IN THE COURT OF APPEAL

AT NAKURU

(Coram: Chunga CJ, Shah & O'Kubasu JJ A)

CRIMINAL APPEAL NO 97 OF 2000

CHARLES MWANGI MURAYA……..…..APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru

(Lady Justice Ondeyo) dated 8th June, 2000 in HCCC No 43 of 1999)

JUDGMENT

Charles Mwangi Muraya (hereinafter called the appellant), was tried, convicted, and sentenced to the mandatory death penalty by Ondeyo J in the High Court of Kenya at Nakuru on 8th June, 2000.

Consequential upon his conviction and sentence, the appellant filed an appeal in this Court through his advocate Mr Sergon, citing a number of grounds. When the appeal came for hearing before us on 19th February, 2001 at Nakuru, Mr Sergon started by saying that he would argue grounds of appeal numbers 1, 2, 3, and 4 together. However, he wanted to start with ground number 5 which, he said he would argue on its own.

We allowed Mr Sergon to proceed in the manner he indicated and, after completing his submission on the 5th ground, he said that the was abandoning the rest of the grounds of appeal. He asked us, therefore, to allow the appeal on the basis of his submissions on the 5th ground only.

Put briefly, the 5th ground of appeal was to the effect that the learned trial judge erred in disregarding medical evidence as to the mental status of the appellant particularly, by failing to carry out an inquiry into the appellant's mental fitness to stand trial upon receiving the evidence of Dr Victor Ombaka Otieno who gave evidence as PW10 (hereinafter called PW10).

Mr Sergon amplified his submission by referring us to section 162 (1) of the Criminal Procedure Code Cap 75 Laws of Kenya with which, he said the learned trial judge failed to comply. According to him, the requirements of the section are mandatory and failure to comply with them, means that the learned trial judge proceeded with the trial against the appellant who may not have been mentally fit to understand and follow the trial and the proceedings.

We were referred by Mr Sergon to the details of PW10's evidence before the trial judge. This, in a nutshell, is what PW10 said in examination-inchief:-

" He (accused), was said to have auditory hallucination. At the time of examination he could not say what time it was. He had no injuries at the time of examination. I arrived at the conclusion that he needed psychiatrist review before he could stand trial, at the time I was not sure that is why I wanted a second opinion from a psychiatrist."

And in cross-examination, PW10 continued as follows:-

"At the time of examination he (accused), had no hallucinations. He didn't know the time. He had not known the time. He had a psychiatric problem. At the time I examined him, he was not sure, that is why I wanted a second opinion."

And in re-examination, PW 10 is recorded testifying as follows:-

"Because he was disoriented on time and he alleged that he normally hears voices which in medical history we call hallucinations, I concluded that he was not mentally fit, and that is why I referred him to a psychiatrist."

On the basis of the foregoing evidence given by PW10, Mr Sergon submitted that the learned trial judge should have there and then complied with section 162(1) of the Criminal Procedure Code by holding an inquiry as to the appellant's mental fitness to stand trial. Failure to do so, according to Mr Sergon, leaves reasonable doubt as to whether the appellant understood and followed the proceedings against him and Mr Sergon urged us to resolve that doubt in favour of the appellant.

Section 162(1)CPC, is in the following words:-

"When in the course of a trial or committal proceedings, the Court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness."

It will be helpful to set out also the provisions of section 162(2) of the same Code which are as follows:-

"If the Court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case."

The rest of the sub-sections of section 162 of the Criminal Procedure Code set out how the accused is to be dealt with after the Court has complied with sections 162(1)(2) of the same Code.

The republic was represented before us by the Provincial State Counsel Mr Onyango Oriri who did not agree with the submissions of Mr Sergon.

According to Mr Oriri, there was nothing on record to show that the appellant did not understand and follow the proceedings against him. The appellant first appeared before the High Court on 21st July 1999 and his plea was taken subsequently on 5th October, 1999, followed by several mentions in between until the trial eventually commenced on 1st March, 2000. In the whole period nothing, according to Mr Oriri, happened that would have compelled the trial judge to invoke section 162(1) of the Criminal Procedure Code.

When the trial commenced, Mr Oriri submitted that prosecution witnesses were called and gave evidence without any protest or application from the defence for appellant's medical examination. In particular, Mr Oriri pointed out that two extra-judicial statements were tendered in evidence by the prosecution and the appellant, through his counsel, did object to both of them. Two trials within trial were held in both of which the appellant was able to make unsworn statements in his defence, describing lucidly in details, what happened to him at the time the two extra-judicial statements were recorded from him by police

officers. Mr Oriri emphasized that the appellant's conduct and participation in the trials within trial, showed that he fully understood and followed the proceedings against him.

Mr Oriri also pointed out that when the prosecution eventually closed its case, the learned trial judge duly complied with section 306 of the Criminal Procedure Code and placed the appellant on his defence. The appellant understood the options available and elected to make an unsworn statement and called no witnesses. This too, according to Mr Oriri, is indicative of the fact that the appellant fully understood and followed the proceedings against him.

Mr Oriri then referred us to the judgment of the learned trial judge and submitted that she full dealt with the medical evidence given by PW 10 and, also, fully considered section 162(1) CPC. In this connection, Mr Oriri referred us in particular to pages 67 and 68 of the record of appeal wherein the learned trial judge had the following to say:-

"I saw the accused person on 5th October, 1999 when he appeared before Court for plea. He did not appear mentally ill because had he appeared, I would have noted that fact and called for a psychiatrist's report on him. During the trial, the Court held two trials within trial to determine the admissibility of two statements (exhibits 7 and 8). The accused person in each of the trials within trial, made an unsworn statement. He was consistent and his mind was very clear and he was very consistent in what he said in each case. He conducted his defence so consistently and so clearly, both at the trials within trial stage and at the close of the prosecution case that he did not give me the impression of a man who is mentally ill or who was not capable of following the proceedings so as to invoke the provisions of section 162 of the Criminal Procedure Code which provides…"

The learned trial judge then reproduced section 162(1) CPC and, after doing so, she continued to say as follows:-

"A case for inquiry into the status of the soundness or otherwise of the mind of the accused person never arose despite the absence of the report of a psychiatrist. It was the further evidence of the doctor who examined the accused, (PW10) and who is not a psychiatrist himself, that the accused was mentally ill and incapable of standing trial. That finding is not reflected in the P3 in which the doctor entered his findings (exhibit 4). In the P3, he recommended that the accused person be reviewed by a psychiatrist. If a person alleges to a doctor that at times, he experiences auditory hallucinations, that is a pointer that all may not be well with him, but that allegation alone, unless confirmed by a psychiatrist, is not conclusive evidence that, that person is mentally ill. Similarly, the fact that a person is asked to state what time it is and he is unable to say, is not conclusive evidence that, that person is mentally ill, unless there is evidence that perhaps this person has a watch or clock shown to him, knows how to read it, is not blind, but he cannot say what time it is."

Having referred us to the above passages in the judgment of the learned trial judge, Mr Oriri submitted that the learned trial judge was perfectly entitled in law, to reject the medical evidence of PW10 and Mr Oriri referred us to previous decisions of this Court and of this Court's predecessor, to support that proposition.

Medical evidence is expert evidence. Like all other expert evidence, it is opinion evidence. Though, it is to be accorded its due weight and respect, it does not necessarily bind the Court. In appropriate circumstances, the Court has every right, and indeed duty, to disregard medical evidence, or any other expert evidence, if the Court has good reason for doing so. Good reasons, in this respect would include other evidence in Court, or other circumstances of the case which emerge from the whole trial which would satisfy the Court that the expert evidence is not sound. We have no difficulty in accepting the submissions of Mr Oriri that the judge, if she found fit and had good reasons, would have been entitled to reject, as she did, the medical evidence of PW 10. However, we are concerned about a number of issues regarding the manner the learned trial judge dealt with the whole matter. To begin with, we think that the learned trial judge, dealt with the issues at the wrong stage in the trial. She waited and dealt with them, though elaborately, in the judgment which was, actually, the final stage of the trial. That then begs the question as to the right stage when section 162(1) CPC should come into play in appropriate

circumstances.

We have previously, quoted verbatim section 162(1) CPC in this judgment.

The words of the section, to our minds, are clear and unmistakable. They place a duty on the Court, to invoke the section, at the time, in the trial or committal proceedings, when the issue of unsoundness of the accused's mind arises. That is the stage at which, the Court should carry out an inquiry into the issue. We stress the use of the word "shall" in the section which, to our mind, places a mandatory obligation on the Court to carry out the inquiry at the time at which the issue arises in the trial or committal proceedings. We are satisfied that the section does not allow the Court to defer the inquiry until the judgment because, at that stage, it will be too late to carry out an inquiry and, even if the inquiry is carried out, its results would be inconsequential to the trial, should, for example, the accused be found to have been mentally unfit to stand trial.

We are fortified in our view by section 162(2) CPC which we quoted earlier in this judgment. It is obvious, that sub-sections (1) and (2) of section 162 of the CPC, must be taken together. The inquiry is carried out in terms of sub-section (1). If the inquiry indicates that the accused person is capable of making his defence, then the Court adjourns further proceedings and the steps set out in the sub-sections 3, 4 and 5 of section 162 of the CPC are then taken. It is a fundamental requirement in criminal trials that an accused person should understand, follow and fully participate in his trial. Section 162 CPC as a whole, is a safeguard meant to achieve that fundamental requirement. That is the reason why the section makes it mandatory for an inquiry to be done immediately when the issue arises, and if, upon inquiry, there is evidence of unsoundness of mind, further proceedings must be adjourned and further consequences follow to ensure the accused is medically treated and becomes mentally fit to understand, follow and participate in the trial.

In the present appeal there is no doubt that, in her judgment, the learned trial judge, quite elaborately and admirably, dealt with the issue. There is, equally, no doubt, that she rejected it upon the fullest consideration of the evidence of PW10, taken together with the other evidence and circumstances in the case. Nevertheless, in view of what we have stated in the preceding paragraphs, we are satisfied that she dealt with the issue, at the wrong stage and too late in the trial.

We now return to the evidence of PW10. As we stated earlier, PW10 was the doctor who examined the appellant and filled the usual P3 form. We have produced verbatim, parts of the evidence he gave before the learned trial judge.

We, nevertheless, for the sake of clarity, emphasize the following salient aspects of his evidence. In examination-in-chief he said:-

"I arrived at the conclusion that he (accused), needed psychiatrist review before he can stand trial."

In cross-examination he said:-

"He had a psychiatrist problem."

And in re-examination he said:

"I concluded that he was not mentally fit and that is why I referred him to a psychiatrist."

Thus, in his evidence, the doctor was quite emphatic on the accused's mental state. He felt that there was need for a psychiatrist examination and report on the accused's mental state before he could stand trial. It is true, the doctor did not mention all these matters in the P3 form, but, we are of the opinion that what he placed before the Court in his evidence, was enough to satisfy the requirements of section 162(1) CPC. That is the stage at which, in the words of the section, an inquiry should have been carried out. If the learned trial judge did so and rejected it at that stage, her reasoning would not easily be faulted.

We now return to page 68 of the judgment of the learned trial judge to which Mr Oriri referred us. We have already observed that the learned trial judge dealt with and analyzed the evidence of PW10 elaborately and admirably. There are, however, certain passages in what she said which have caused us some concern and on which we must comment. This is what she said on page 68:-

"If a person alleges to a doctor that at times, he experiences auditory hallucinations, that is a pointer that all may not be well with him, but that allegation alone, unless confirmed by a psychiatrist, is not conclusive evidence that, that person is mentally ill. Similarly, the fact that a person is asked to state what time it is and is unable to say, is not conclusive evidence that the person is mentally ill….."(underlinings are ours).

The first thing to point out is that, in the passage quoted, the learned trial judge appears to put the standard too high. There was no requirement for conclusive proof that the appellant was mentally ill. Even in cases where an accused person raises the defence of insanity, either under section 12 or under section 13 of the Penal Code Cap 63 Laws of Kenya, although the onus of proof is on the accused, the standard of proof required is never so high as to reach conclusive proof. It is a proof on balance of probabilities.

Here, the issue raised was not one of defence of insanity at the time of the commission of the offence, either under section 12 or under section 13 of the Penal Code Cap 63 Laws of Kenya. The issue raised was that the learned trial judge erred in failing to hold an inquiry under section 162(1) CPC, on the appellant's mental fitness to stand trial. The section does not require a standard of proof so high as the learned trial judge had put it in her otherwise admirable judgment. What is required under the section is merely that there should be some reason before the Court to make the Court believe or merely suspect that an accused person is of unsound mind and consequently incapable of making his defence. Some evidence, or conduct exhibited by the accused during the trial, should be enough to make the Court invoke section 162(1) CPC and order inquiry as to accused's mental fitness.

We are satisfied, for the reasons stated in the preceding paragraph that what the learned trial judge said about conclusive proof, in the peculiar circumstances of this case, amounts to misdirection. No such standard or proof was required.

For the reasons we have given in this judgment, we arrive at the conclusion, that the conviction is unsafe and cannot stand. Although the appellant gave evidence in the two trials within trial and upon being placed on his defence, all these stages were reached after PW10's evidence on the appellant's mental status. An important opportunity had been lost to invoke section 162(1) CPC and to ensure that appellant's mental fitness and safety of his trial.

There is one other matter which, though not raised in the submissions of both sides, has caused us concern in the conduct of the trial. After placing the appellant on his defence and after taking his unsworn statement, the learned trial judge adjourned further hearing to 5th April, 2000 for submissions. Up to this stage, the trial had been with the aid of three assessors as required by section 263 of the Criminal Procedure Code which is in the following terms:-

"when the trial is to be held with the aid of assessors, the number of assessors shall be three."

On 5th April, 2000, the Court convened for submissions to be made by counsel for both sides. The record shows that the first assessor one Joseph Makangu was absent. The learned trial judge then made the following order:

"One assessor Joseph Makangu is absent. He is excluded from the rest of the proceedings. We shall continue with two assessors. Submissions to proceed."

Submissions duly proceeded, followed by summing up to the assessors, recording of the opinions of the assessors, and, eventually, judgment on 8th June, 2000.

Thus, although the trial, initially, quite properly, started with three assessors as required by law, from the 5th of April 2000, one assessor was absent, and the trial then continued to conclusion with two assessors only.

In Kenya, all trials before the High Court shall be with the aid of assessors as declared by section 262 CPC. And, section 263 of the same Code, which we quoted earlier in this judgment, says that where the trial is to be with the aid of assessors, the number of assessors shall be three.

We pause to emphasize that both sections 262 and 263 CPC, use the word

"SHALL". This, to our minds, means that all trials before the High Court, must be with the aid of assessors and the number of assessors must be three. Where the word "shall" is used in a statute, it is settled that it has a mandatory meaning. Without satisfying these requirements about assessors, the High Court would not properly be constituted or competent

for purposes of a trial before it.

Nevertheless, section 263 CPC, which prescribes the mandatory number of assessors in a trial in the High Court, is qualified by section 298(1) of the same Code which is in the following terms:-

"If, in the course of a trial with the aid of assessors, at anytime 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."

Thus, the trial, once started with three assessors as mandatorily required by section 263 CPC, can only proceed with two assessors in the circumstances envisaged by section 298 (1) of the same Code. The said sub-section mandates that if one of the assessors is prevented from attending the trial, the Court may proceed with the trial if it is not practicable immediately to enforce his attendance. Unless this condition is satisfied, the section does not come into operation and a trial having started with three assessors, cannot proceed with two assessors.

In the case of *Rex vs Romani Bin Mwakiponya* (1937) 4 EACA 62, a near similar situation had arisen. A murder trial in the High Court had started before a judge with the required number of assessors. Subsequently, one assessor absented himself during the course of the trial and his place was taken by another person. The trial then proceeded and there was a conviction. On appeal it was held**60**

"That the trial was a nullity. An assessor once chosen continues to be an assessor until he has been released from attendance by the judge."

Discussing the matter further, the Court of Appeal for East Africa, said as follows:-

"It was held, following the minority judgment of Davis

J, in *King Emperor vs Tirumal Reddy and others* that the Court ceased to be a Court of competent jurisdiction because, there had been no continous sitting of the same assessors and therefore the trial was a nullity. In the light of that decision, it would seem that because of the substitution of another person, for an original assessor, during the course of a trial, the Court ceased to be a Court of competent jurisdiction whether the substitution was known or unknown to the trial judge."

The *Romani* case dealt largely with substitution of one assessor by another person. That is not exactly what happened in the appeal before us. Nevertheless, one point which comes out clearly is the emphasis that once a trial starts with the required number of assessors, it should continue with those assessors to the end, otherwise, the Court ceases to be a Court of competent jurisdiction and the trial is rendered a nullity.

In the case of *Muthemba s/o Ngombe v Reginum* (1954) 21 EACA 234, a situation arose which was exactly the same as what happened in the appeal before us. In a murder trial before the High Court, three

assessors were selected and the trial opened accordingly on the first day. On the second day of the trial, one of the three assessors absented himself. The trial judge observed the absence of the assessor, and recorded that the trial would proceed with the other two assessors. In doing so, the trial judge relied on section 294 (1) CPC which was equivalent to our present day section 298 (1) CPC.

At the end of the trial, the assessors and the trial judge found the accused guilty of murder as charged. Against that, the accused appealed to the East African Court of Appeal. This is what the Court held in a judgment which was delivered on 15th March, 1954:-

(1) "Criminal Procedure Code section 294(1), casts on the trial court, a duty of inquiring as to the whereabouts of an absent assessor. If he is not found in the precincts of the Court and his exact whereabouts are not known, the Court cannot immediately enforce his attendance and the trial may proceed.

(2) Failure to comply with section 294 aforesaid is not necessarily an incurable defect."

In the present appeal we have quoted earlier the notes which the learned trial judge made on realizing the absence of one of the assessors. There is nothing to show that the Court inquired on the whereabouts of the absent assessor. Despite this, the Court proceeded with the trial. One month after the *Muthemba* case came the case of *Cherere Gikuli vs Reginum* (1954) 21 EACA 304 in which, once again, what happened was exactly similar to what is in the present appeal. A murder trial in the High Court opened on the first day with three assessors as mandatorily required by sections 262 and 263 CPC. On the second day of the trial, one assessor was, unknown to the trial judge absent. The trial then continued. The following morning, upon the trial judge being informed of the matter, he ordered the trial to continue with the aid of the remaining two assessors. The accused was convicted and on appeal, this is what the Court of Appeal for Eastern Africa held.

"Held (28-6-54) (1) a trial which is 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 aforesaid.

(1) To be within section 294 aforesaid, one of two conditions must be satisfied, viz, either that the absent assessors is from any sufficient cause prevented from attending throughout the trial, or that he absents himself, and it is not practicable to immediately enforce his attendance."

Discussing the matter in fuller details, the Court said as follows at page 305:-

"It is clear that if a trial is commenced with less than the prescribed number of assessors, it is not merely an irregularity but unlawful. We think, equally, that it must be unlawful then to begin with the prescribed number, but continue with less than that number, unless the case can be brought precisely within the terms of section 294 of the Criminal Procedure Code, which alone, authorizes a trial with less than the original number. In order that the case may be within section 294, it is necessary to satisfy one or two conditions, either that the absent assessor is from any sufficient cause prevented from attending, or that he absents himself and it is not practicable immediately, to enforce his attendance. We do not know the cause of his absence, nor presumably, did the Supreme Court, and we think therefore, that it cannot safely be said, that he was prevented from attending by any sufficient cause." (underlings are ours.)

We observe that the *Cherere Gikuli* case came barely one month after the *Muthemba* case. We observe that in the *Cherere Gikuli* case, the *Muthemba* case was distinguished and therefore not fully followed. Finally, we observe that in the *Cherere Gikuli* case, it was expressly held, that a trial which has started with the prescribed number of assessors will be rendered not only irregular, but unlawful, if it proceeds with less assessors, except where the case could be brought under section 294 CPC which was equivalent to our present section 298(1) CPC.

We now briefly turn to what happened in the present case. We have set out the sequence of events and the order which the learned trial judge made upon discovering the absence of one of the three assessors. There is nothing in the proceedings to indicate that any inquiry was made by the learned trial judge or

officers of the Court. The whereabouts of the absent assessor were therefore never established. As was observed in the *Muthemba* case, it may very well be, that the absent assessor was within the precincts of the Court waiting for his name to be called. Under the circumstances therefore, there was no material on the basis of which, either the trial judge, or ourselves, can say that it was not practicable immediately to enforce the presence of the absent assessor. This being so, we arrive at the conclusion that section 298(1) CPC did not apply. In that event the trial, from the moment the learned judge discovered the absence of one of the assessors, became an irregular and unlawful trial.

We reiterate what we said earlier in this judgment in regard to sections 262 and 263 CPC. Both sections make the presence of assessors in trials before the High Court mandatory. Section 263 CPC makes the number of assessors mandatorily three. There is no other section that provides for the trial to proceed with a lesser number of assesors than three except section 298(1) CPC. Unless the trial comes within this section, it is a mandatory requirement that it must proceed with three assessors before the High Court.

In the *Romani* case, the Court held that the trial was a nullity because of the irregularity over the assessors. That was in 1937. About twenty years later, in the *Muthemba* case, the Court held that the irregularity over the assessors was not necessarily an unincurable defect. One month after the *Muthemba* case, the Court held in the *Cherere Gikuli* case, that the irregularity was unlawful and therefore rendered the trail a nullity.

In all the three cases, one factor stands out as common, namely the absence of one assessor in the course of a criminal trial in the High Court. Upon careful consideration, we prefer to follow the decision in the *Cherere Gikuli* case. We say this because, as we indicated earlier in this judgment, the position of assessors in trials before the High Court, is a statutory position. Section 262 CPC makes the requirement for assessors mandatory. Section 263 requires the number mandatorily to be three. The only qualification is in section 298(1) CPC. We are in agreement with what the Court of Appeal for Eastern African said in the *Cherere Gikuli* case that unless the situation is brought within the provisions of section 298(1) CPC, a trial which has started with the mandatory number of assessors, cannot proceed with anything less.

To bring the case within the provisions of section 298(1) CPC, we have already referred to the conditions that must be satisfied. In the appeal before us, and upon careful consideration of the record and what transpired, we are satisfied that the case did not come under the provisions of section 298(1).

In the final analysis therefore, we arrive at the conclusion, for two reason, that the trial in the present appeal was rendered a nullity. The two main reasons are the failure of the learned trial judge to comply with section

162(1) CPC at the right stage in the trial, and the decision by the learned trial judge to continue with the trial judge with two assessors only when, there was no material to bring the case under the saving section namely section 298(1) CPC. The appeal succeeds and is allowed to this extent and conviction quashed and sentence set aside.

It remains for us to consider the final order to dispose off the appeal. Where a trial is rendered a nullity, the first option usually is to order a retrial. It is, however, settled in law that a retrial will not be ordered where it is likely to occasion injustice or, where it will be used merely to fill up gaps in the prosecution case. Here, the appellant was charged with, tried and convicted of murder on 8th June, 2000. We do not find it necessary to go into the merits or the facts of the case, but having considered everything on record, we are satisfied that a retrial would be justified and appropriate and we order accordingly. The case will be remitted to the High Court and there will be a retrial on murder charge against the appellant on a priority basis before any judge other than Ondeyo J. Pending the retrial, the appellant to remain in remand custody. Orders accordingly.

Dated and delivered at Nakuru this 16th day of March, 2001

B. CHUNGA

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CHIEF JUSTICE

A.B. SHAH

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JUDGE OF APPEAL

E.O.O'KUBASU

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR