



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: OMOLO, WAKI & ONYANGO OTIENO, J.J.A)

CRIMINAL APPEAL NO. 350 OF 2010

BETWEEN

ABEL ABUNGA MWAMBI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (Musinga, J) dated 23rd July, 2009

in

H. C. CR. A. No. 81 of 2004)

JUDGMENT OF THE COURT

Though Mr. Gumo, the learned Deputy Public Prosecutor, asked us to order a retrial in this matter and Mr. Otieno for the appellant did not seem to seriously oppose Mr. Gumo's request, we do not think that it would be fair to the appellant to make an order for retrial. The appellant was tried and convicted on an information that charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the information were that on the 12th day of July, 2003 at Mavoko sub-location in Nyamira District the appellant murdered Richard Onsongo.

The trial of the appellant opened before the late Kaburu Bauni, J on 25th October, 2005. The learned Judge sat with three assessors and he heard all the eleven witnesses called by the prosecution in support of its case. After listening to the submissions of the appellant's then advocate Mr. Gekonge, on whether the appellant had a case to answer on the charge of murder, the learned Judge called upon the appellant to defend himself. By that time, one assessor had absented himself and the Judge had summarily dispensed with that assessor's participation in the trial. After numerous adjournments which carried the matter to the 17th July, 2007, the appellant eventually gave his unsworn defence and once again the appellant's counsel, this time Mr. Okenye made the submission that the case against the appellant had not been proved beyond a reasonable doubt. The Judge adjourned the hearing to the 27th July, 2007 to enable him write a summing-up to the two remaining assessors. Nothing appears to have happened on 27th July, 2007 and the Judge next dealt with the matter on 18th October, 2007. On the latter date the learned Judge's record shows that the appellant's advocate was not present in court as **"Advocates are on strike."**

The matter was again adjourned to 7th November, 2007 for mention. That was the last order made by the late Judge and the proceedings remained in abeyance until the 2nd July, 2008 when the appellant appeared

before another Judge, Musinga, J. The record made by Musinga, J. shows as follows:

“Mr. Okenye: I pray that the court proceeds to have the proceedings typed and thereafter prepare a judgment.

**D. MUSINGA,
JUDGE**

Court: Proceedings to be typed. Judgment on 25/9/2008.

**D. MUSINGA,
JUDGE**

Nothing was said about the pending summing-up to the assessors and the verdict of the two remaining assessors was never sought or taken. The learned Judge then apparently read the proceedings and prepared a judgment in which he convicted the appellant and duly sentenced him to death. We are mindful of the fact that by **Act No. 7 of 2007** Parliament introduced **section 201 (2)** into the Criminal Procedure Code and by that introduction it was provided that:

“The provisions of section 200 of this Act shall apply, mutatis mutandis to trials held in the High Court.”

Section 200 of the Act provides for incoming magistrates taking over uncompleted trials by other magistrates but **section 200 (4)** specifically provides:

“Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused was materially prejudiced thereby, set aside the conviction and may order a new trial.”

Musinga, J never saw any of the witnesses who testified before Bauni, J. No summing-up notes were available on the record and the incoming Judge deprived the appellant and of course himself of the opinion of the two assessors who had at least seen and heard the prosecution witnesses and the appellant testify before them. We have no doubt that these factors materially prejudiced the appellant and this must be the basis on which Mr. Gumo asked us to order a retrial.

We have already indicated that we are not inclined to order a retrial in this case. In the case of **Mwangi vs Republic [1983] KLR 522**, this Court held 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.”

What was the evidence relied on in this case? It was simply that of Nathan Obongo Momanyi (PW 8) who was the only witness to testify that he saw the appellant stab the deceased with a knife in the hall where dancing was going on. Jeremiah Ogendi (PW 3) the assistant chief of the area said he received a report of the stabbing that night. He visited the house of the appellant but did not find the appellant. Instead, on the appellant’s bed, the assistant chief found a pair of trousers and a shirt both of which were blood stained. He took them, and when cross-examined on those items, the witness stated: **“I found blood stained clothes in accused’s house. They are not in court. I handed them to the investigating officer. I only went to the house of accused and his friend Nathan that night.”**

No-one else ever spoke about the blood stained clothes and it was not known what could have happened to them. An order for a retrial might well enable the prosecution to go and fill in these gaps. Again Nathan said the appellant and the deceased “fought” over some girl and taking into account the fact that the incident took place in a dancing hall it may well be that on a proper consideration of the admissible and potentially admissible evidence, only a conviction for manslaughter might result. The appellant has been in custody since 2003; that is some seven years now. In these circumstances, we reject the request for an order for retrial.

Accordingly we allow the appeal and quash the conviction for murder. We set aside the sentence of death and we order that the appellant shall be released from prison forthwith unless he is held for some other lawful cause. Those shall be the orders of the Court.

Dated and delivered at Kisumu this 26th day of November, 2010.

R. S. C. OMOLO

.....
JUDGE OF APPEAL

P. N. WAKI

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR