



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Criminal Appeal 78 of 2006**

**DICKSON MWANIKI M’OBICI**

**EVANS NDUNGU KURIA .....APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Nairobi (Rawal, J.) dated 20<sup>th</sup> July, 2005**

**in**

**HC.CR.C. NO. 39 & 92 OF 2003)**

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**JUDGMENT OF THE COURT**

This is a first and last appeal by the two appellants herein against their conviction by the superior court (Rawal, J.) for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Upon their conviction they were sentenced to death as by law provided. Although both appellants raise no less than 23 grounds of appeal between them, the central issue relates to criminal trials with the assistance of Assessors.

**Sections 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.”**

Once the trial is concluded on both sides and the Judge has summed up the evidence for the assessors, the law requires, again in mandatory tone, that the Judge shall require each of the assessors to state his opinion orally which shall be recorded. The opinions are not binding however, and the court may subsequently deliver its judgment on the basis of its own assessment of the facts on record and the law. (see **section 322** of the **Criminal Procedure Code**.) In the event that the opinions of the assessors are at variance with the court's judgment, this Court has stated that a judge who disagrees with the unanimous opinion of the assessors should explain sufficiently his reasons for so disagreeing. See **Kihara v R [1986] KLR 473**. In **Kinuthia v R** (supra) the Court held: -

**“In a case involving controversial evidence which might be decided either way, it would be a strong action to overrule the unanimous opinion of the assessors on some points. It is therefore fundamental that a court gives its reason for disagreeing with the assessors.”**

What transpired in the case before us?

On Christmas day, the 25<sup>th</sup> December, 2003, **Daniel Kimani Ngugi** (hereinafter “the deceased”) was drinking beer at Sports Bar & Grill (hereinafter “the bar”) at Banana trading centre in Kiambu. The trading centre is also known as Karuri and is within walking distance of Karuri Police Station and Karuri Health Centre. The bar was owned by the second appellant, **Evans Ndungu Kuria (Evans)** who had employed, amongst others, the first appellant, **Dickson Mwaniki M’Obici (Mwaniki)** as his watchman at the vehicle parking area outside the bar. To access the bar one has to climb a staircase of 20 steps and there is a wall between the bar and the corridor where the staircase is situate. The toilets serving the bar were situated outside the bar.

The deceased arrived at the bar at about 8.30 p.m in the company of his friend, **Peter Ndungu Mumbi (PW3) (Ndungu)**. There, they found another friend, **Peter Karanja Kuria (PW2) (Karanja)**. **Karanja** was a 20-year old unemployed living with his parents in Banana and it was his first time to visit that bar. He had no appointment to meet the deceased and Ndungu there and did not know where they had come from, but they drank together at one table. **Ndungu**, a former mason, was a 23-year old seller of second-hand clothes at Banana trading centre. Many patrons were also drinking in the bar that evening and it was admittedly busy.

According to **Karanja** and **Ndungu** they had been drinking for about one hour when the deceased rose to go to the toilets outside the bar. Shortly after, they heard screams or shouts outside but could not see what was happening since there was an obstructing wall. They went outside the bar as did a group of other bar patrons. There, on the corridor they saw the watchman, **Mwaniki**, holding the deceased. Before **Karanja** and **Ndungu** could move nearer to find out what was happening, the bar owner, **Evans** came along wielding an object described by Karanja thus:

**“It was like a pipe. It was about 2 meters. It was about 2” inches in width. It did not have any colour”**

**Ndungu** for his part described it thus: -

**“It was an iron bar. It was a black iron bar. It was about 2 inches in width. It was a kind of a pipe”.**

With this object, and without uttering any word, **Evans** struck the deceased once “*at the back of the neck*” and **Mwaniki** then threw the deceased down the staircase. The deceased rolled to the bottom of the staircase. **Karanja** and **Ndungu**, as well as some other patrons followed him there and assisted him to his feet. The deceased was still talking but he could not walk. They looked for a taxi to take him to Karuri health centre where they were advised to report the matter to Karuri police station. In their reckoning, they reported to the police between 10.30 to 11 p.m. that evening but the officer who recorded the Occurance Book (OB) testified that the deceased, in the company of **Ndungu** made the report at 2 a.m. on 26<sup>th</sup> December, 2003. The officer was **PC Francis Njuguna (PW7)**. He went to the vehicle where the deceased was and recorded his statement. Nothing was said by the deceased or anyone else about the

person who assaulted the deceased. The officer however noticed that the deceased had a swollen face. When the statement was being recorded, **Karanja** had gone for a short-call and did not know what the deceased had told the police. After that they returned to the Health Centre where the deceased was treated and discharged. They took him home and **Karanja** spent that night at the deceased's home and left in the morning. Later that day the deceased died in his sleep and a report was made to **IP Michael Misati** (PW8) at Karuri police station. **IP Misati** saw a bruise on the deceased's face and an injury on the head. In a postmortem examination carried out by **Jane Wasike Simiyu** (PW6) at the city Mortuary on 6<sup>th</sup> January, 2003, she found a depressed skull fracture on the occipital bone and formed the opinion that the cause of death was as a result of a head injury due to a blunt object. The injury, she also concluded, could occur as a result of a fall on the ground.

Apart from the above witnesses, the prosecution also called **Nancy Wambui Njagi** (PW4) (Nancy) as an eye-witness. She remained a prosecution witness throughout and was never declared hostile. Her evidence however was materially divergent from the version narrated by **Karanja** and **Ndungu**, the only other two witnesses offered as eye witnesses to the incident. **Nancy** was the barmaid who reported for work at 1 p.m. that Christmas day and went home the following morning at 1 a.m. She remembered serving the deceased and his two friends, **Karanja** and **Ndungu** with drinks from 9 p.m. that evening until 11 p.m. when the deceased left to go outside. As the deceased was walking down the stairs he slipped and fell down the stairs. His two friends then went out and were joined by other bar patrons including the watchman, **Mwaniki** who was outside in the parking area, in assisting to lift up the deceased. Once he was on his feet, the deceased said he was not injured. The three then left since the deceased wanted to be taken home. He was drunk as far as **Nancy** could see even before he entered the bar where he drunk four more beers. He was unsteady in his walk, she said. **Karanja** and **Ndungu** only joined him after he had fallen down the stairs. According to Nancy, her employer, **Evans**, was nowhere near the area and she only saw him at the bar on 2<sup>nd</sup> January, 2004.

For their part, both **Mwaniki** and **Evans** denied the offence. **Mwaniki** insisted that he was guarding vehicles and directing others to park outside the bar on the day in question. He recalled hearing some noises and seeing a group of people standing outside and when he went close to ask them whether there was a problem they said no and they went home. He never entered the bar area and if **Karanja** and **Ndungu** say they saw him, they must have mistaken him for someone else. He was positive that his employer, **Evans**, was not in the bar that day. On 26<sup>th</sup> December, 2003, **Mwaniki** was arrested by police but according to him no reasons were given to him. Later he was charged with the offence of murder.

**Evans** was a businessman operating matatus and running the Sports bar and Grill. On 25<sup>th</sup> December, 2003 he was hired by some students from Mahanishi Institute to take them to Narok and he picked them up at 1 p.m. He had passed through the bar at 11 a.m. to inform the employee in-charge of sales, one **Winny**, about the trip and that he would be away for seven days. They arrived in Narok at 4 p.m. and did not return until 2<sup>nd</sup> January 2004. He produced at least one receipt issued by a guest-house in Narok on 25<sup>th</sup> December, 2003. Upon his return to Karuri, he was informed that his watchman, **Mwaniki**, had been arrested by police and he went to the station to find out why. He met the OCS who asked him where he was on Christmas night and **Evans** produced the guest-house receipt to show that he was in Narok. He was informed that there were allegations that he had committed an assault but he was not arrested. He returned to his business. For the next six months, no one sought to arrest him until 6<sup>th</sup> June, 2004 when **PC George Murekalsu** arrested him at 12 noon and his statement was recorded. He knew **Karanja** whom he had employed as a driver in his matatu business but he had dismissed him for reckless driving. He had rejected **Karanja's** pleas for re-employment.

The two appellants first appeared in court for their trial on 10<sup>th</sup> March, 2004 but the trial commenced on 10<sup>th</sup> February, 2005 after several mentions. Three assessors were properly appointed and they participated fully in the trial until the last of the eight witnesses called by the prosecution testified on 19<sup>th</sup> April, 2005. After the close of the prosecution case, it was incumbent on the trial court to comply with **section 306** of the **Criminal Procedure Code**. **Section 306 (2)** in particular provides as follows: -

**“(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it**

**considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally, or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”**

There is no indication in the record that those provisions were complied with. Instead an order was simply made that the hearing of the defence would commence on 27<sup>th</sup> April, 005 at 2.30 p.m. On that day, only two assessors were present. The third assessor was recorded as absent but no reason was given for his absence and no order was made that his presence would be dispensed with or the reasons therefor. **Mwaniki** testified on oath and was cross-examined fully in the absence of that assessor. **Evans** also testified on oath and was not cross-examined at all on his evidence. Submissions by the appellant’s counsel and state counsel were made the following day before the same assessors and a date was set for summing up the entire evidence. On that day, 15<sup>th</sup> June, 2005, the third assessor re-appeared and joined the other two when the summing up was concluded. All three were given one week to consider the case and return their opinions which they did on 21<sup>st</sup> June, 2005. It was a unanimous opinion of “*not guilty*” but the trial Judge was not sure that the opinion related to one or both appellants. She gave the three assessors further time to reconsider the matter and on 6<sup>th</sup> July, 2005 the three assessors once again returned a unanimous opinion that the two appellants were not guilty of the offence as charged. Surprisingly however, the judgment delivered on 25<sup>th</sup> July, 2005 made no mention at all about the anomaly relating to the third assessor or the unanimous opinion returned in the matter which differed with that of the Court.

It is for the above reasons that learned counsel for the appellants Mr. Kiage, vehemently submitted that the entire trial was vitiated particularly when the prosecution evidence was conflicting and the assessors had believed the evidence of the appellants. It was necessary in those circumstances that the trial Judge should give reasons for disagreeing with the assessors’ opinions, instead of simply disregarding them and saying nothing about their role in the trial. With respect, we agree with those submissions.

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.

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 opinions expressed by the assessors is another vitiating factor in the trial. What then is the consequence of such transgressions in procedure?

Ordinarily a retrial would be the appropriate order to make since such fundamental irregularities would result in a miscarriage of justice which is not curable under **section 382** of the **Criminal Procedure Code**. The appellants did not have a satisfactory trial. This Court has however stated before, that 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 – see **Mwangi v R. [1983] KLR 522**.

As stated above, the eye-witnesses presented by the prosecution in this matter were **Karanja, Ndungu** and **Nancy**. Far from being consistent however, the evidence of **Karanja** and **Ndungu** on the one hand, and that of **Nancy** on the other, is in sharp contrast one with the other. The superior court however chose to believe the version of **Karanja** and **Ndungu** and dismissed that of **Nancy** as “*uncreditworthy and untruthful*”. With respect, we do not think the learned Judge was entitled to make that choice. The prosecution, which has the sole burden of proving the case beyond reasonable doubt presented the three as truthful witnesses of fact. They were not expert witnesses of opinion where a court has the option, for good reasons, to believe or not to believe one version of the expert evidence. None of the witnesses of fact in this case were declared hostile by the prosecution. They all swore to tell the truth and it was not suggested by the prosecution that **Nancy** had perjured herself in her testimony. The least that the court could surmise from those circumstances is that the contradictory evidence of **Nancy** and the two other witnesses raised considerable doubts on the events of that fateful Christmas day. In our view they were reasonable doubts because, if Nancy was believed, it would follow that the deceased sustained his injuries when, in a drunken state, he stumbled down a flight of stairs. The injuries were consistent with the cause of death documented by the pathologist **Jane Simiyu** (PW6). It would also be consistent with other prosecution evidence that the deceased had an injury on the face which was noted by **PC Njuguna** (PW7) and **IP Musati** (PW8). Neither **Karanja** nor **Ndungu** mentioned any injury on the deceased’s face. Furthermore Nancy’s evidence gave credence to the alibi defence put forward by Evans that he was in Narok when the incident occurred. The police had all the time to investigate the alibi defence and to discount it but they did not. They even took six months to arrest and lay charges against him. Evidence given on oath by Evans on that alibi was not even challenged through cross-examination. The learned Judge however derided the evidence on the ground that there was only one receipt of his whereabouts which was produced. As correctly submitted by Mr. Kiage, there was no burden placed on the 2<sup>nd</sup> appellant to prove his alibi as desired by the learned Judge. That was made clear in **Sekitoleko v Uganda [1967] EA 531** which has been applied before by this Court. The Chief Justice Sir Udo Udoma in that case 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;”**

Learned Principal State Counsel Mrs. Murungi was alive to the shortcomings noted above in the entire trial and, quite properly in our view, conceded the appeal. She however sought a retrial but we think it would be futile to make such an order. We earlier restated the circumstances in which an order for retrial may be made. We have carefully considered the evidence on record and in our assessment, it is unlikely to lead to a conviction for the offence as charged even if a retrial was held. We have not been made aware of any other potentially admissible evidence that may be adduced in the retrial. Finally the alleged offence was committed some three years ago and the appellants have been in custody since then. It is unlikely that they will receive a speedy trial as envisaged under **section 77** of the Constitution. In all the circumstances of this case, we decline to make an order for retrial. The upshot is that the appellants’ appeal is allowed, the convictions are quashed and the appellants are set at liberty forthwith unless they are otherwise lawfully held.

*Dated and delivered at Nairobi this 13th day of October, 2006.*

**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**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**