REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 53 & 82 of 1994

DAVID KIPROP CHEBON…….....……1ST APPELLANT

ALEXANDER ROTICH…….....……..2ND APPELLANT

AND

REPUBLIC…….....…….…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Lady Justice R.N. Nambuye) dated 25th February, 1994

IN

H.C.CR.C. NO. 9 OF 1992)

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JUDGMENT OF THE COURT

It is worth repeating that the law requires that all criminal trials before the High Court shall be with the aid of assessors and that the number of such assessors shall be three who if any such trial is adjourned are required to attend at the adjourned sitting, and at any subsequent sitting until the conclusion of the trial. However, if in the course of such a trial, at any time before the finding, an assessor is from 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 remaining two assessors. When in such a trial the case on both sides is closed, the trial judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record that opinion. See sections 262, 263, 298(1), 299 and 322(1) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

The first and second appellants were convicted of the offence of murder contrary to section 204 of the Penal Code, Chapter 63 of the Laws of Kenya by the High Court of Kenya at Nakuru (Nambuye, J.). The first appellant was sentenced to suffer death in the manner authorized by law while the second appellant on account of being under the age of eighteen years when the offence he was convicted of was allegedly committed was sentenced to be detained during the President's pleasure.

The hearing of the case against the appellants together with their mother, who was their co-accused in

the superior court and was convicted by that court of the offence of being an accessory after the fact to a felony contrary to section 397 of the Penal Code and sentenced to 2 years imprisonment and has not appealed against that conviction and sentence, commenced on 23rd November, 1992 in the presence of three assessors, namely; Tom Aoko, Jared Charles Olango and Peter M. Mucheru. At the adjourned sitting of their trial on 25th November, 1992 all the three assessors were in attendance. At the next adjourned sitting of the same trial on 19th January, 1993 one of the assessors, Peter M. Mucheru, was absent but the trial proceeded with the aid of the remaining two assessors - Tom Aoko and Jared Charles Olango - who continued to be in attendance at the subsequent adjourned sitting of that trial on 20th January, 1993. At the adjourned sitting of the trial on 15th March, 1993 which was towards the close of the hearing of the case against the appellants and their mother, Jared Charles Olango was absent but Peter M. Mucheru re-surfaced and was in attendance and continued to be present at the trial both on this date and at the close of the hearing of the case against the appellants and their mother on the next adjourned sitting on 5th April, 1993. On this latter date, Jared Charles Olango was again absent. Thus, save for Tom Aoko, as at the close of the case for the prosecution and the defence on that date, none of the other two assessors - Jared Charles Olango and Peter M. Mucheru - was throughout in attendance at the hearing of the case against the appellants and their mother. Nonetheless, the learned trial judge summed up the case for prosecution and for the defence tot he two assessors present on 5th April, 1993 - Tom Aoko and Peter M. Mucheru - and allowed them to read their jointly written and subsequently signed verdict. On account of the law set out at the beginning of this judgment, it is plainly obvious that the trial of the appellants together with their mother in the superior court was grossly irregular and the same amounted to a mistrial.

At the hearing of this appeal on 25th September, 1995, Mr. Onyango-Oriri for the respondent conceded just as much but sought to have the case remitted to the superior court for re-trial. Mr. Mirugi Kariuki for the appellants, however, submitted that for whatever it is worth, the entire evidence adduced at the purported trial of the appellants and their mother in the superior court could at the very most establish only the offence of manslaughter against the first appellant and no offence at all against the second appellant. According to him, the appellant have been in custody now for a period of close to 5 years and it would not be in the interests of justice to subject them to a re-trial which would only mean their further incarceration pending such re-trial. He therefore thought that their discharge would better serve the interests of justice.

The appellants were the sons of their deceased father- Livingstone Kiprotich. There appears to have been a running feud between them and their deceased father over the latter's constant beating of the appellants' mother together with their frequent expulsion by him from what they thought was their home. This had culminanted in their taking their deceased father to their local Chief on 4th February, 1990 whom they asked to deal with failing which they were going to deal with him. This resulted in all the parties concerned agreeing in writing before their Chief, their local Assistant Chief and two Administration Police Constables that their now deceased father was to stop taking alcoholic drinks as that was the main source of the problems at their home and that he was henceforth going to respect them and their mother and that they too were to reciprocate this respect to him. This pact seems to have worked until December, 1990 when just before the Christmas festivities of that year the deceased chased the appellants' mother from home. She went to her parents' home and only returned to the deceased's home on 3rd January, 1991.

On 11th January, 1991 the first appellant who was a soldier in the Kenya Army came home at about 3.00 p.m. His mother had brewed some traditional liquor for the deceased. It would appear that shortly thereafter, the deceased, the first appellant and the second appellant started consuming the liquor and in the process the first appellant asked the deceased about his having chased away his (first appellant's) mother during the Christmas celebration. The deceased took exception to this and in the result, it would seem that a brawl ensued with the deceased being beaten to death. From the first appellant's and his mother's statements under caution, the deceased was beaten to death by the first and second appellants. They then burned his body and thereafter buried the remains thereof.

The foregoing evidence which is largely from the first appellant's and his mother's statements under caution cannot by any stretch go further than towards the proof of the charge of manslaughter contrary to section 205 of the Penal Code against the appellants. In view of the period the appellants have been in custody as is mentioned above, we thank that in the circumstances obtaining in the case against the appellants, it will not advance the cause of justice by remitting the same to the superior court for their re-trial on a charge of murder contrary to section 204 of the Penal Code or any other charge. Consequently, we allow the appellant's appeal, quash their convictions, set aside their respective sentences and order that they be set at liberty forthwith unless held in custody for any other lawful cause.

It is so ordered.

Dated and delivered at Nakuru this 29th day of September, 1995.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR