter alia*:

"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

In this case the appellant was arrested on 29th April 2004. He has been in custody for slightly under three years part of which was taken up in his trial. The record shows that human life was lost and there is need to bring whoever was responsible to book. In our view the record shows a case worth pursuing to its finality. The appellant's counsel has no objection to a retrial. In all the circumstances of this case, an order for retrial would reflect justice to all concerned.

The appeal is allowed, the conviction and the sentence set aside. The case is referred back to the superior court for a retrial before a Judge other than Tanui J. The appellant shall remain in custody for purposes of retrial. Orders accordingly.

Dated and delivered at Kisumu this 23rd day of March, 2007.

S.E.O. BOSIRE

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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