



**IN THE COURT OF APPEAL
AT KISUMU
CORAM: OMOLO, GITHINJI & VISRAM J.J.A)
CRIMINAL APPEAL NO. 198 OF 2009**

BETWEEN

**SIMION CHECHE MAGEREAPPELLANT
AND
REPUBLICRESPONDENT**

(An appeal from a judgment of the High Court of Kenya at Kisumu (Musinga J.) dated 26th May, 2009

**in
H.C.CR.A.NO.24 OF 2005)

JUDGMENT OF THE COURT

The appellant was convicted by the superior court (Musinga J.) for the offence of murder contrary to **sections 203 and 204** of the Penal Code and sentenced to death. This is his first appeal against the conviction and sentence.

The charge stated that on 1st December 2004 the appellant murdered Gisiri Gitangita (deceased). The prosecution called five witnesses at the trial namely, Coleta Nyamwamu (PW1), (Coleta); Robi Gitangita (PW2), (Robi), John Gitangita Magere (PW3), (John), P.C. Charles Ndege (P.C. Ndege) and Dr. Aggrey Idagiza (PW5), (Dr. Aggrey). The Appellant made unsworn statement at the trial and called one witness Zacharia Letoto Magere (DW 2), (Zacharia).

The evidence on which the prosecution relied was briefly as follows.

On 1st December 2004, John left his home at about 4 p.m. and told his son, the deceased who was aged 13 years, to look after the cattle. At about 6 p.m., Coleta who is a brother of the deceased was collecting firewood near the home while the deceased was grazing cattle nearby. The appellant who is a brother of John and an uncle of Coleta went to where deceased was armed with a panga and a rungu. According to evidence of Coleta, the appellant held deceased, knocked him down and got hold of his neck. She testified that when she asked the appellant why he was doing so he left the deceased and started chasing her and that she ran away and reported to her mother Robi that the appellant was killing the deceased. Robi ran to the scene in the company of Coleta. She saw the appellant running away from the scene. She found the deceased lying down and when she asked the deceased what had happened the deceased replied in low tone that the appellant had held his neck. Robi noticed that the deceased's neck was loose and screamed for help. When John, the father of the deceased returned home later he found many people. The deceased who was lying down told him that it was the appellant who had attacked him. The deceased's neck was loose and he was taken to Isebania Hospital where he was pronounced dead on arrival. Dr. Aggrey who performed postmortem on the body two days later found a laceration of the neck at the level of cervical

vertebra 1 and 2. He also found that, the cervical vertebra 2 had fractured and the spinal cord had laceration. He formed the opinion that cause of death was due to laceration of the spinal cord at the level of C1 and C2 due to sudden jerk and extension of the neck.

The appellant disappeared from home and when John saw him at home on 3rd March 2005 - over 3 months later he reported to the police and the appellant was arrested on the following day – 4th March 2005.

The appellant stated at the trial, among other things, that he went to Ntimaru stock market on 1st December 2004, and bought a cow; that the cow was stubborn and he spent the night at the home of Mwita Mairu; that he sold the cow on the following day at Kehancha market; that he bought another cow which he sold at Maberu market on the following day; that he returned home on 3rd December 2004 when he was informed that the deceased had died and that he was the suspect; that later at night the deceased's father, John, speared him at the back; that he was given land- 5 acres by his father and that John wants him to die so that he can take the land.

The appellant's witness Zacharia who is his brother testified at the trial, among other things, that, the appellant was speared when he returned home on the night of 3rd December 2004 after which he was admitted at Onchere Hospital for one month; that after discharge the appellant was admitted at Kehancha Hospital; that the appellant returned home in February 2004 and that there was no previous attempt to arrest him.

The appellant who was represented by Mr. Omwenga was tried before Bauni J with the aid of assessors. The requirement that trials for murder should be held with aid of assessors has now been repealed. The two assessors who participated in the entire trial formed an unanimous opinion that the appellant was guilty of murder.

The trial Judge passed on before writing the judgment. The trial was taken over by Musinga J and upon Musinga J complying with **section 201(2)** of the Criminal Procedure Code, the appellant's counsel requested the new Judge to proceed to write the judgment based on the proceedings. Musinga, J believed the evidence of Coleta and Robi and made a finding that the evidence of the two witnesses rendered the defence of alibi worthless; that the finding of the doctor regarding the cause of death corroborated the evidence of Coleta and that the defence of alibi was a sham.

Although Mr. Soire the appellant's counsel filed a supplementary memorandum of appeal containing six grounds of appeal, he only raised technical grounds at the hearing of the appeal namely, that, the language used at the trial was not disclosed; that the charge was defective as the appellant should have been charged under **section 202** of the Penal Code; that the medical report regarding appellant's fitness to stand trial was not availed and that no police officer was present during the postmortem. He also referred to the evidence of John that he does not know why the appellant attacked his son.

However, this being a first appeal the Court had a duty to reappraise the evidence of Coleta and her mother Robi. Coleta testified that the appellant went to where the deceased was grazing cattle at 6 p.m., held his hands and legs, knocked him down, held his neck and that when she asked appellant why he was doing so the appellant chased her away. Robi on her part testified that upon receiving the report she ran to the scene, that she saw the appellant running from the scene and that she found the deceased lying down with a loose neck. On cross-examination, Robi testified that she did not see the appellant attacking the deceased but found him a few metres away from where the deceased was lying.

There was also the evidence of Robi and John that the deceased named the appellant as the person who attacked him. Moreover, the evidence of Robi and John that the appellant disappeared from home for some time was supported by P.C. Ndege.

There was ample evidence that the deceased sustained neck injuries and that he died shortly after as a result of the neck injuries. On our evaluation of the evidence, we are satisfied that the prosecution case

was credible. The evidence of Coleta and Robi was consistent as to the identity of the appellant. The evidence of Robi and John that the deceased made a dying declaration in which he mentioned the appellant was consistent and credible. As the superior court correctly found, the evidence of Dr. Aggrey regarding the injuries that the deceased had sustained supported the evidence of Coleta that she witnessed the incident and that she saw the appellant hold the deceased by the neck.

The material witnesses, that is, Coleta, Robi and John were closely related. The appellant claimed that John wanted to take his land if he is sentenced to death. Zacharia claimed that John used to complain that the appellant was given a bigger piece of land by their father. However John denied that there was any grudge and said that the appellant's land and his land are of the same size which evidence was supported by Robi. There was no concrete evidence of any grudge by John against the appellant. Both John and Robi testified that they did not witness the appellant assault the deceased. Had they intended to fabricate the charge against the appellant there was nothing to stop them from lying that they witnessed the assault. Although Zacharia supported the appellant's defence of alibi the defence was displaced by the strong and credible evidence of the material witnesses.

The appellant admitted that he was not at his home for some time after the incident. The evidence of Zacharia that the appellant was away from home because he had been admitted to hospital is not supported by the appellant. Indeed the appellant did not say that he was admitted in hospital at any time. Furthermore, there was no concrete evidence that the appellant was admitted in hospital. The two assessors believed the prosecution case. The evidence of Robi, John and PC Ndege that the appellant absconded after the incident was believed by the assessors. That evidence is credible and we accept it. That conduct of the appellant lends credence to the evidence of Coleta and Robi.

The technical grounds raised by the appellant's counsel have no merit.

Although the appellant did not complain that he was prejudiced by the fact that the judgment was written by a judge who did not conduct the trial we have nevertheless considered the matter in the interest of justice.

By **section 201 (2)** of CPC the provisions of **section 200** of CPC applies *mutatis mutandis* to trials held in High Court. By section **200 (1) (b)** of CPC Musinga J. had jurisdiction either to act on the evidence recorded by Kaburu Bauni J. or to resummon the witnesses and recommence the trial. If the Judge elects to act on the evidence wholly recorded by another Judge and convicts on such evidence this Court on first appeal, like the High Court sitting on first appeal from judgment of a subordinate court, would have jurisdiction to order a re-trial in such a case if it is of the opinion that the appellant was materially prejudiced thereby.

In the present case the appellant was tried with the aid of assessors. He was represented by a counsel at the trial who elected that the trial should not be repeated. This is a case where the witnesses were related to the appellant and where there was overwhelming and credible evidence to support the charge. In the circumstances the procedure adopted did not materially prejudice the appellant.

In the circumstances we are satisfied that the appellant was properly convicted.

Accordingly the appeal is dismissed in its entirety.

Dated and delivered at Kisumu this 2nd day of November, 2011

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR