



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 220 OF 2008**

**MARTIN OTIENO OYIER ..... RESPONDENT**

**VERSUS**

**REPUBLIC ..... PROSECUTOR**  
*(Being an appeal from the original conviction and sentence in Migori Senior Principal Magistrate's Criminal Case Number 284 of 2008 dated 18<sup>th</sup> November, 2008).*

**JUDGMENT**

1. The appellant, **Martin Otieno Oyier** was charged with the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The particulars of the offence were that on the 19<sup>th</sup> day of August, 2007 at East Kanyamwanda Sub location in Migori District within the Nyanza Province, he unlawfully killed **Joshua Ariya Obosi**. The applicant pleaded not guilty to the charge and the case went to full hearing.

2. The prosecution called five (5) witnesses from whose testimony, the facts of the case emerge. On the 18<sup>th</sup> August, 2007 at about 2.00a.m., **Charles Oduor Mola (PW1)** was at his father's home in Kadem attending the funeral of his father. The deceased, **Joshua Ariya** was stewarding the events of that night. There was music, including a disco. The appellant and one **Joseph Ario Ogocha,**

**PW2,** were also at the funeral. There were also many unnamed visitors who had come for the funeral of **Mzee Elmanus** who had died along with his wife. When the deceased asked the appellant to move away from where the visitors were after a visitor lost a wallet the appellant did not apparently take it well. He went away briefly and then returned and suddenly attacked the deceased with a knife. The deceased fell down while the appellant took flight. The deceased died on the way to hospital. Though **Mola** tried to chase the appellant the appellant managed to escape. The following morning, the appellant was arrested from his home by members of the public. The matter was reported to the area chief, **Andrew Miano(PW3)** by **Joseph Ario Ogocha (PW2)**. On receiving the report the area chief reported the matter to the police at Macalder. The report at the police station was received by **No.2323401 Inspector of Police Mosila (PW5),** the Deputy OCS and investigating officer. The appellant was re-arrested by **I.P Mosila** from the members of the public. The appellant was later charged with the offence of manslaughter. **IP. Mosila** also took the appellant for examination. The P3 form was produced as PExhibit.2. The deceased's body was also taken to Akidwa Mortuary for post-mortem examination. The post-mortem report was produced as PExhibit.2.

3. At the close of the prosecution's case, the appellant gave a brief [**unsworn**] statement in which he

asked to be pardoned.

4. After carefully considering the evidence that was before him, the trial court found that the prosecution had proved its case beyond any reasonable doubt. The trial court was satisfied that the appellant was properly recognized as being a fellow villager. The court also expressed satisfaction that though the prosecution's case rested on the evidence of a single identifying witness the said witness was trustworthy. Accordingly the appellant was found guilty as charged and convicted of the offence. He was sentenced to serve ten(10) years imprisonment.

5. The appellant was aggrieved by both the conviction and sentence. He has appealed to this honourable court for redress. The appellant has complained that the trial Magistrate erred in both law and fact by failing to consider that there was no proper identification/recognition of the deceased's killer(s). The appellant also complained that the sentence imposed upon him by the trial court was excessive in the circumstances. The appellant therefore prayed that the conviction be quashed and the sentence of ten (10) years imprisonment be set aside.

6. I heard submissions from both the appellant and the Senior Principal state counsel on behalf of the respondent, during which the appellant told the court that he was only appealing for reduction of the sentence.

7. On his part, Counsel for the respondent submitted that there was a mistrial of the appellant's case for reasons that:-

- a) *The appellant did not have his rights explained to him by the court.*
- b) *The appellant was never asked whether or not he would give sworn or unsworn evidence nor was he given a chance to indicate whether he would call witnesses.*
- c) *The charge was not read out to the appellant.*

8. In a nutshell, counsel submitted that the court did not comply with the mandatory provisions of section 21(5) of the Criminal Procedure Code. The subsection provides that where an accused person is put on his defence, the court shall:-

- *Again explain the substance of the charge to the accused.*
- *Inform him that he has a right to give evidence on oath from the witness box, and that if he does so, he will be liable to cross-examination.*
- *To make a statement not on oath from the dock;*
- *Ask him whether he has any witness to examine or other evidence to adduce in his defence.*

9. For the above reasons, counsel for the respondent submitted that the proceedings by the trial court were a mistrial which resulted in miscarriage of justice. He conceded the appeal on his score but asked for retrial on the following grounds:-

- *The mistrial was caused not by the prosecution but by the court.*
- *The appellant was charged with a serious offence;*
- *For the interest of justice, it is only fair that the case be heard afresh.*
- *There was overwhelming evidence from the 5 prosecution witnesses in support of the charge against the appellant;*
- *The appellant who was sentenced to ten(10) years imprisonment with effect from 18<sup>th</sup> November, 2008 is yet to serve a substantial part of his sentence;*
- *Retrial will not cause any prejudice to the appellant since the state will not be filling in any gaps in the*  
*prosecution's case.*
- *The prosecution witnesses are still available and have not lost their memory.*

**10.** This matter is before me as a first appeal. As the first appellate court, this honourable court is under a duty to reappraise and evaluate the evidence afresh with a view to reaching my own decision in

the matter. See **Okeno –vs- Republic[1972] EA 32 and Pandya –vs- R[1957] EA 336.**

**11.** I have now reappraised and evaluated the evidence afresh. I have also read through the proceedings of the lower court and also weighed and considered the judgment of the lower court. The issue that arises for determination is whether the respondent was right in conceding this appeal on account of the trial court having failed to comply with the provisions of **Section 211(1)** of the **Criminal Procedure Code**.

**12.** After considering all the above, I am in agreement with the position taken by the respondent concerning this appeal. From the record, there is no indication that after the appellant was put on his defence, any explanation was given to him of the provisions of Section 211(1) of the Criminal Procedure Code. The appellant is then heard to say something that sounds more of a mitigation than a defence. There is no record to show that the court complied with **Section 211(1)** of the **Criminal Procedure Code**. Nor does it show whether the statement by the appellant was sworn or unsworn but I have drawn the inference that he gave an unsworn statement because there were no questions put to him after he had made his statement. It is therefore correct as stated by the respondent that the process through which the appellant was taken was prejudicial to him and amounted to a mistrial. On that ground, this appeal succeeds. Accordingly the conviction is quashed and the sentence of ten (10) years imprisonment is set aside.

**13.** The next question for determination is whether the matter should go for retrial. The factors to be taken into account by the court in considering whether a case should go for retrial are:-

- i. *The length of time between the time of commission of the offence and the date of judgment on appeal.*
- ii. *Whether the prosecution will be seeking to fill in gaps in the evidence adduced during the trial.*
- iii. *Whether the retrial will be prejudicial to the appellant.*

**14.** I have considered all the above and it is my considered view that this is a proper case for a retrial. From the record, it does not appear to me that the prosecution will be seeking to fill in any gaps in its evidence in support of the charge against the appellant. The Senior Principal State Counsel submitted that the five prosecution witnesses were still available and that since the offence took place only about three (3) years ago the witnesses cannot be said, to have lost their memories.

**15.** Further, the appellant is faced with a very serious offence which resulted in the death of the deceased.

**16.** For the above reasons, I find and hold that this is a proper case to go for retrial and I so order. The retrial shall be conducted by Magistrate other than **Ezra O. Awino**, who heard the case in the first instance.

**17.** It is so ordered.

Dated and delivered at Kisii this **20<sup>th</sup>** day of **January, 2011.**

**RUTH NEKOYE SITATI**

**JUDGE**

**In the presence of:-**

Present in person for appellant

Mr. Mutua for respondent

Mr. Bibu Court Clerk.

**RUTH NEKOYE SITATI**

**JUDGE.**