



**IN THE COURT OF APPEAL
AT NAKURU**

CORAM: TUNOI, O'KUBASU & AGANYANYA, J.J.A.

CRIMINAL APPEAL NO. 115 OF 2009

BETWEEN

DAVID BENSON KIPKERICH KEMEI CHUMO APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from conviction and sentence of the High Court of Kenya at Kericho (Kimaru, J) dated
15th May, 2009**

in

H.C.CR.C. NO. 21 OF 2004)

JUDGMENT OF THE COURT

DAVID BENSON KIPKERICH KEMEI CHUMO, the appellant, was according to information dated 15th June, 2004, arraigned before the High Court of Kenya at Kericho with two offences of murder contrary to **Section 203 as read with Section 204 of the Penal Code**.

It was alleged that on the night of 12th and 13th day of April, 2004, at Kakabur village in Kericho District within the Rift Valley Province, he murdered his wife, **Ruth Cherotich Kemei** and his son, **Alphonse Kipkurui**.

The appellant pleaded not guilty, but after a trial, part of which was conducted with the aid of assessors, the learned Judge, (Kimaru J) found him guilty as charged, convicted and sentenced him to death.

The main ground of appeal canvassed before us by the appellant through his learned counsel Mr Magata, relates to the breach of procedure committed by the learned Judge in the trial of the appellant. It is submitted that the learned Judge erred both in law and fact in discharging the assessors midstream in the trial and yet they had substantially participated in the trial.

The record shows that the plea was taken on 1st July, 2004, before Muga Apondi, J. The hearing commenced on 4th November, 2004, after three assessors had been selected. Two witnesses were heard on that day after which the trial was adjourned to 11th April, 2005. It would appear that soon thereafter, Muga Apondi, J was transferred and the case was thereafter mentioned on several occasions with no hearing dates fixed until 7th June, 2006, when Kimaru, J took over. On that day, the hearing commenced

de novo and the same assessors were empanelled afresh.

However, on 6th November, 2007, after six witnesses were heard, the learned Judge made an order as follows:

“ORDER:

Although the assessors are present, their attendance is dispensed with in view of the amendments made to the Criminal Procedure Code and which came into effect on the 15/10/2007.”

Soon thereafter, the prosecution called one more witness and closed the case.

It is clear that when the trial started on 4th November, 2004, the provision of the assessors was still part of the law and if the repeal of that law was effected through amendment by **Act No. 7 of 2007 of 15th October, 2007**, that did away with assessors, then the provisions of **Section 23 (3) (e) of the Interpretation and General Purposes Act (Cap 2 Laws of Kenya)** were to be applied and the trial should have continued with the aid of assessors to the end. See **PETER NGATIA RUGA VS REPUBLIC, CRIMINAL APPEAL NO. 42 OF 2008 (NYERI) Unreported**. This was not done here and the omission constituted a grave misdirection.

It must follow, therefore, that the trial the subject matter of this appeal was vitiated and we declare it a nullity.

In this case, the evidence established that the two deceased persons were brutally hacked to death while in bed. They suffered horrific injuries to which they succumbed after several hours of painful groaning. Though the appellant has been in custody for about seven years, justice must be done. Witnesses are easily available since most of them are members of one family. Successful retrial can be mounted. In those circumstances, we think that it is in the best interest of justice to order a retrial and we do so.

In the result, the appeal is allowed. The conviction is quashed and the sentence of death imposed upon the appellant is set aside.

The appellant shall be re-tried before the superior court and the trial shall proceed under the provisions of the law obtaining after the repeal of the sections relating to the trials with the aid of assessors by **Act No. 7 of 2007**, that is, without the aid of assessors.

We order that the appellant be remanded in police custody for 14 days hereof. We further direct that his trial be conducted expeditiously. As we have ordered a re-trial it would not have been appropriate for us to set out the full facts of this case nor to discuss the merits of the other issues raised in the appeal.

Dated and delivered at Nakuru this 9th day of June, 2011.

P. K. TUNOI

JUDGE OF APPEAL

E. O. O’KUBASU

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR