COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 157 OF 2006

ANN WANGECI KIMANI ……..……..…….. APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J) dated 31st March, 2006 In H.C. Cr. Case No. 18 of 2005)

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JUDGMENT OF THE COURT

The appellant herein, **Ann Wangeci Kimani**, was tried before the superior court (Khamoni, J) sitting with assessors on an information charging her with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence contained in the information were that on 18th day of March 2005 at Kagati village in Nyeri District within Central Province the appellant murdered GRACE NYAMWIRA MUREFU.

On 19th July, 2005 the case was fixed for plea on 25th July, 2005 and the appellant was remanded in custody.

On 25th July the appellant stated that she was arrested on 18th March, 2005. The plea was deferred at the request of Mr. Orinda, learned Principal State Counsel, to 27th July, 2005 and the appellant was again remanded in custody.

On 27th July, 2005 a plea of not guilty was entered after the charge had been read and explained to the appellant who responded "*it is not true*".

After several mentions, on 7th March 2006 Khamoni, J presided in the presence of Mr. Orinda for the Republic, and Mr. Macharia, learned counsel for the appellant. Assessors were selected being Jane Wambui Muriithi, Joyce Njeri Wangari and Nancy Njoki Ihuthia.

Eleven witnesses gave evidence for the prosecution which evidence was accurately summarized in the judgment of Khamoni, J. dated 31st March, 2006.

When put to her defence, the appellant elected to give an unsworn statement in which she stated:-

"**I am not concerned with all that has been said in this court. I therefore ask this court I am no (sic) agreeable to the evidence so far adduced. It is hearsay. I ask the court to acquit me, so that I can go and look after my children.**

That is all. I have no witness to call."

The record then shows:

"**<u>Assessors' Decision</u>**

Joyce Njeri Wangari

The Accused is guilty, and this is unanimous as we are convinced from the evidence adduced that nobody else could have killed the child who was at her home.

Jane Wambui Muriithi

I confirm that is the position.

Nancy Njoki Ihutha

We all do agree."

It is to be observed here that there was no summing up to the assessors by the learned Judge before the assessors were asked for their opinion.

The learned Judge, after hearing Mr. Macharia in mitigation to the effect that the appellant was assessed to be 23 years and may be 25 years with two children, completed the proceedings in the superior court by pronouncing:

"**<u>SENTENCE</u>**

The Accused person has been convicted. Being treated as a first offender. I take into account what has been said in mitigation.

At the same time I note that the offence she committed is very serious and the court should not undermine it. The law provides only one sentence and that is what I will follow.

Accordingly, the Accused is hereby sentenced to suffer death in accordance with the law. Right of appeal within 14 days."

The appellant felt aggrieved by the decision of the superior court and filed this appeal which is premised on the following eight grounds of appeal:

"**1. That I pleaded not guilty to the charge.**

2. Your honour, PW 3 who is my brother in-law attempted to rape my 4 year old daughter, when I reported the matter to his father, his father told me to stop nonsence. I sent my neighbour elderly man Simon Gaturuku to my father-in-law and we settled the matter. When I told my husband about the matter he asked his father about it, my father in-law threatened us telling us that he will throw us out of his home if we try to tell the police. Thus even my father in-law hated me.

3. Your Lordship it is not possible for me to murder the child and throw her in my own farm and the witness said that the child was without her inner clothes.

4. Your honour I was not prepared for defence as I was not feeling well but the court proceeded on convicting me without my defence.

5. That the High Court Judge found murder charge as established but failed to observe that

essential element (sic) constituting the offence weren't established to the required standard.

6. That the High Court Judge found the charge as established but failed in observing that intent wasn't established to the standard required.

7. That I request for the proceedings and I wish to be present during the hearing.

8. Your Honour I had a grudge with my mother-in-law and she hated me, she might have organised anything behind my back to hurt me."

When the appeal came before this Court, the main point raised by the appellant's learned counsel, Mr. J. Macharia, was that the learned trial Judge erred in failing to sum up the case to the assessors before the assessors made their finding. Mr. Macharia relied on a recent decision of this Court in the case of **Eliud Njeru Nyaga vs. Republic - Criminal Appeal No. 182 of 2006 (unreported)**.

The relevant passage in that decision was as follows:

"***The Learned Judge erred in law in failing to sum-up the case for the assessors and thus failed to direct them as to what constitutes murder."***

We said at the beginning of this judgment that the learned Judge tried the case with the aid of assessors. The trial before the learned Judge began on 28th March, 2006 and was concluded on the same day, the learned Judge and the assessors having heard a total of twelve prosecution witnesses and the unsworn statement of the appellant. Neither the prosecuting counsel nor the defence lawyer made any submissions before the learned Judge, either at the close of the hearing or at the close of the prosecution case. At the close of the defence case, the learned Judge said:-

"***Court – when evidence is still fresh in the minds of the assessors who are ready to give their opinions."***

The assessors then proceeded to give their opinion each finding the appellant guilty of murder as charged.

We think that on this aspect of the matter, M/s Mwai is undoubtedly right when she contends that the purpose of a summing-up by a trial judge to the assessors is not merely to remind or refresh the memory of the assessors as to what the evidence in the case is. That is only part of the summing-up. Assessors are chosen because they are lay-people, unschooled on the various principles of law. Assessors do not know the meaning of murder as understood by lawyers. They do not know the meaning of manslaughter, insanity, provocation, self defence and such like principles. They do not know of the standard of proof, the burden of proof and on whom that burden lies. It is the duty of a trial judge to explain to the assessors these principles where they or any of them is applicable. True, *section 322(1)* of the Criminal Procedure Code, *Chapter 75* Laws of Kenya, only requires that the judge "*may*" sum-up the case to the assessors. But if the judge chooses not to sum-up the case to the assessors, how are the assessors to know what constitutes malice aforethought which is the basic element in a charge of murder? How are lay assessors to know that in the absence of malice aforethought a charge of murder can be reduced to one of manslaughter? How are they to know that where provocation is proved a charge of murder can be reduced to manslaughter? This must be the basis on which this Court has consistently held that even though the word "*may*" is used in *section 322(1)* of the Criminal Procedure Code, the need to sum-up the case for the assessors is a long-standing practice of law, has acquired the force of law and must always be complied with by trial judges. It is no answer to say, as Mr. Orinda told us, that a trial judge is not bound by the opinion of the assessors. If a trial judge is disagreeing with the opinion given by the assessors the judge is required to give the reason or reasons for disagreeing.

In the circumstances of the case, we think the learned trial Judge's failure to sum-up the case to

the assessors rendered the trial fatally defective."

The remaining issue to be decided is whether a retrial should be ordered. The appellant was convicted in March 2006 after a trial commenced in July, 2005 so that it should not be unduly difficult to summon the prosecution witnesses who numbered 17, most of whom were relatives and neighbours of the appellant, police officers or doctors.

For these reasons and the fact that the prosecution was not to blame for what happened, we consider that a retrial should be ordered.

Accordingly, we allow this appeal and set aside the conviction and sentence of death and order that the appellant be tried ***de novo*** before another Judge. Pending the new trial, the appellant shall be held in prison.

These shall be our orders in the appeal.

Dated and delivered at Nyeri this 2nd day of November, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

…….……..……

JUDGE OF APPEAL

W.S. DEVERELL

……...…..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR