REPUBLIC OF KENYA
COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 610 OF 2010

JULIUS MURAMBI OUKO

BENSON OWINO OLONDE.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (Musinga, J) dated 9th June, 2009

in

H. C. CR. A. NO. 56 OF 2003)
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JUDGMENT OF THE COURT

In Information dated 6th October, 2005, the appellants, ***Julius Murambi Ouko*** and ***Benson Owino Olonde***, faced the charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal code. The particulars of the charge were that on the night of 11th and 12th August, 2005 at Ocholo village in Ruri west sub location, Lambwe East location in Suba District of the Nyanza Province, the accused jointly murdered Samuel Odhiambo Odundo.

They pleaded not guilty to the charge but after the full hearing, which began with the aid of assessors, but somehow proceeded without them in respect of the last two witnesses, the learned Judge of the High Court, Musinga, J. who took over the hearing from the late Bauni, J midstream, found them guilty as charged, and convicted and sentenced them to death.

The appellants were dissatisfied with the conviction and sentence, hence this second, and possibly final, appeal.

At the commencement of the hearing of this appeal, Mr. P. M. Gumo, Assistant Director of Public Prosecutions, brought to the attention of this Court, correctly in our view, that the trial in this case began before the late Bauni, J on 6th March, 2006 with the aid of assessors, as the law then provided. Six witnesses were heard, with the aid of assessors. Thereafter, the case was adjourned from time to time for one reason or another, including, finally, the passing away of Bauni, J. Some two years later, on 23rd September, 2008, the trial began before another Judge, Musinga, and J. By then, the provision for trial with the aid of assessors had been repealed. The Statute Law (Miscellaneous Amendments) Act, 2007 which abolished the role of assessors in murder trials, came into effect on 15th October, 2007.

The record shows that when Musinga, J took over the matter, he neither complied with the requirements of ***section 261 (2)*** as read with ***section 200 (3)*** of the Criminal Procedure Code, nor did he take into consideration the provisions of ***section 23 (e)*** of the Interpretation and General Provisions Act, Cap 2, which required that the trial shall continue, the amendments to the law notwithstanding. He

proceeded with the case as if there was no need for assessors at all and indeed made no mention of the assessors whatsoever. Both these were serious errors. In the case of ***Wilson Uhuru Baje vs Republic, Criminal Appeal No. 116 of 2009***, this Court (differently constituted) stated in a similar situation as follows:

"Lastly, the trial started with the aid of assessors and in law had to continue with them till the end. We appreciate the fact that midstream, the provision of trial with the aid of assessors was removed from our Criminal Procedure Code, but that repeal, like most other legal provisions, did not have retrospective effect. It was, in our view, improper for the learned Judge to drop the assessors and even worse, to fail to give any reasons as to why he did so."

In this case, the trial with the aid of assessors, which was, at the time the offence was committed, and at the time the trial started, a right of the appellant, was denied her midstream after six witnesses had given evidence. This was not proper.

It is unfortunate that this point was not canvassed on appeal before us by the learned counsel for the appellants, Mr. M. Gichaba, who, also, did not see fit to raise the same in his long, and needlessly wordy, supplementary memorandum of appeal filed on 9th September, 2011. However, this is a matter of law, and we could not have ignored it, even if it was not brought to our attention by the learned Assistant Director of Public Prosecutions. The effect of the above two grave errors is that the trial was vitiated. The resulting conviction and sentence cannot stand, and the same are hereby set aside. Although the learned counsel for the appellants submitted that the appellants should be set free, having been in custody for some six years, we are of the considered view that this is an appropriate case for a re-trial. Accordingly, we order that the appellants shall be tried before any Judge of the High Court other than Musinga, J. Pending their production before the court, the appellants shall be held in prison custody. We direct that the hearing dates for the re-trial be given on priority basis. The retrial need not be with the aid of assessors since the law on this respect changed in 2007.

Orders accordingly.

Dated and delivered at Kisumu this 22nd day of March, 2012.

R. S. C. OMOLO
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JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR