



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kwach, Githinji & Waki JJ A)

CRIMINAL APPEAL NO 84 OF 2003

MUIRURIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court

at Mombasa, Hayanga J, dated 23rd October 2001 in

High Court Criminal Case No 1 of 1990)

JUDGMENT

Until such time as Parliament in its wisdom reviews the manner of trials in murder cases, the practice and procedure in such trials shall remain and be regulated under Part IX of the Criminal Procedure Code cap 75, Laws of Kenya. Sections 262 and 263 on the “Mode of Trial” provides:-

“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.”

Then there follows other provisions on selections and attendance of such assessors.

For purposes of the appeal before us, section 298 Criminal Procedure Code is most crucial. It provides:-

“298. (1) If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from 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 proceeding shall be stayed and a new trial shall be held with the aid of fresh assessors.”

Why was it necessary to recite these provisions? On the night of 23rd day of December 1988 at Timboni Area Mombasa, one Zamda Yusufu was killed in her house. Hours later, Samwel Hunja

Muiruri (hereinafter “the appellant”) was arrested on allegation that he was responsible for the murder. Upon preparation of committal bundles in October 1989, he was arraigned before the High Court sitting

in Mombasa and he pleaded not guilty. The case was set down for hearing on 6th August, 1990 but the appellant was reported to be sick in hospital.

The matter was mentioned severally thereafter until 2nd March 1992 when it was reported that the appellant had somehow eluded his guard at the hospital and escaped. He remained at large until 1993 when he was arrested in Nairobi for another offence. After another four years he was taken before the Superior Court on 15th December, 1997 to face trial for the murder charge. The plea was taken before Hayanga, J on 2nd December, 1998 and three assessors were selected as follows.

1. Omari Kibwana Hamisi
2. Joseph Ngome
3. Salim Khalil

All three assessors were present and participated in the trial when the case was partly heard on 2nd and 3rd December, 1998. When the hearing resumed on 11th November 1999, only two assessors were present and the following record was made:

“Coram:

Before Justice Hayanga

Clerk: Lewa

State counsel: Mrs Mwangi

Mrs Katisya: for accused

Two assessors present: Mr Ngome & Mr Khalil. The third assessor Mr Omari is sick.

Mrs Mwangi: trial can proceed with the assistance of two assessors.

Order: trial to proceed with two assessors present.

AI Hayanga

Judge”

The trial then proceeded on that day and the next day when it was adjourned.

On the resumed hearing on 24th February 2000, only assessor Ngome attended and it was adjourned to 23rd March 2000. This time round, Omari re-appeared but Khalil was absent. Notwithstanding the order made on 11th November, 1999, Omari participated in the resumed hearing in the absence of Khalil. He and Ngome sat on two other hearings until 4th October, 2000 when all three assessors were recorded to be present and the further hearing proceeded. On 8th March 2001 the following record was made:

“Coram:

Before Justice Hayanga

Advocate: Ms Katisya

State counsel: Mrs. Mwangi

Court clerk: Mukabwa

Assessors present: Omari Khamisi (sic)

Josephat (sic) Ngome

Court: There is no order discharging the third assessor

Mr Salim Khalil who should be here also.

Order: The ruling be read on 14th March, 2001 and hearing to proceed thereafter.

Third assessor, Salim

Khalil of the Municipal Council be summoned to appear on that day.”

Two unnamed assessors appeared on that day when the prosecution closed its case.

When the case resumed for submissions and the defence case on 5th April,

2001, only Ngome and Omari were present. But on 16th May 2001, Khalil re-appeared on record and Omari was absent. An order was made to serve him. Submissions were made on 23rd May and 12th June 2001 in the presence of two unnamed assessors. An order was made for “summing up” to the assessors on 8th October 2001. The appeal record however contains no further proceedings until judgment was delivered on 23rd

October 2001.

We nonetheless called for, and looked at the original record but it gives us no solace about the missing record. Although it shows a record of “summing up” to the assessors, it says nothing about the identity of the assessors present or those who gave their opinions before judgment.

That being the state of the record before us, it was not surprising that Mrs Mwangi, learned principal state counsel applied for a retrial. We are in no doubt that there was a mistrial and non-compliance with the mandatory provisions laid out at the beginning of this judgment. Unless there are valid and sufficient reasons advanced and a considered ruling made on record for proceeding with a trial before the High Court with the assistance of two assessors, there must be three assessors as provided under the law.

No reasons were recorded or considered before the order was made on 11th November 1999 to proceed with the trial with the assistance of two assessors. To compound the irregularity the order appears to have been abandoned or forgotten since the three assessors thereafter appeared alternately as and when they desired.

In the result we must and do hereby declare the trial a nullity. The conviction recorded against the appellant is hereby quashed and the sentence of death is set aside.

What agonized our minds was the consequential order sought for retrial. Mr Kithi, learned counsel for the appellant, opposed the order for retrial and called for the appellant’s acquittal, citing the long period elapsed between the appellant’s arrest and the hearing of this appeal which is about 15 years. Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See *Zededkiah Ojuondo Manyala v Republic* (Criminal Appeal No 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the Court’s.

It is indeed so that the appellant in this matter has been in custody for a period of 15 years save for three years or so when he absconded before he was re-arrested. He says, and there is no record to establish

otherwise, that he was not tried or punished for the offence of escaping from lawful custody. An attempt was made to extract his explanations before the

Superior Court but no penalty was imposed on him. We say no more about that incident.

By the time the trial eventually commenced, effluxion of time had already taken its toll and several material witnesses had died. We need not speculate on the physical or mental state of the remaining witnesses, since the conclusion of that trial two years ago. Suffice it to say that there would be no meaningful trial and it would be an act in futility for us to order one after a period of 15 years since the commission of the offence. Accordingly, the order that commends itself to us, and which we now make, is that there will be no retrial. The appellant is set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 8th day of August, 2003

R.O. KWACH

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR