



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: OMOLO, O'KUBASU & GITHINJI, J.J.A.)

CRIMINAL APPEAL NO. 207 OF 2008

BETWEEN

VINCENT ONDIEKI OMAO APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Kimaru, J.) dated 7th May, 2008
in
H.C.CR.C. NO. 84 OF 2005)

JUDGMENT OF THE COURT

On 19th October, 2005, the appellant was arraigned in the High Court at Nakuru before Muga Apondi, J. on an Information dated 27th September, 2005 which charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The information alleged that the appellant murdered **Laban Maneno Ongera**, on the night of 5th and 6th September, 2005.

The appellant pleaded not guilty.

When the trial began before Kimaru, J. on 22nd February, 2006, three assessors were selected namely **Mungai Mututa**, **Gichuki Joseph** and **Milka Wairimu Kinyanjui** apparently in accordance with **section 297** as read with **section 261** of the Criminal Procedure Code which provided that all criminal trials in the High Court should be with the aid of assessors. The prosecution called a total of eight witnesses who testified and were cross-examined by the appellant's counsel in the presence of the assessors. The prosecution ultimately closed its case on 30th May, 2007 whereupon the trial Judge made a finding that the prosecution had established sufficient evidence to enable the court to put the appellant on his defence. The appellant gave evidence in his defence on 12th July, 2007 after which the defence case was closed.

Thereafter, the trial Judge adjourned the case to 3rd August, for summing up of the evidence under **Section 322(1)** of the **Criminal Procedure Code** which provided:-

“When in a case with the aid of assessors, the case on both sides is closed, the judge may sum up the evidence of the prosecution and the defence, and shall then require each of the assessors to state his opinion orally and shall record that opinion.”

The record does not show that the summing up was done and that the assessors gave their respective opinions. However, by a judgment delivered on 7th May, 2008, the appellant was convicted for murder, the learned Judge concluding:-

“..... I wish to state that this case was heard with the assistance of assessors. This was before the Criminal Procedure Code was amended to exclude assessors in murder trials. This judgment is therefore delivered pursuant to the provisions of Section 322(1) of the Criminal Procedure Code as amended by the Statute Law (Miscellaneous Amendments) Act (Act No. 7 of 2007) and which came into effect on 15th October, 2007.”

By the three supplementary grounds of appeal the appellant in essence asserts that the trial Judge erred in law by discharging the assessors notwithstanding the provisions of **Section 23 (3)** of the *Interpretation and General Provisions Act – Chapter 2* of Laws of Kenya.

By **section 23 (3) (4)** aforesaid, where a written law repeals in whole or in part another written law, such repeal, unless a contrary opinion appears, does not affect, *inter alia* legal proceedings and any such proceedings may be continued as if the repealed written law had not been made.

Mr. Githui, learned Counsel for the appellant, relied on the case of ***Wanjiku v. Republic* [2009] KLR 210**. Mr. Omutelema, learned Senior Principal State Counsel, conceded the appeal but asked for an order of re-trial saying that the prosecution was able to get the witnesses.

In this case, the entire trial was completed with aid of assessors before the law was amended. All what remained was the summing up to assessors. On the authority of ***Wanjiku v. Republic*** which construed **section 23(3)(e)** of the Interpretation and General Provisions Act, the trial Judge erred in law in convicting the appellant without the benefit of the opinion of the assessors.

The principles upon which an order of re-trial can be made do not need repetition. It is sufficient to say that the deceased who had married the sister of the appellant had housed the appellant who was a school boy, that the deceased was found killed inside the house and that it is just in the circumstances of this case that a re-trial should be ordered.

For the foregoing reasons, we allow the appeal, set aside the conviction, the sentence of death and order that the appellant be re-tried before another judge. The retrial shall be held in accordance with the current law and without the aid of assessors. The appellant shall be remanded in custody pending the retrial.

Dated and delivered at Nakuru this 23rd day of February, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR