



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL 335 OF 2008
DENNIS MBOGHO APUDHO..... APPELLANT
AND
REPUBLIC RESPONDENT**

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Tanui, J.) dated 3rd April, 2003

in

H.C.CR.C. NO. 7 OF 2001)

ORDER OF THE COURT

Mr. Justice Tanui, as he then was, tried and convicted the appellant, *Dennis Mbogho Apudho*, on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code. The information containing the charge had stated in its particulars that on the night of 4th /5th January, 2000, the appellant, together with five other persons who were charged with him, jointly murdered **Abdallah Juma Ochieng**. The trial Judge tried the appellant with the aid of assessors. At the end of the trial, the learned Judge summed-up the case for the assessors and all the three of them unanimously advised the Judge that the appellant was guilty of the charge of murder. The Judge then reserved his judgment to the 24th March, 2003 but we were told, during the hearing of the appeal that the judgment was in fact given on 4th April, 2004. However, it is conceded on all sides that the judgment and the learned Judge's notes on the summing-up to the assessors have both disappeared and cannot be traced. They have been looked for since 2005 and we were told that there are no prospects of tracing the judgment and even the summing-up notes. In the absence of the judgment of the superior court, there is really nothing upon which the Court can adjudicate. The offence was allegedly committed in 2000 which would be some ten years ago but both Mr. Kimanga for the appellant, Mr. Gumo the Deputy Public Prosecutor and even the appellant himself asked us to order a retrial as the most feasible manner of resolving the situation. We accede to that proposition.

Accordingly, we allow the appeal, set aside the conviction for murder and the sentence of death, and order that the appellant shall be tried *de novo* and that his trial shall be handled as a matter of priority. It is our hope that if the prosecution is unable to trace its witnesses within a reasonable time, they will take other measures to terminate the new trial. Though the crime was allegedly committed at a time when trial with the aid of assessors was mandatory, the institution of assessors was abolished sometime back and we direct that it will not be necessary to retry the case with the aid of assessors. Those shall be our orders on the appeal.

Dated and delivered at Kisumu this 26th day of November, 2010.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR