



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 287 of 2008**

JOSEPH OKOTO OLOO 1ST APPELLANT
ISAIAH MENO OWITI 2ND APPELLANT
MARTIN ANYANGO LUKA 3RD APPELLANT
JANNES ODERA ANDARA 4TH APPELLANT
RICHARD ODANGA OLUNDU 5TH APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the sentence and conviction of the High Court of Kenya at Kisii (Musinga, J) dated 18th December, 2008

In

H.C. Cr. C. No. 20 of 2004)

JUDGMENT OF THE COURT

On 18th April, 2004, a total of seven persons appeared before the late Mr. Justice Kaburu Bauni, charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information were that during the night of 30th November/1st December, 2003 at Kwa sub-location, Suna Rabuor Location in Migori District of Nyanza Province, the seven named persons murdered Joseph Abich Odhuno, hereinafter “*the deceased.*” The persons so cited in the Information were William Otieno Jaoko (Accd 1), Paul Okeyo Opiyo (Accd. 2), Joseph Okuto Oloo (Accd 3), Isaiah Meno Owiti (Accd. 4), Martin Anyang Luka (Accd. 5), Janness Odero Andela (Accd. 6) and Richard Odanga Orundu (Accd. 7). It appears from the record that during the trial, William Otieno Jaoko (Accd. 1) and Paul Okeyo Opiyo (Accd. 2) died. The remaining five are now the appellants before the Court. The trial Judge also died after hearing the case for the prosecution and the defence but before summing-up the case to the assessors. The trial was taken over by Mr. Justice Musinga but it appears that no summing-up to the assessors took place and the assessors did not in fact give their verdict. We think this must have occurred because Musinga, J took over the trial on 3rd April, 2008 and by that time Parliament had amended the Criminal Procedure Code and abolished the requirement that trials before the High Court had to be with the aid of assessors. The learned Judge apparently read the record prepared by his predecessor and thereafter wrote a judgment dated 18th December, 2008 in which he convicted the five appellants and duly sentenced each one of them to death. While what Musinga, J did is perfectly permissible under the new **section 201 (2)** of the Criminal Procedure Code which applies the provisions of **section 200** of the Code to trials in the High Court, we would nevertheless caution that even though **section 200** of the Code allows this, a wholesale application of those provisions without taking into account the circumstances of each case – e.g. the stage which the trial has reached, whether it would be necessary for the judge taking over the trial to form an opinion on the credibility of a particular witness

or witnesses and so on – might well result in an injustice. In the present case, the evidence of one witness, Rose Auma (P.W1), the widow of the deceased appears to have been crucial. Musinga, J did not take her evidence and did not see her. Nor did he see the other two witnesses who also mentioned the names of some of the appellants as having participated in the crime. The Judge did not also have the benefit of hearing the opinions of the assessors who might have seen and heard some of the witnesses.

But even if the assessors had been allowed to give their verdict that would have been of very little assistance to the Judge.

When the trial opened before Kaburu, J on 18th October, 2004, he selected three assessors as the law then required him to do . The assessors so selected were Jared Ndigwa Oriki, Joseph Manyabe Okao and Samuel Ongwae Onkundi. Rose was the only witness who testified that day; the hearing was then adjourned and resumed on 13th June, 2005. Only two assessors, Jared Ndigwa Oriki and Joseph Manyabe Okao were present. The third assessor Samuel Ongwae Onkundi was absent and the Judge ordered that :-

“Hearing to proceed with two assessors present. A 3rd assessor is dispensed (sic).”

After the third assessor was dispensed with thus, PW2, PW3 and PW4 testified. The hearing was again adjourned to 25th October, 2005. It appears that on 25th October, 2005, one of the two remaining assessors was absent. The Judge again dropped the absent assessor but the record shows that two assessors, Jared Ndigwa and Joseph Manyabe were present to sit as assessors.

In the face of this kind of confusion, it is not surprising that Mr. Musau, the learned Senior Principal State Counsel, agreed with Mr. Jude Ragot, the learned counsel for the appellants, that the trial of the appellants was not held according to the law that then existed and Mr. Musau conceded the appeal on that ground. We respectfully agree.

Mr. Musau, nevertheless, asked the Court to order a retrial of the appellants. Mr. Musau submitted that since the trial was concluded in 2008, the prosecution would still be in a position to re-summon its witnesses. Mr. Ragot vigorously opposed any order for retrial pointing out that the offence took place in 2003, some six years ago.

In coming to our conclusion we must take into account the nature of the charge against the appellants and it is agreed the charge is a serious one as a life was brutally taken away. We must also take into account the nature of the available evidence and in this respect we must point out that if Rose (PW1) and some other two witnesses were to be believed, a conviction might well be possible. Again the appellants were described in the evidence as “*vigilantes*” which we understand to mean they were involved in the maintenance of law and order in the village. If the evidence on record were to be correct then it seems that they were rather terrorizing the village and not maintaining law and order. Taking all the circumstances into account we have come to the conclusion that an order for retrial would better serve the cause of justice. Accordingly we allow the appeal, set aside the conviction and sentence of death imposed on each appellant and order that they shall be tried *de novo* before a judge other than Musinga, J and the retrial shall be at the High Court at Kisii. The trial with the aid of assessors has been abolished and the new trial shall not be with the aid of assessors. The appellants will remain in custody to await their new trial. These shall be the Court’s orders in the appeal.

Dated and delivered at Kisumu this 5th day of February, 2010

R.S.C. OMOLO

.....
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.