



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**Criminal Appeal 217 of 2009**

**BETWEEN**

**PETER NYAUMA MOGIRE ..... 1ST APPELLANT**  
**JOSEPHINE NYABOKE NYAUMA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**  
**(Appeal from conviction and sentence of the High Court of Kenya at Kisii (Musinga, J.) dated 8th June, 2009**

**in**

**H.C.CR.A. NO. 54 OF 2004)**

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**JUDGMENT OF THE COURT**

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Both the Principal State Counsel, Ms. Oundo, and learned Counsel for the appellant, Mr. Abungu, agree that this matter should be sent back to the superior court for retrial. We also agree. The circumstances that commend themselves to that order were as follows:-

The two appellants were arraigned before the superior court for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged in the Information filed by the Attorney General on 21st July, 2004, that on the 14th day of August, 2002 at Nyangoso Sub location in Nyamira District within Nyanza Province, jointly with others not before Court, they murdered Michael Mogire Nyangabaria. The trial subsequently commenced before the late Bauni J. after plea and selection of three assessors on 24th July, 2006. The evidence of the first witness was then recorded and he was fully cross-examined before the case was adjourned for further hearing. Unfortunately, when it resumed hearing in March, 2007, Bauni J. had passed on and the new Judge Gacheche, J. made an order that the hearing shall start de novo. A new plea was recorded and a date was set for selection of assessors. Before Gacheche, J. could proceed however, she was transferred from the station and Musinga, J. took over the case.

On 2nd April, 2008, Musinga, J. made the following order without any prompting or other preliminaries:-

“Court: The hearing to proceed from where Justice Bauni had reached.”

The learned judge then proceeded to hear five more witnesses from the prosecution, the two appellants, and the submissions of Counsel before delivering his judgment on 8th June, 2009. By that judgment, the appellants were convicted for the offence and were sentenced to death.

It is apparent at once, that the learned Judge, with respect, grossly erred in adopting the procedure he did. In the first place, he failed to notice that there was already an order on record from a Judge of coordinate jurisdiction, that the trial shall commence de novo, and that order was not set aside. Secondly, there was an order made for selection of assessors which was a lawful order at the time since the alleged offence was committed in the year 2002 when murder trials had to be conducted with the aid of assessors. The amendment to the Criminal Procedure Code which dispensed with that system did not come until 15th October, 2007. Finally, the learned judge did not appreciate the provisions of Section 200 of the Criminal Procedure Code as applied by Section 201 (2) of the same code which came into effect on 15th October,

2007 (Act No. 7/07). By that Section (200(3)), the succeeding judge in a partly heard case must inform the accused person(s) of their right to demand that any witness be resummoned and reheard. The duty is imposed on the Court and it matters not whether the accused person or his advocate did not raise any objections to the procedure. The failure to comply would vitiate the whole trial.

For those reasons, we are of the view that the trial of the two appellants here was not conducted within the law as it existed at the time. We set aside all the proceedings, the judgment, the conviction and sentence and order that the appellants be tried afresh as a matter of priority before any Judge of the superior court other than Musinga, J. As the institution of Assessors has since been abolished, we direct that the retrial shall proceed without the aid of assessors. Orders accordingly.

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

**P.K. TUNOI**  
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**JUDGE OF APPEAL**

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

**ALNASHIR VISRAM**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**