



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**

**Criminal Appeal 271 of 2008**

**JULIUS OBARE ANGASA ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a sentence and conviction of the High Court of Kenya at Kisii  
(Kaburu, J) dated 13th June, 2006**

**In**

**H. C. Cr. C. No. 25 of 2003)**

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**JUDGMENT OF THE COURT**

On 8<sup>th</sup> November, 2005 Julius Obare Angasa, the appellant herein, appeared before the late Mr. Justice Kaburu Bauni to take his trial on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the information were that on 5<sup>th</sup> day of December, 2002 at Eburi sub-location in Gucha District within Nyanza Province, the appellant murdered Margaret Nyambeki Anyona, hereinafter the deceased. The deceased was the wife of David Anyona Angasa (PW5) who was appellant's elder brother. In the morning of 5<sup>th</sup> September, 2002 at about 7.30 a.m. she went to work on her shamba where she was planting groundnuts. Robina Nyangweso (PW1) who was their close neighbour saw the appellant go to the shamba where the deceased was working. The appellant was armed with a panga. Robina heard the appellant tell the deceased to leave the shamba. The deceased asked why she was to leave and the next thing Robina saw was the appellant cutting the deceased with the panga he had. According to Robina the appellant cut the deceased twice on the neck and on the right hand. The deceased fell down and the appellant started to run away. Josephine Moragwa (PW3) was another close neighbour. That morning she was in her house with her children. She heard "noise" from the shamba where the deceased was working. She went outside and she saw the appellant standing near the deceased with a panga. The panga was blood-stained and the deceased was lying down. Josephine was about twenty metres from them. When the appellant saw Josephine, he started to run away. Josephine did not talk to him. Josephine went to where the deceased was lying and she found her dead. She raised an alarm.

Dr. Stephen Ondigo carried out the post-mortem on the body of the deceased on 10<sup>th</sup> September, 2002 at Gucha District Hospital. During the hearing, Ondigo was not available and Dr. Dickson Mchana (PW2) produced the post-mortem report on behalf of Dr. Ondigo. According to the report, there was a deep cut wound 10cm x 10cm on the left side of the neck. There was another cut wound on the right elbow. The deceased was six months pregnant and the child was dead inside her body. In Dr. Ondigo's opinion, the cause of death was severe blood loss secondary to cut wounds inflicted by a sharp object.

All the prosecution witnesses testified on the same day, namely 8<sup>th</sup> November, 2005. The learned trial Judge then adjourned the hearing to 7<sup>th</sup> December, 2005 and on that day the Judge ruled that the appellant had a case to answer. The hearing was again adjourned to 22<sup>nd</sup> February, 2006 and on that day, the appellant made an unsworn statement. Apparently only two assessors out of the three, who had been selected on 8<sup>th</sup> November, 2005 were present. No mention at all was made as to what had happened to the third assessor but the only inference one can draw from the record is that the Judge dispensed with his presence and continued the trial with the remaining two assessors. The casual manner with which the learned Judge dealt with that issue drew a lot of fire from Mr. Onsongo, learned counsel for the appellant, and we shall in due course deal with that issue.

In his unsworn statement the appellant told the learned Judge and the remaining two assessors:-

***“I recall the night of 4<sup>th</sup>/5<sup>th</sup> September, 2002. We were brewing traditional liquor. I assisted my wife to brew. The next day we went to plant maize. I left home with a jembe and fertilizer. I had drunk some liquor. I reached the shamba at 8 a.m. I found Margaret Nyambeki Anyona had interfered with the boundaries. She was planting groundnuts in my portion. When I asked why she had done so she charged towards me with the jembe she had. She hit me on the forehead I disarmed her. She also had a panga. She picked a panga. She picked it and cut me on the chest I also hit her. She fell down. I did not hit her again. We had no problems between us before then we have been staying with her for five years with no problem. I was later arrested.”***

It is clear from this statement that the appellant basically admitted that it is him who killed the deceased. He said he hit her and she fell down though he did not say what he used to hit her. But Robina said it was the appellant who was armed with a panga and that it was the appellant who attacked the deceased. Josephine, of course, did not see the actual attack but she said she saw the appellant standing over the deceased with a blood stained panga. Robina did not say that she saw the deceased attack the appellant first and it was never suggested to her that it was the deceased who attacked the appellant. On the state of the evidence on record the Judge and the remaining two assessors were perfectly entitled to conclude that the appellant went to the shamba armed with a panga and that it was him who attacked the heavily pregnant woman, cutting her with a panga on the neck and on her arm. She and her unborn baby died from that attack.

We have alluded to Mr. Onsongo’s attack on the casual manner in which the presence of the third assessor was dispensed with by the trial Judge. Before their repeal by **Act No. 7 of 2007**, i.e. the provisions relating to trials with the aid of assessors were contained in Part IX of the Criminal Procedure Code and that part is headed: -

### **“PROCEDURE IN TRIALS BEFORE THE HIGH COURT”**

**Sections 262 and 263** provided:-

**“262. All trials before the High Court shall be with the aid of assessors.**

**263. When the trial is to be held with the aid of assessors the number of assessors shall be three.”**

Relying on these sections, Mr. Onsongo stressed that at the beginning of a trial conducted with the aid of assessors the number of the assessors must be three and Mr. Onsongo rightly pointed out the use of the word “shall” in both **sections 262 and 263**. The Judge, however, complied with the two sections for he selected three assessors whose names were recorded as Samuel Ongwae Onkundi, David Herald Obegi and David Onger Omosa. All of these assessors heard witnesses for the prosecution but when the appellant gave his unsworn statement after the hearing had been adjourned the third assessor was not present. The record of the Judge simply shows:-

**“22/2/06  
Bauni, J**

**Mr. Chirchir for State.**

**Mr. Kaburi for accused**

**Accd present.**

**Both assessors present.**

**Court: Accused put on his defence.”**

The absence of the third assessor is only indicated by the entry “*Both assessors present.*” No explanation was given as to why the third assessor was not present and whether his presence could not have been enforced. **Section 298** of the Criminal Procedure Code as it then stood provided:-

***“298 (1). If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors.***

***(2) If two or more of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.”***

The third assessor had clearly absented himself but even so, it was the duty of the learned trial Judge to show that it was not immediately possible to enforce the attendance of that assessor; nor did the Judge formally make an order dispensing with the attendance of that assessor. Because of these defaults on the part of the trial Judge, Mr. Onsongo asked us to declare the trial of the appellant a nullity. We do not think it would be right for us to do so. Though the learned trial Judge failed to formally dispense with the attendance of the third assessor, it is clear from the record the Judge did so and the third assessor did not thereafter participate in the trial. Only two assessors gave their verdict and that was allowed under the provisions we have cited. Mr. Onsongo relied on this Court’s decision in **MURAYA VS. REPUBLIC [2001] KLR 50** where the Court held that:-

***“A trial once started with three assessors as mandatorily required by section 263 of the Criminal Procedure Code can only proceed with two assessors in the circumstances envisaged by section 298 (1) of the Code. The trial in this case was a nullity.”***

What are the circumstances envisaged under **section 298 (1)** of the Code? One is that it is not “*practicable immediately to enforce his attendance.*” That phrase must take into account the circumstances of each case. The offence against the appellant was committed in September, 2002. His trial did not begin before Kaburu, J until 8<sup>th</sup> November, 2005 when the assessors were selected and all the prosecution witnesses testified. The trial was again adjourned on several occasions and when it did resume on 22<sup>nd</sup> February, 2006, some four years from the date of the crime, one assessor was absent. The Judge ought to have made a clearer record with regard to the absence of the assessor but it is clear to us the Judge must have been reluctant to adjourn the hearing again to enforce the attendance of the missing assessor. There is nothing in the record before us to show that the attendance of the absent assessor could have been immediately procured to enable the trial proceed that day. We are satisfied the course adopted by the trial Judge did not occasion a failure of justice to the appellant and we reject ground six of the appellant’s grounds of appeal dealing with that aspect of the matter.

Mr. Onsongo next argued on the issue of intoxication raised by the appellant in his unsworn statement. We agree with Mr. Onsongo that the Judge did not in any way direct the assessors on that issue. In his summing-up the Judge told the assessors to consider the issue of manslaughter but he did not tell them the basis on which they were to consider it. It was the duty of the Judge to direct himself and the assessors on that issue, particularly in view of the provisions of **section 13 (4)** of the Penal Code which provides that:-

***“Intoxication shall be taken into account, for the purpose of determining whether the person had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the***

*offence.”*

Was the appellant telling the Judge and the assessors that because he had taken liquor, he was not in a position to form the specific intent to kill, i.e. the *mens rea*? It was clearly the duty of the trial Judge to direct the assessors on the point. He dealt with the matter in his own judgment but it was also his duty to direct the assessors on it. As this Court pointed out in **DAVID MUNGA MAINA VS. REPUBLIC [2007]** eKLR, a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The court is under a duty to consider such a defence where it is raised and in this case the trial court was also under a duty to direct the assessors on it - see for example, **SAFARI GALGALO KOMORO VS. REPUBLIC**, Criminal Appeal No. 255 of 2006 (unreported). We are satisfied there is merit in this ground of appeal.

We accordingly allow the appeal to the extent that we set aside the conviction for murder and substitute therefor a conviction for manslaughter under *section 202* as read with *section 205* of the Penal Code. We also set aside the sentence of death imposed on him by the trial court.

What sentence should we impose on the appellant? He was a first offender but he brutally attacked a heavily pregnant woman and as a result of the attack, even the innocent baby the deceased was pregnant with died. We must, accordingly, impose upon him a severe sentence which will bring it home to him that liquor is no excuse for such grave crimes. We sentence the appellant to twenty (20) years imprisonment to run from **13<sup>th</sup> June, 2006** when he was sentenced by the High Court in Kisii. Those shall be the orders of the Court in the appeal.

Dated and delivered at Kisumu this 5<sup>th</sup> day of February, 2010.

**R.S.C. OMOLO**

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

**E.O. O’KUBASU**

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

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**