



## **BITTON GICHINE MUGO v REPUBLIC**

### **COURT OF APPEAL AT NAIROBI**

**(Hancox J A, Chesoni & Ag JJ A) 21st February 1984**

**Criminal Appeal No. 13 of 1983**

**(Appeal from the High Court at Nairobi, O’Kubasu J)**

Murder – land dispute – trespass amounting to provocation – reduction of charge to manslaughter only one assessor giving opinion – whether opinions of all three assessors required – Criminal Procedure Code sections 322(1) and 382.

On the 21st May 1981, the appellant became annoyed at the deceased cutting grass on, and passing across his land. He went up to where the deceased was sitting and stabbed him several times with a knife, causing his death. There was evidence of a land dispute between them and that, the appellant resented people passing across his land. He was charged with murdering the deceased, but after receiving the opinion of the second assessor, who acted as spokesman for all three, the Judge held, there was provocation and convicted the appellant on the reduced charge of manslaughter. He was sentenced to seven years’ imprisonment and appealed against his conviction and sentence.

Held: \_

Section 322(1) of the Criminal Procedure mandatorily requires the Judge to take the opinion of each assessor separately, on the guilt or innocence of the accused. However, notwithstanding that the Judge did not ask the other two assessors to confirm the second assessor’s opinion, no miscarriage of justice had occurred and the Court would apply the curative provisions of section 382 of the Code.

Francis Juma s/o Muasungu v R [1958 EA 192 applied.

Appeal dismissed.

The appellant in person.

21st February 1984. The judgment of the Court was read by Chesoni, Ag J A :

Chesoni, Ag J A: The appellant who was originally charged with the murder on the 21st day of May 1981, of a man called Isaac Kibiru Githiongo, was after trial, convicted of manslaughter and sentenced to 7 years’ imprisonment. He has appealed against both the conviction and sentence.

The appellant stabbed the deceased with a knife many times. Joyce Wagaitheri Gitonga (PW3), and Dinah Wanjiku Maina (PW4) who both knew the appellant and the deceased, saw him do it from a distance of about 30 paces. Kabiru died at the scene of attack. Joyce and Dinah screamed and the appellant ran to and locked himself in his house. Many people responded, broke into the appellant’s house and arrested him and he showed them a blood stained knife behind his house. He himself, was wearing a blood stained

jacket when re-arrested by Chief Inspector Gideon Muli.

The post-mortem examination of the deceased's body, revealed that, the cause of death was cardio respiratory failure due to hemorrhage into brain, due to penetrating injuries. In his cautionary statement to the police, the appellant admitted assaulting the deceased. He said:

“I fought with that man called Kibiru after having warned him five times to stop cutting plant materials from my garden. On that day, the 21st May 1981, at about 4.45 pm, I found Isaac Kibiru in my garden cutting plant materials. I told him to move from my garden and he refused. After refusal, we started quarreling and after a quarrel, we started fighting. It is Isaac who started beating me with an object I did not know. After he hit me, I also bit him on the head with a small metal that I had in my possession. After hitting him with that small metal, he fell down and after that I stabbed him once on the head with a knife.”

The appellant said nothing at his trial.

The three assessors were of the opinion that the appellant killed the deceased, but he was provoked by the deceased trespassing over his land. On the day prior to his death, the deceased had cut grass from Obadiah's land, and in order to get to Obadiah's land, the deceased had to pass through the appellant's land.

Two of the assessors told the learned judge that, they would express their opinion through Mr Ndei, the third assessor, with whom they had consulted. Mr Ndei acted as the assessor's spokesman. He explained the basis for arriving at their decision and then said :

“We ask the court to reduce the charge from murder to manslaughter, and the learned judge did so.”

Section 322(1) of the Criminal Procedure Code provides that the judge

: “shall then require each of the assessors to state his opinion orally, and shall record such opinion.”

In our opinion, the law requires the trial judge to record the opinion of each assessor separately. In Francis Juma s/o Musungu v R. [1958] E A 192, the assessors retired and when they returned after conferring together, the first assessor told the court : “We all agree that the accused is guilty”; the other assessors were not asked to confirm this statement and they did not speak individually. The former Court of Appeal for Eastern Africa said, at p.193 :

“The wording of s.318 (the wording is the same as that of the present section 322(2) of the Criminal Procedure Code), .....clearly contemplates and, we think, requires that each assessor shall separately state his own opinion.”

In this case, the learned judge did not ask the other two assessors to confirm Ndei's opinion. Nevertheless, our view is as that of the Court, in Francis Juma Musungu's Case that this irregularity is not fatal and is curable under section 382 of the Criminal Procedure Code; more so, in a case like the present one, since it has occasioned the appellant no injustice. We are satisfied that the appellant was properly convicted.

The appellant, a young man aged about 30 years, brutally and fatally assaulted an old man of 70 years. The appellant alleged the deceased beat him first but the medical examination showed that, the appellant had no injuries. In the circumstances and on the facts of this case, we do not find the sentence of 7 years' imprisonment unreasonable or manifestly excessive as to justify interference.

For the reasons stated the appeal is dismissed.

.....