



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: AKIWUMI, LAKHA, J.J.A. & BOSIRE, AG.J.A.)**  
**CRIMINAL APPEAL NO. 69 OF 1997**

**BETWEEN**

**MARK ARISI MOGERE**

**MATHEWS MOTARI KERANGE ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from conviction and sentence of the High Court of  
Kenya at Kisii (Justice Juma) dated 5th February,  
1997  
in  
H.C.CR.C. NO. 13 OF 1996)**

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**JUDGMENT OF THE COURT**

The appellants were convicted after a trial before the High court (Juma, J.) of Murder contrary to section 203 of the Penal Code, and were sentenced to the Mandatory death sentence. They now appeal against that conviction and the sentence.

Mr. Karanja, Senior State Counsel, does not support the conviction of the appellants, properly so in our view. The appellants were jointly charged with three other persons who were acquitted. The evidence which was placed before the trial Judge showed that the deceased Maria Kemunto Nyamao was attacked by quite a large number of people who like her had gone to the home of one Jacob Mogere in response to a whistle which was blown to call people there, violently assaulted using sticks and stones, and later doused with paraffin and set on fire on the allegation that she had through witchcraft had the said Mogere's child dumb. Among those who testified against the appellants and their co-accused were her son and his wife. Those witnesses named the appellants and their coaccused as having participated in the killing of the deceased.

The trial Judge did not set out evidence particular to those appellants upon which he relied to convict them which did not apply to their co-accused whom he acquitted. It is therefore with justification that Mr. Menezes, counsel for the appellants, complains in the first ground of appeal that it was improper for the trial judge to convict the appellants and to acquit the others on the same evidence. The trial Judge perfunctorily dealt with the evidence and seems to have acted on whims to convict these appellants.

We also note, and Mr. Karanja properly drew it to our attention, that the trial judge's judgment does not comply with the clear directions given under section 169(1) of the Criminal Procedure Code for writing judgments. Besides, the trial judge did not properly sum up the case to the assessors. The notes on summing up do not show what the learned trial Judge told the assessors. He has only indicated headings on the various matters he may have addressed them about but has not actually shown what he said. The notes on summing up must give sufficient details albeit in note form, to show an appellate court what directions were given to the assessors in the case.

Moreover, the evidence on record shows that certain essential witnesses who should have been called by the prosecution were not called, and no explanation is on record as to why they were not called. There are for example the parents of the sick child. It was essential for them to be called to explain the circumstances under which their child got sick, what necessitated the summoning of the villagers to their home and whether or not the child eventually became well. These are not directly relevant to the elements of the charge but they were essential as part of the *res gestae*.

In the above circumstances and the reasons we have given, we think that the appellants were improperly convicted. Accordingly, we allow the appeal, quash the appellants' respective convictions and set aside the sentences meted against them. They must be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Kisumu this 26th day of November, 1997.**

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**A. A. LAKHA**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**AG. JUDGE OF APPEAL**

I certify that this a true copy of the original.

**DEPUTY REGISTRAR.**