



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

Criminal Appeal 324 of 2008

**JAMES KAMAU WAINAINA 1ST APPELLANT
PETER MUYA KAMOTHO 2ND APPELLANT**

AND

REPUBLIC RESPONDENT

***(Appeal from a Conviction and Sentence of the High Court of Kenya
at Nakuru (Koome, J.) dated 16th October, 2008***

in

H.C.C.R.C. NO. 41 OF 2003)

JUDGMENT OF THE COURT

The two appellants herein, **JAMES KAMAU WAINAINA** and **PETER MUYA KAMOTHO**, were tried by the High Court of Kenya at Nakuru on an Information charging them with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the **15th day of December, 2002** at Central Farm Kuresoi in the Nakuru District of the Rift Valley Province, the two jointly murdered **Peter Kinuthia Thuku**.

The prosecution called a total of ten witnesses who testified in support of the charge against the two appellants.

On **14th December, 2002**, **Peter Kinuthia Thuku** (the deceased) was well when he escorted his wife **Florence Wairimu Kinuthia** (PW1) to the bus stage where she boarded a matatu to Njoro together with their two children. On **21st December, 2002** the body of the deceased was found buried in a grave that had been dug inside the bedroom of his house under the bed. When **Wairimu** (PW1) left for Njoro, she left the deceased with his two workers who are the two appellants.

The summary of the evidence adduced in the superior court was as follows: When **Wairimu**(PW1) travelled to Njoro she left the deceased with the two appellants at home in Kuresoi, where the deceased had employed the two in the business of brewing chang'aa which the deceased used to sell in his homestead. PW1 testified that she had agreed with the deceased that she would attend a funeral of an uncle at Elburgon after visiting her family in Njoro. The deceased was supposed to join PW1 at Elburgon but he never showed up at the funeral. When PW1 returned to her home in Kuresoi on **18th December, 2002**, she found the 2nd appellant selling at the kiosk which ordinarily used to be operated by the deceased. She inquired from the 2nd appellant where the deceased was and the 2nd appellant told her that the deceased had gone on a safari the same day she left for Njoro and that the deceased had left the kiosk to him (2nd appellant) to run. This surprised PW1 because the deceased did not mention to her that he was going on a safari.

PW1 informed the deceased's sister as she (PW1) made further enquiries from friends and neighbours. **Evans Mukui Mbiyu** (PW3) a neighbour of the deceased testified that on 15th December, 2002, at about 10:00 p.m. there was noise of somebody groaning in pain from the home of the deceased. When Mbiyu went to check he found the gate locked from inside. The following day PW3 went to inquire what had been happening the previous night and the 2nd appellant informed him that police officers were beating somebody along the road and the person who was being beaten had escaped with the deceased. On further inquiries as to why the 2nd appellant was operating the kiosk of the deceased, the 2nd appellant stated that the deceased had run away to Nakuru or Kisumu to set up a new business and left the kiosk to him (2nd appellant). On 21st December, 2002, PW3 accompanied PW1 to the police station to report the disappearance of the deceased. As a result of that report, the 2nd appellant was arrested.

Benson Nyandusi (PW2) testified that on 15th December, 2002 at about 8:30 p.m. he heard screams from the home of the deceased and when he went to check he found the gate locked from inside. According to (PW2) there was noise as if somebody was digging a hole inside the house of the deceased but since this was a house where there was brewing of illicit brew he thought that it must be the illicit brew being buried. On 19th December, 2002, the 2nd appellant collected cow dung from PW3's compound to smear the floor of the deceased's house.

As a result of investigations the police were led by the 2nd appellant to the place where the body of the deceased had been buried - under the bed in the deceased's bedroom. The body was exhumed on 23rd December, 2002. According to **PC Richard Langat** (PW9) postmortem examination on the body of the deceased was conducted on 24th December, 2002 but there was no postmortem report produced in evidence.

When put to their defence both appellants denied any involvement in the death of the deceased. They both claimed that they were arrested in connection with chang'aa brewing.

The learned judge considered the evidence adduced before her and came to the conclusion that the case against the appellants was based on circumstantial evidence in that on the material day the deceased was with the two appellants and the same night there were screams from that home. In the course of her judgment, delivered on 16th October, 2008, the learned judge said:-

"It is clear from the evidence that there was no eye-witness who saw the accused persons killing the deceased. This case is purely based on circumstantial evidence that on the material day the deceased was with the accused persons. Neighbours namely PW2 and PW3 heard a scream of a man groaning in pain. When they went to check they heard people digging but they thought chang'aa was being buried. The 2nd accused person told PW1, PW2 and PW3 that the deceased had gone on a safari. The 2nd accused person also smeared the floor of the house where the body of the deceased was found buried with cow dung. This was obviously meant to conceal the death of the deceased and to divert the attention."

After considering a few authorities on circumstantial evidence, the learned judge went on to state as follows:-

"In this case the two accused persons were the last ones to be seen with the deceased person. The second accused person kept diverting the attention of the witnesses who enquired about the whereabouts of the deceased. He misled them that the deceased had gone on a safari. The second accused person took over the business of the deceased. The smearing of the floor of the house where the body was buried was meant to conceal the body of the deceased which was found dead."

And finally the learned judge concluded her judgment thus:-

"Obviously the prosecution did not avail evidence on the cause of death of the deceased person. In a recent Court of Appeal decision in the case of Omar Rajab & Anor. vs. R. Criminal Appeal No. 231 of 2006 (Nakuru) (unreported) it was held at page 6 that:

"Besides, in absence of a post mortem report on the deceased a finding of guilty for the offence of murder cannot be sustained, because as we stated earlier, it is not possible to say what the immediate cause of the deceased's death was."

It is for those reasons that I find the evidence on record disclose a cognate offence of conspiracy to conceal the murder of the deceased person against the provisions of Section 224 of the Penal Code. The two accused persons are accordingly convicted."

Having convicted the two appellants, the learned judge sentenced each of them to **15 years imprisonment**.

It is the foregoing that gave rise to this appeal which came up for hearing before us on 23rd February, 2010 when the appellants appeared in person and the State was represented by Mr. T.G. Njogu (Senior State Counsel). In conceding the appeal, Mr. Njogu submitted that the appellants were charged with murder but there was no evidence from the doctor who performed the post mortem examination on the body of the deceased, hence the cause of death was not established. He pointed out that **section 224** of the Penal Code does not provide for the offence of conspiracy to conceal but conspiracy to murder. Hence, the appellants were convicted of an unknown offence. The other aspect of the case that led to the learned Senior State Counsel conceding the appeal was that the assessors were discharged before the conclusion of the trial. Mr. Njogu was of the view that he would have applied for the re-trial of the appellants but that he did not wish to pursue that line.

Having considered the evidence adduced during the trial, it would appear that this was a case based entirely on circumstantial evidence. As correctly stated by the learned trial judge, the two appellants were the last people to be seen with the deceased and the conduct of the two appellants was such that they knew what had happened to the deceased but they were not willing to reveal what had transpired between them and the appellant. During the trial the prosecution failed to call the doctor who performed post mortem examination on the body of the deceased so that the cause of death was not proved. Again, the assessors who had been present when the trial commenced were somehow discharged before the completion of the trial. We think this must have been due to the amendment of the **Criminal Procedure Code** which did away with the provision regarding the assessors. But we would draw the attention of the learned judge to **section 23(3)(e)** of the **Interpretation and General Provisions Act** (Cap 2 Laws of Kenya) which provides:-

“(3) Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not-

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

(emphasis supplied)

In view of the foregoing, the learned judge should have retained the assessors to the end of the trial. The fact that the assessors were discharged mid-stream rendered the rest of the trial a nullity. Since there was only one trial it means the entire trial was rendered null and void- see **ELIREMA & ANOTHER V. R. [2003] KLR 537**.

As already stated elsewhere in this judgment, the learned judge convicted the appellants of conspiracy to conceal the murder of the deceased contrary to **section 224** of the Penal Code. However, **section 224** of the Penal Code provides:-

“Any person who conspires with any other person to kill any person, whether that person is in Kenya or elsewhere is guilty of a felony and is liable to imprisonment for fourteen years.”

Hence, while there is an offence known as **“conspiracy to murder”** there is no offence known as **“conspiracy to conceal murder”**. It is instructive to note that the learned judge sentenced each appellant to **15 years imprisonment**. That sentence was unlawful under **section 224** of the Penal Code since the maximum sentence under that section is **14 years imprisonment**.

In view of the foregoing, it is clear that the trial of the appellant was riddled with a number of errors rendering the entire trial a nullity. Mr. Njogu was therefore right in conceding the appeal. He has not asked us to order a retrial. In **MWANGI V. R. [1983] KLR 522** this Court said:-

“A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result.”

And in **MUIRURI V. R. [2003] KLR 552** this Court held:-

“3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution making or not.”

We have considered this appeal in the light of those principles and it is our view that an order for retrial would not meet the ends of justice.

The upshot of the foregoing is that this appeal is allowed and we set aside the conviction of the appellants and the sentence imposed on them. The appellants are to be set free forthwith unless otherwise lawfully held.

These shall be our orders.

Dated and delivered at Nakuru this 16th day of April, 2010.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR