REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 169 of 2006

THOMAS SANGARE KELOLON ….…… APPELLANT

AND

REPUBLIC ……..……..…….. RESPONDENT

(An appeal from conviction and sentence of the High Court of Kenya

at Kisii (Kaburu Bauni J) dated 4th May, 2006

in

H.C.CR.A. NO. 61 OF 2003)

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JUDGMENT OF THE COURT

On 15th September, 2003, Thomas Sangare Kelolong, the appellant herein, together with **Johnvey Atera Mariera** appeared before Wambilyangah, J. sitting in the High Court at Kisii and the two were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the information were that on 14th July, 2003 at Ntimaru Trading Centre in Kuria District of Nyanza Province, the appellant and his co-accused person Mariera jointly murdered Michael Onyango Apati, hereinafter, *"the deceased"*. Right from the first time the appellant and his colleague appeared in court, they were represented by an advocate, one Mr. Ondika who held the brief of Mr. Mogire. Wambilyangah J. read and explained the charge to the appellant and his colleague; they pleaded not guilty to the charge.

On 9th December, 2003, the two, this time around, appeared before the late Bauni, J. The appellant was then represented by Mr. Sunkuli and Mr. Mogire. Mariera was represented by Mr. Ondari and Mr. Sangare. The learned Judge selected three assessors to assist him in the trial as the law then mandatorily required. After the selection of assessors, the trial opened before the same Judge and on that day, three witnesses testified in the case. Thereafter the prosecution was able to call another seven witnesses at various stages making in all a total of ten witnesses before the prosecution closed its case. At the close of the prosecution's case, the learned Judge found that no sufficient evidence had been brought against Mariera to warrant his being put on his defence; Mariera was accordingly acquitted by the learned Judge under **section 306 (1)** of the Criminal Procedure Code. The appellant was, however, placed on his defence and chose to make an unsworn statement. After the learned Judge heard the final submissions on

behalf of the appellant, the Judge summed-up the case to the two remaining assessors who thereafter returned a unanimous verdict that the appellant was guilty of the lesser offence of manslaughter contrary to **section 202** of the Penal Code. In his final judgment dated and delivered on 4th May, 2006, the learned Judge found the appellant guilty on the charge of murder and duly sentenced him to death. It is against that conviction and sentence against which the appellant appeals to this Court and his learned counsel Mr. Onsongo in what he has designated as *"Grounds of Appeal"* and not *"Memorandum of Appeal"* as the rules of the Court prescribe, has listed a total of six grounds as follows:

"**1. The superior court erred in both law and fact in failing to appreciate that the appellant had been held in police custody as from 19th July, 2006 until 15th September, 2006 when he was arraigned in court in total contravention and breach of his constitutional right as set out in section 72 (3) of the Constitution.**

2. The superior court erred both in law and fact in failing to appreciate that the prosecution did not establish malice aforethought, the vital ingredient of a charge of murder.

3. The trial commenced with the aid of three (3) assessors but was concluded in the presence of only two (2) of the assessors in contravention of section 263 of the Criminal Procedure Code (Cap 75) and yet the court did not make any notes and or comply with the requirements of section 271 of the Criminal Procedure Code.

4. The superior court heavily relied on the evidence of P.W.4, NELLY AKINYI, the wife of the deceased who had a direct interest in the outcome of the trial and hence not an independent witness.

5. The superior court erred both in law and fact in relying on exterior possibilities "…. *She said she first heard some sound before the shooting*. *Possibly he was releasing the safety catch …… He was possibly incensed when ……"*

6. The decision and judgment of the superior court is against the weight of the evidence on record".

What was the evidence upon which this appellant was convicted? Briefly, it was as follows.

On 14th July, 2003 an official of the Maendeleo ya Wanawake visited Ntimaru Police Station and complained to Inspector Hesbon Baraza (PW2), the officer in charge of the station, that the wife of the Headmaster of St. Anne's Academy within Ntimaru township was mistreating a six year old child staying with the headmaster and his wife. The appellant and his acquitted co-accused were police officers attached to Ntimaru police station. Inspector Baraza assigned the appellant and his colleague to go to the Academy and bring to the police station the headmaster and his wife. Before leaving the station, Police Constable Thomas Bii (PW3) issued the appellant with an A.K. 47 rifle Serial No. 794617 containing thirty rounds of 7.62 special ammunition. The appellant's colleague was issued with a Webley revolver Serial No. 133300 with five rounds of ammunition. It was the prosecution's case that instead of going to the Academy where the headmaster and his wife were to be found, the appellant and his colleague chose to go to a local medical clinic which was operated in the township by the deceased and his wife Nelly Akinyi Wagunda (PW4). The appellant and his colleague found only Nelly in the clinic. They demanded the licence under which the clinic was being operated; Nelly gave them the licence and upon looking at it, the appellant's companion said the licence had expired. Nelly thought the licence was valid and it appears that at that stage, the deceased entered the clinic. The deceased was asked about the licence; he pointed out that the appellant's companion was holding the licence. The companion said the licence had expired; the deceased said it had not. The deceased was told he would be arrested; the deceased demanded to be shown a warrant of arrest. Instead of showing any warrant, the deceased was asked to pay Shs.1,000/= or he would be arrested. The deceased obliged and handed to the appellant's companion Shs.1,000. The companion walked out of the inner room where this conversation was taking place; the appellant remained behind and demanded more money. The other officer who had been given the money returned to the room and put back on the clinic counter the Shs.1,000/= he had been given. Meanwhile

the deceased adamantly refused to pay any more money. Nelly saw the appellant point the gun at her husband and she also heard a noise and thought the appellant was cocking his gun. The next thing she saw was that the appellant had fired his gun at her husband who immediately fell down and then died. The two police officers ran out of the clinic. The appellant's companion ran back to the police station and reported to Inspector Baraza. The appellant took a different direction and it was the evidence of various police officers from the station who visited the clinic that they followed the appellant to some river bank during which several warning shots were fired but they were unable to arrest the appellant. At about 10 p.m. that night the gun which the appellant had been issued with was found abandoned at the door of Constable Bii's house. Nelly handed over to police officers an expended cartridge which she found in the clinic. Lawrence Nthiwa (PW10) a fire-arms examiner was of the view that the cartridge had been fired from the gun Bii had issued the appellant with. Of the thirty rounds of ammunition which Bii had issued to the appellant, only twenty nine rounds were found in the magazine. Dr. Aggrey Idagiza Akidiba (PW1) performed the post-mortem on the body of the deceased on 15th July, 2003; he was of the clear view that he found one gun-shot wound on the neck of the deceased entering at the chin and exiting on the left side of the neck. The cardio-vascular system had completely collapsed and the upper part of the carotid artery and the left internal jogular vein had been completely severed. The doctor formed the opinion that the cause of death was due to cardio-vascular collapse secondary to hemorrhage due to cut vein and artery. That, in sum, was the prosecution's case against the appellant.

What was the appellant's answer to that case? He agreed that Inspector Baraza sent him out to go and bring to the station the offending headmaster and his wife. The two of them went to the house of the headmaster but they were told he had gone to the clinic. They went to the clinic and while there the deceased whom he did not know pounced on him, apparently intending to take away his gun, that they struggled over the gun and that during the struggle, the gun accidentally went off and the deceased was shot in that way. A hostile crowd gathered around and he was prevented from running back to the police station as his colleague was able to do. When he eventually reached the station at night he found a large crowd gathered there and threatening to burn down the station. He handed back the gun to Bii and then escaped and thereafter surrendered at Kehancha police station. He was thereafter charged with this offence.

On the material placed before him, the learned Judge had no difficulty in believing the prosecution's version as narrated by Nelly with regard to the circumstances of the shooting. However, before we deal with that issue, it is better for us to dispose of ground one of the grounds of appeal which deals with the issue of the appellant having been held in police custody for more than the fourteen days allowed under **section 72 (3)** of the Kenya Constitution. Mr. Onsongo submitted that whatever led to that unlawful detention and irrespective of the circumstances surrounding the whole trial, the appellant is entitled to an acquittal on that basis alone. In view of this Court's recent decisions in **JAMES GITHUI WATHIAKA & ANOTHER VS. REPUBLIC**, *Criminal Appeal No. 115 of 2007* (unreported) and **PROTAS MADAKWA alias COLLINS AND TWO OTHERS VS. REPUBLIC**, *Criminal Appeal No. 118 of 2007* (unreported), we do not think this appellant is entitled to an acquittal merely on the basis that he was detained for more than fourteen days before being brought to court. As we said at the beginning of this judgment right from the day he was brought to court on 15th September, 2003, the appellant was represented by counsel. The High Court and any Judge of that court is the constitutional court. On 15th September, 2003, 2003 Mr. Ondika who held Mr. Mogire's brief and represented the appellant before Wambilyangah J. did not raise before that Judge the issue of the appellant having been unlawful detained in police custody. Had Mr. Ondika done so, Wambilyangah J. being a constitutional Judge, would have been obliged to rule on that point. Then the late Bauni, J. took over the trial and before that Judge, the appellant, as we have seen, was represented by two experienced advocates, M/s. Sunkuli and Mogire. At no stage during the long-drawn out trial, did any of those advocates complain to the learned Judge that appellant's constitutional rights guaranteed by **section 72 (3)** of the Constitution had been violated and he could, therefore, not be tried on the charge of murder. We once again quote from the case of **PROTUS MADAKWA alias COLLINS & TWO OTHERS VS. REPUBLIC**, supra, which in turn applied the principles set down earlier in the case of **JAMES GITHUI WATHIAKA & ANOTHER VS. REPUBLIC**, supra:

"**The two appellants, right from the time their trial opened in the High Court, were each**

represented by an advocate. Their trial was before the High Court which by law is 'the Constitutional Court' in Kenya. The appellants and their advocates knew or must have known that their constitutional rights had been violated. Yet the advocates raised no kind of complaint at all and as we have said the High Court is the constitutional court in Kenya and if the appellants' advocates had raised the issue there, the Judge would have had to deal with the issue just as Mutungi J. did in the NJOGU case, supra. When we asked Mr. Muthoni and Mr. Nganga why the advocates representing the appellants did not raise the matter with the Judge, their answer was that they did not know. An information before a judge is different from a charge-sheet before a magistrate. The charge-sheet would normally show on its face the date on which an accused person was arrested and the date on which he is brought to court. An information does not have on it details such as the date of arrest. So that a magistrate is able to see at a glance the relevant particulars from which it can be deduced if section 72 (3) of the Constitution has been complied with. A judge by merely looking at an information, will not be able to tell when the accused person was arrested. The date on which the offence was allegedly committed is not necessarily the date of the arrest. We think we cannot equate advocates to poor and illiterate accused persons and where an advocate is present in court and does not raise such relevant issues, the appellant whom the advocate represents must be taken to have waived his or her right to complain about alleged violations of his or her constitutional rights before being brought to court. Different considerations must continue to apply where an accused person is unrepresented ……".

These principles must apply to the circumstances of the present appeal and that being so, ground one of the appellant's grounds of appeal must accordingly fail.

We must next move to ground four of the grounds of appeal in which the complaint is that the superior court heavily relied on the evidence of Nelly Akinyi, the wife of the deceased who had a direct interest in the outcome of the trial and hence not an independent witness.

Nelly Akinyi was the only person who was present in the clinic when her husband was shot dead. Even the appellant himself did not dispute the fact that the deceased was shot and killed by a bullet from his (appellant's) gun. The only difference between Nelly Akinyi and the appellant was that Nelly said the shooting was delibarate while the appellant said that the shooting was accidental in the sense that the gun went off while the appellant and the deceased were struggling over it. On this aspect of the matter, the learned Judge had no difficulty in believing the evidence of Nelly and rejecting the unsworn version put forward by the appellant. The learned Judge stated in his judgment:

"…… **She [PW4] told the court that when the deceased refused to give more money the accused cocked his gun and cold bloodedly shot the deceased. The evidence of PW4 was not shaken in cross-examination by the defence counsel. She said there was no struggle between the accused and the deceased before he shot him. She said she first heard some sound from the gun before the shooting. Possibly he was releasing the safety catch. The evidence of PW4 there (sic) was very clear and even though there was no other eye-witness, after examining the same I am satisfied that she told the truth and said exactly what happened. The shooting was intentional and accused must have known it would inflict grievous harm on the deceased which led to his death ……".**

The only basis of attack on the evidence of Nelly appears to be that because she was the wife of the deceased, she had a direct interest in the outcome of the case and because of that she was not an independent witness. We quite do not appreciate what this contention implies. Does it mean that relatives of victims of crimes are not to be believed because they are interested in the outcome of the trial? The evidence before the Judge appears to have been that Nelly and her late husband ran the clinic and when the appellant and his companion arrived there, only Nelly was in the clinic. The deceased subsequently came in but there was no suggestion that there were other people present in the clinic who could have been called to support Nelly's evidence. Nelly was clearly a competent witness for the prosecution, her evidence did not require corroboration and that evidence was clearly admissible. Was her evidence to be disbelieved simply because she was the wife of the deceased person and, therefore, not an independent witness? We are glad Mr. Onsongo did not cite to us any authority, statutory or case law, in support of this startling contention. If that were to be the law, then it would mean that in cases where a

family is attacked in their house at night when no other non-family members are available to provide "*independent"* evidence, no convictions could ever be had. We reject that proposition.

The learned Judge, as we have seen, believed Nelly. The Judge saw and heard Nelly testify before him. In addition, the appellant had no business at all being in the clinic at the time of the shooting. Inspector Baraza had sent them to a totally different place and no connection at all was demonstrated between the clinic and the Academy to which Baraza had sent the appellant. Nelly gave the reason why the appellant and his companion went to the clinic; the two demanded for money and threatened they would arrest the operators of the clinic if the money was not given to them. None of the lawyers who represented the appellant before the Judge did suggest to Nelly that no money was demanded from them and that she was making up the story. As to the gun accidentally going off, Lawrence Nthiwa (PW10) who described himself as "*Ballistic expert"*, said he found the gun to be in good general mechanical condition, complete with its component parts and capable of being fired. It was never suggested to him that the gun was prone to accidental discharge and the appellant himself never made any such suggestion. We think the learned Judge was right in his conclusion that the appellant "*cold bloodedly"* shot the deceased, and we see no reason at all to warrant our interfering with him. On the material before him, the Judge was entitled to believe Nelly as he did.

On the issue of malice aforethought raised in ground two, all we can say is that a person who cold-bloodedly shoots another on the neck as this appellant did must be taken to have intended either to kill the person so shot or to cause grievous bodily harm to the person shot. That is malice aforethought as set out in **section 206 (b)** of the Penal Code. Ground 5 of the grounds of appeal is, with respect to Mr. Onsongo, really baseless. The remarks by the learned Judge to the effect that: *'She said she first heard some sound before the shooting'. 'Possibly he was releasing the safety catch. He was possibly incensed when'* …… must be read in the context in which the Judge made them. Nelly said she heard some noise before the shooting. The Judge was drawing an inference from Nelly's evidence that the noise Nelly heard must have been from the release of the safety catch by the appellant. That the deceased was shot was not a matter in dispute. The last sentence of the appellant being *"possibly incensed"* was the Judge's speculation as to the motive why the appellant could have shot the deceased. Under **section 9** of the Penal Code, motive for a crime is really not a relevant issue – see s**ection 9 (3).**

As to the issue of why only three assessors were allowed to continue and give their verdict, it is clear that when the trial opened, three assessors were selected and sat throughout the prosecution's case and even after the appellant had made his unsworn statement. There were various adjournments thereafter and on the day set for the final submissions one of the assessors was absent. Obviously the Judge was not inclined to adjourn the hearing and he exercised his discretion and dispensed with the absent assessor. That assessor was never allowed back into the trial. In our view, the stand was substantially in accordance with the law as it then stood regarding the assessors and we are satisfied, in all the circumstances of the case, that the learned Judge's decision to dispense with the third assessor did not occasion to the appellant any injustice and is curable under **section 302** of the Criminal Procedure Code.

In the event, we have come to the conclusion that the appellant was convicted on sound evidence which proved beyond any reasonable doubt that on the 14th day of July, 2003 at Ntimaru Trading Centre, he murdered **Michael Onyango Apati**. Like the learned Judge we can find no basis for reducing the charge to one of manslaughter as the two assessors did. The sentence of death imposed upon him was the only lawful sentence for his crime. His appeal accordingly fails in its entirety and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 16th day of January, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR