



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

CRIMINAL APPEAL 105 OF 2009

BETWEEN

DOUGLAS OSORO SIANYI NYAMBONYE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a sentence and conviction of the High Court of Kenya at Kisii
(Musinga, J) dated 13th March, 2009*

In

**H.C. Cr. C. No. 78 OF 2004)

JUDGMENT OF THE COURT

On 13th March, 2009, Musinga, J found **Douglas Osoro Sianyi Nyabongoye**, the appellant herein, guilty of murder contrary to **section 203** of the Penal Code and under **section 204** of the Code, sentenced him to death. The appellant now appeals to the Court against the conviction and sentence. The particulars contained in the Information charging the appellant with murder were that on the 3rd day of September, 2004 at Nyamaware sub-location in Kisii District within Nyanza Province, the appellant murdered Daniel Nyabongoye Motaroki, “*the deceased*” hereinafter. The deceased was the appellant’s father, and on the evening of 3rd September, 2004, he was found lying in a pool of blood some distance from his compound. The appellant was suspected to be involved in the attack and hence the charge of murder preferred against him. His trial opened before the late Kaburu Bauni, J on 9th November, 2006, and the late Judge selected three assessors to sit with him in the trial. The Judge then heard and recorded the evidence of three witnesses and adjourned the trial. It is apparent the Judge passed away before he could resume the trial. On 6th March, 2007, Gacheche, J took over the trial and ordered that she would hear the case *de novo*. She further directed that the new hearing would resume before her on 25th April 2007, and would continue on 26th April, 2007. The Judge was unable to sit on 25th April, but on 26th April, 2007, she selected three new assessors and proceeded to hear and record the evidence of three witnesses, and then adjourned the hearing. She was not able to resume the hearing because Musinga, J thereafter took over the trial and on 10th February, 2009, he heard and recorded the evidence of witnesses designated as PW4, PW5, PW6 and PW7. It is clear from the record that Musinga, J continued with the hearing from where Gacheche, J had left. He was entitled to do so under **section 201 (2)** of the Criminal Procedure Code which was introduced into our law by Act No. 7 of 2007. That section provides:-

“201 (2): The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.”

Before this enactment the provisions of **section 200** of the Code applied only to trials in subordinate courts. Those provisions remain the same and they provide for situations where a magistrate has been transferred after completing a hearing but before delivering a judgment, or where the transfer or death or other cause has occurred where a magistrate has started a hearing and received evidence from some witnesses but has not completed the hearing. The Magistrate may also have completed a hearing, written a judgment convicting an accused person but has not passed a sentence. In all these circumstances an incoming magistrate is entitled to proceed from where the other magistrate has left the matter, but in the case where the outgoing magistrate had heard evidence but not completed the trial **section 200 (3)** of the Code provides:-

“200 (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

These are the provisions which **section 201 (2)** of the Code applies *mutatis mutandis* to trials in the High Court. There is nothing in the record to show that when he took over the trial which had been partly conducted by Gacheche, J, Musinga, J informed the appellant of his right to demand that any or all of the witnesses who had testified as aforesaid be re-summoned and reheard. It was the learned Judge’s duty to do so and on an appeal like this, we can only tell if that duty was discharged if the record shows that the accused person was informed of his right.

Again, Gacheche, J had been presiding over the trial with the aid of assessors. The record of Musinga, J is wholly silent on what happened to the assessors. He did not record their presence or absence when he took over the trial. There is no summing-up to them or their opinions if they continued to participate in the trial. There is no evidence of the learned Judge having discharged them and if he did so, the reason or reasons for his doing so. These omissions by the learned Judge were serious and we agree with Miss Oundo, the learned Principal State Counsel, that the omissions by the Judge rendered the appellant’s trial a nullity. Miss Oundo also alleged that in placing the appellant on his defence the learned Judge said he was doing so under **section 211** rather than **section 306 (2)** of the Criminal Procedure Code and that this also rendered the trial a nullity. We would have been very reluctant to declare an otherwise valid trial a nullity merely because a trial court has cited an incorrect section of the law. At least, the Court would have to consider whether the citing of the wrong section of the law did in fact occasion to an accused person a failure of justice as is set out in **section 382** of the Code. But as we have said, the other serious omissions by the Judge rendered the appellant’s trial a nullity and a consideration of **sections 211** or **306 (2)** of the Code is really irrelevant.

Miss. Oundo did ask the Court to order a retrial. Mr. Onsongo, learned counsel for the appellant, agreed with that proposition saying the life of another person was taken away. We agree with the respective counsel on this point and in the circumstances, we allow the appellant’s appeal against the conviction, set aside the conviction and the sentence of death and order that the appellant shall be tried afresh in the High Court in Kisii before a Judge, other than Musinga, J. Pending the retrial, the appellant shall remain in prison custody. Those shall be the orders of the Court on the appeal.

Dated and delivered at Kisumu this 18th day of June, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.