



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT KISUMU  
CORAM: BOSIRE, O’KUBASU & ONYANGO OTIENO, J.J.A.  
CRIMINAL APPEAL NO. 152 OF 2011

BETWEEN

CHARLES OGERO BOSIRE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Musinga, J) dated 9<sup>th</sup> June, 2009*

in

H.C.CR.C. NO. 77 OF 2003)

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**JUDGMENT OF THE COURT**

In an information dated and filed on 24<sup>th</sup> September, 2003, at the High Court at Kisii, vide Criminal Case Number 77 of 2003, the appellant **CHARLES OGERO BOSIRE** was arraigned on the offence of murder contrary to **Sections 203** and **204** of the Penal Code. The particulars of the offence were that:-

***“On the 12<sup>th</sup> day of November, 2002, at Kegogi location in central Kisii District within Nyanza Province, murdered Henry Nyakundi Obonyo.”***

He pleaded not guilty to the charge, but after full hearing with the aid of assessors by *Bauni J (as he then was)*, Musinga J. who took over the matter, found him guilty as charged, convicted him and sentenced him to death. The two assessors however each returned a verdict of not guilty. The appellant was not satisfied with the conviction and sentence and hence this appeal before us premised partly on his home made memorandum of appeal filed on 14<sup>th</sup> September, 2011, and three grounds set out in a supplementary memorandum of appeal filed by the firm of *Bruce Odeny & Company Advocates. Mr. Odeny*, the learned counsel who conducted the appellant’s appeal before us, also relied on third, fourth, fifth and sixth grounds in another supplementary memorandum of appeal filed by *Onsongo and Co. Advocates*. These were that:-

**“3. The superior court erred both in law and fact in failing to strictly observe and adhere to the relevant provisions of the law as relating to a trial conducted with the aid of assessors.**

**4. The discharge of one of the assessors was done in breach of or without observing and complying with the Criminal Procedure Code on the issue of absence of an assessor from court.**

**5. The superior court erred both in law and fact failing to conduct the proceedings in line with the mandatory requirements of Section 200 of the Criminal Procedure Code as relates to the taking over a trial my (sic) one Judge from another.**

**6. The trial court erred both in law and fact in failing to ascribe any reasons why it did not agree with or differed with the verdict of the assessors.”**

And as we have stated, he also relied on three grounds in the supplementary memorandum of appeal filed by his firm which were that:-

**“1. The learned Judge erred in both law and fact in convicting the appellant purely on uncorroborated circumstantial evidence.**

**2. The judgment was against the weight of evidence.**

**3. The learned trial Judge grossly erred in law by failing to offer the appellant an opportunity to mitigate before sentence was passed.”**

We shall revert to the grounds of appeal hereafter, but first the facts that gave rise to the entire saga.

On 11<sup>th</sup> November, 2002 at 7.30 p.m. **Eucabeth Bonareri Ogembo, (PW4)** was in her rented room at Nyakora Market together with her child **Douglas**. As the child was going out of the kitchen, apparently with his mother in law he met the appellant who had a knife. The appellant told the mother, and **Eucabeth**, that he (the appellant) would drink her blood. The appellant then stabbed her with a knife three times. She started screaming and members of the public responded to her screams. According to her, the deceased, **Nyakundi** was the first to arrive at her house in response to her screams. At that time, **Euchabeth** said in evidence, the appellant dragged her outside to the verandah and stabbed her twice leaving her on the verandah. The appellant then started chasing the deceased. She was emphatic that the appellant is the person who stabbed her inside her room, dragged her out to the verandah and further stabbed her twice. She was also certain that after stabbing her at the verandah, the appellant chased the deceased who had come to her rescue but she did not see the appellant assaulting the deceased. According to her, it was not dark, and she had lit a lamp in the house, and in addition there was moonlight. She had known the appellant before the incident as the appellant had also rented a house near her rented room. **Joseph Ogero Obonyo, (PW3)**, was cousin to the deceased. On 11<sup>th</sup> November, 2002, at 7.30 p.m. he was at his house when he heard people screaming and he heard a voice he recognized as that of the appellant saying, **“I have finished.”** He went to the scene and found the deceased lying on his back. He could not talk. The appellant was also his cousin. Seeing the deceased lying on his back and could not talk, **Joseph** sent a child to call **James Kingoina Obonyo, (PW1)** who was brother to the deceased. In the meanwhile, **Joseph** went back to his house to get his vehicle. **James** was in his house at 7.30 p.m. when the child sent by **Joseph** approached him and told him that her father had been killed. He went to the deceased’s home about 120 metres away. He got there and found the deceased lying by the roadside about 50 metres from his home. The deceased had several cuts on his head. **James** said in cross-examination that he found one person at the scene and that person said, **“I have finished him.”** **Joseph** returned to the scene with his vehicle and he took both the deceased and **Eucabeth** to Kisii District Hospital. The next day, the deceased died. On 21<sup>st</sup> November, 2002, **Dr. Deya** performed post mortem examination on the body of the deceased. The post mortem form was produced by **Dr. Ezekiel Ogando Zoga, (PW6)**. **Dr. Deya** formed an opinion that the cause of death was due to massive blood to the brain secondary to a depressed compound skull fracture which was attributed to assault. The body of the deceased was identified to **Dr. Deya** by **Joseph Mogere Isoe, (PW5)**. There is some evidence that even on 12<sup>th</sup> November, 2002, the appellant assaulted one **Evans Onyiego Zacharia, (PW7)**, but we do not attach any

importance to that evidence as we see no relevance of it to the entire case, that was before the trial court.

Although, there is no record of the appellant's arrest, he was nonetheless arrested and that fact is clear from the fact that he did stand his trial and he also said in his defence that he was arrested on 18<sup>th</sup> January, 2003. At the close of the prosecution case, the appellant was put on his defence. In an unsworn statement, the appellant stated that all those who testified against him were all liars. On 11<sup>th</sup> November, 2002, he left his place of work at Tambacha Primary School at 2 p.m. and reached home at 3.45 p.m. Thereafter he went to the home of one *Christopher Oyero Nyaata*. He arrived there at 4.30 p.m. and stayed with the visitors till next day. That place was about two (2) kilometers from Nyakora trading centre. He returned to Nyakora Trading Centre at 8.00 a.m next day. That is when he received message that the deceased had died at the Hospital. He, together with others went to the deceased's house and stayed there for sometime. He then returned to the trading centre until the deceased's burial on 25<sup>th</sup> November, 2002. He was arrested on 18<sup>th</sup> January, 2003 and was taken to Kisii Police Station where he was later charged with the offence of murder.

The above, were the facts that were before the trial court. We observe the assessors were empanelled, on 6<sup>th</sup> July, 2004, and after hearing five witnesses the hearing was adjourned and did not resume till 29<sup>th</sup> May, 2006, almost two years later. When it resumed, one assessor was absent and the trial court made an order dropping him as an assessor and the hearing proceeded with the two assessors who were present on that day. That assessor however, was not allowed back and never took any part in the proceedings until the end of the trial. After the end of the defence, the learned trial Judge (*Bauni, J.*) summed up the case to the assessors' and received and recorded the two assessors opinions. He ordered judgment to be delivered on notice. That was never to be. Thereafter, he (*Bauni, J*) ceased to have jurisdiction as he died. *Musinga J*, took over the matter, prepared judgment and on 9<sup>th</sup> June, 2009, the learned Judge delivered the judgment in which the appellant was found guilty, convicted and sentenced to death as we have stated. In that judgment, *Musinga, J.* stated that he proceeded so with the consent of the defence and prosecution.

In his submission to us, *Mr. Odeny* contended that the trial was a nullity as the learned trial Judge made two serious errors. First he dispensed with the services of one assessor without complying with the legal requirements in that he failed to give reasons for dispensing with the assessor. Secondly, he took over the conduct of the case from another Judge but failed to comply with the requirements of **Section 200** as read with **Section 201 (2)** of the Criminal Procedure Code. He also said the learned Judge erred in failing to give reasons for his different conclusion from that of the assessors. On merit, *Mr. Odeny* submitted that there was no eye witness who testified that the appellant was seen killing the deceased. Both *Joseph* and *Eucabeth* never saw the appellant kill the deceased. *Joseph's* evidence was based on the identification of the appellant's voice but there was no evidence that he knew the appellant before and for how long to enable the court rely on that evidence. He added further that as *Eucabeth* admitted that she was unconscious immediately after she was stabbed, her evidence on identification could not therefore be a basis for conviction of the appellant particularly as there was not enough light for identification. Lastly *Mr. Odeny* submitted that the learned trial Judge did not give the appellant opportunity to adduce mitigating factors to the Court before sentence and that the provisions of **Section 306 (2)** of the Criminal Procedure Code were not complied with by the learned Judge. In opposing the appeal, *Mr. Kiprop*, the learned State Counsel submitted that the learned Judge came to a proper and inevitable conclusion as the prosecution's case against the appellant was watertight. *Eucabeth* saw the appellant with a knife and was attacked by the appellant as well; the deceased went to her rescue and the appellant turned on him. *Joseph* knew the voice of the appellant and so the issue of identification was not there. In his view, the dropping of one assessor midstream did not cause any miscarriage of justice as he was not allowed back again and the two remaining assessors were enough as far as law demanded then. In his view the provisions of **Section 306** were complied with and as to the complaint about non compliance with the provisions of **Section 200** as read with **Section 201** of the Criminal Procedure Code, his view was that as only judgment remained, those sections could not be complied with. He urged us to dismiss the appeal.

This is a first appeal. We are therefore bound to revisit the entire evidence analyse it, evaluate it

and arrive at our own conclusion provided we give allowance to the fact that the trial court had the advantage of hearing and seeing the demeanor of witnesses. – see case of **OKENO V R (1972) EA 32**.

On the complaint, that the learned Judge erred in dropping one assessor without giving reasons for doing so, we think the record is clear that after the first hearing which took place with all the assessors resent, it took a very long time for the hearing to resume i.e. from 6<sup>th</sup> July, 2004 to 29<sup>th</sup> May, 2006. To adjourn the hearing again so that reasons for the assessors' absence would be investigated would have delayed the hearing to the prejudice of the appellant who had been in custody since his arrest on 18<sup>th</sup> January, 2003. In law, two assessors could assist the court in hearing murder cases. Two assessors were there. It did not prejudice the appellant that only two assessors were available. If anything it did help in having his matter heard as early as a proper coram existed to dispose of his case. We see no merit in that complaint, particularly as the dropped assessor was not allowed back into the case.

The next issue we want to deal with is the issue of whether or not the trial was vitiated by the learned Judge taking over the case and proceeding to write and deliver judgment without calling upon the appellant personally to select whether to have the matter heard *de novo* or to recall some or all witnesses as the original trial court was not available to complete the case. In short, whether he was required to comply with the provisions of **Section 200**, as read with **Section 201(2)** of the Criminal Procedure Code. As is clear from the record, Bauni J. heard the entire case and summed up the entire case to the assessors. He also received assessors' opinion and thereafter reserved the judgment to be delivered on notice. In our view, the relevant part of **section 200** are **sections 200(1) (b)** and **200 (3)** both as read with **section 201(2)**.

**Section 200 (1)** provides:

***“Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –***

**(a) not applicable.**

**(b) Where judgment had not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.”**

And section 200 (3) states: -

***“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resumoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

Our understanding of that position is that where the preceding magistrate has heard the whole case such that only the judgment is remaining and he then ceases to exercise jurisdiction, then the succeeding magistrate has two options, under **section 200 (1) (b)** and these are either to act on the evidence recorded by the predecessor and write the judgment or to start the hearing *de novo*. He is not required to seek the accused persons input in such a case. Under **section 200 (3)**, where part of the evidence was recorded by the predecessor, then the court must inform the accused of his right to seek to recall any or all witnesses to be reheard. Thus, there is a difference between a situation where the preceding magistrate has completed full hearing and only judgment remains to be written and a situation where part of the evidence has been recorded by the preceding magistrate. In the former, all the succeeding magistrate needs to do is to decide whether to act on the evidence and write a judgment or to start the entire case *de novo*. We do not see **Section 200 (3)** as directing the succeeding magistrate to inform the accused of his right to recall some of the witnesses. This is borne out of common sense as in the case where the predecessor has recorded all evidence and only judgment is remaining, both sides have closed their case and all that remains for the succeeding magistrate is to see whether he can comprehend the evidence rendered and proceed to write judgment on it or not. If he can, then he would proceed and act on the evidence. If on the other hand he cannot comprehend the recorded evidence then he has to start *de novo*. That, in our view is

the legal position. **Section 201(2)** provides:-

**“The provisions of section 200 of this act shall apply mutatis mutandis to trials in the High Court.”**

Thus our interpretation of **Section 200(1)(b)** and **200(3)** in respect of a trial by magistrate applies to this case which was tried by the High Court. In short, we cannot fault *Musinga, J.* the learned judge who acted on the evidence, already recorded by his predecessor, *Bauni J.* He needed not inform the appellant of his rights to seek recall of witness as the case had been fully heard and all evidence recorded by his predecessor. In fact, as both sides had closed their case, summing up to the assessors’ done and the assessor’s opinions received and recorded the only thing *Musinga, J.* could have done if he could not comprehend the record could have been to order hearing *de novo* if he was minded to do so. But as is apparent, he comprehended the evidence on record and acted on it rightly. In any case as we have said, in his judgment, the learned judge stated that both parties agreed that he could peruse the record and proceed to prepare judgment. This complaint lacks merit.

The third issue raised before us was that the learned Judge did not comply with the provisions of **Section 306 (2)** of the Criminal Procedure Code. That is the provision which requires the court, in a trial in the High Court to explain to the accused person his rights as regards his defence, after finding that a *prima facie* case has been made out by the prosecution against him. This complaint is, with respect, a non starter. The appellant had an advocate at his trial. After the learned judge found that the appellant had a case to answer, the hearing was adjourned and thereafter from time to time it came for mention. On 16<sup>th</sup> July, 2007, the record shows that when the hearing resumed, *Mr. Nyabera*, the then appellant’s advocate told the court.:-

**“Accused will give unsworn defence. No witness to call.”**

That answer must have been given in response to a question which must have been put at the end by the court having told the appellant his rights in law at that stage. *Mr. Odeny* says the appellant should have responded to the question himself to indicate he was made aware of his rights as the case was his and not advocate’s case. That might have been the best approach, but that is besides the point. His complaint is that the court did not tell him his rights at all, and that is answered by the fact that his own advocate also heard the court tell him his rights and responded on his behalf. That complaint cannot stand.

The last complaint is that the learned Judge did not give the appellant opportunity to address the court on mitigating factors. The short answer to that complaint is that the learned Judge afforded the appellant that opportunity and that is why the appellant is recorded as having said, after the judgment was delivered:-

**“I did not commit the offence. My defence was not well considered.”**

That is what he chose to say in mitigation. No one could force him to say more and certainly, that court could not.

That brings us to the merits or demerits of the appeal on substance. It is true from the record before us that none saw the appellant inflict the fatal stab wounds that caused the death of the deceased. *Eucabeth* was however firm that it was the appellant who attacked her and stabbed her three times in the room, pulled her to the verandah and again stabbed her twice. There was a lamp in the room. There was moonlight outside. Besides that, she said it was not yet very dark. It was 7.30 p.m. She knew the appellant as he lived near her in the same market. As she was being stabbed, she screamed and the deceased was the first to respond. The appellant then chased the deceased but she did not see the appellant inflict any wounds upon the deceased. of course, she was left at the verandah as the deceased was being chased by the appellant and so she could not see what happened outside the verandah particularly as it was getting dark even though moonlight was on. *Joseph* heard the screams and heard voice of the appellant saying “*I have finished.*” *James* on being called by a child sent by *Joseph* says he also heard somebody who was standing near the deceased saying “*I have finished him.*” There is some difference in

the two versions and unless these words were repeated, it is doubtful that *James* could have heard what *Joseph* heard as *James* said he heard his version once he reached the scene, yet it was a child sent by *Joseph* who called him. Secondly, *James* only gave that piece of evidence in cross-examination. We think it was proper that his evidence was ignored as far as that aspect was concerned. In short, it was upon circumstantial evidence that the appellant was convicted of the offence. The circumstances being that he was the person who left *Eucabeth* having stabbed her with a knife and chased the deceased with the same knife. At the relevant time *Joseph* heard his voice just as he also heard screams and that voice *Joseph* heard was from the scene and was saying “*I have finished.*” *Mr. Odeny* submitted that *Joseph* did not say in evidence that he knew the appellant. That with due respect is not altogether correct. *Joseph* said in examination in chief:-

***“I had heard and recognized the voice of the other man who said “I have finished.” He is Charles Ogero now the accused. He too is my cousin.”***

As cousins, one must accept that they used to talk to each other so that each would be in a position to recognize the voice of the other. In our view, these circumstances pointed irresistibly to the appellant as the perpetrator of the offence with which he is charged –See cases of **REX VS KIKERING ARAP KOSKE & ANOR [1949] EACA 135**, as read with the case of **SIMONI MUSOKE VS REPUBLIC [1958] EA 715, MKADISHO VS REPUBLIC [2002] I KLR 461** and **TEPER V R [1952] AC 480**.

Added to that, is the fact that if *Eucabeth* is to be believed, and we have no reason for not believing her, then the appellant is the only person who left *Eucabeth’s* verandah in hot pursuit of the deceased. Thereafter deceased was found lying down next to the road with several stab wounds which ended in his death the next day. *Eucabeth* saw him with a knife which he used in stabbing her. He left with that knife as he was chasing the deceased. The deceased was stabbed apparently with a knife. In that scenario, he was the only person who knew what could have happened to the deceased immediately after he left *Eucabeth* chasing the deceased. **Section 111** of the Evidence Act provides:

***“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception from or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”***

In this case, he was the only person seen last with the deceased chasing the deceased. Immediately thereafter the deceased was found lying down with stab wounds. It was upon him to explain what happened. He did not do so. In fact his defence was alibi. As we have said, *Eucabeth* appeared a reliable witness and *Joseph’s* evidence too was reliable. In the circumstances, the appellant was placed at the scene and in our view his defence of alibi was ousted. We have no reason to disturb the decision of the trial court.

*Mr. Odeny* said the learned Judge did not give reasons for disagreeing with the assessors. We agree. This was an omission, but in our view it would not warrant disturbing the judgment which clearly gives reasons why the learned Judge reached his decision and these reasons fill the gap.

In the result, this appeal lacks merit. It is dismissed.

***Dated and delivered at Kisumu this 22<sup>nd</sup> day of MARCH, 2012***

***S.E.O. BOSIRE***

.....  
***JUDGE OF APPEAL***

***E.O. O’KUBASU***

.....  
***JUDGE OF APPEAL***

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**