



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

Criminal Appeal 311 of 2008

1. SOLE GALE SOLE

2. JOHN BUNGE CHENGO.....APPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court

of Kenya at Meru (Emukule, J.) dated 5th December, 2008

in

H.C.CR.C. NO. 128 OF 2003)

JUDGMENT OF THE COURT

SOLE GALE SOLE and **JOHN BUNGE CHENGO**, the appellants, were on 5th December, 2008 jointly convicted by the High Court of Kenya at Meru (Emukule, J.) of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death. According to the Information filed by the Attorney General on 3rd September, 2003, the appellants and two others whose appeals have abated under **rule 68 (i) (a)** of the Court’s Rules on account of their demise after conviction were alleged to have jointly with others not before court murdered **Magasha Wolde**, the deceased, on 4th March, 2003 at Dakarbaricha Location in Marsabit within the Eastern Province. This is their first and final appeal.

This appeal has greatly caused us a lot of concern. The court record shows that the appellants were arrested and detained at Marsabit Police Station on 5th March, 2003. However, they were not brought before any court until 4th September, 2003 when they were taken before Mulwa, J. at the High Court of Kenya at Meru to answer a charge of murder, the subject of this appeal. Thus, they stayed in detention for 183 days. Mr. Makura, the senior state counsel, accepts that the appellants were, indeed, kept in custody for that excessively long period, but, is unable to offer any explanation for that detention.

Another unsatisfactory aspect of the case is the length of time the trial took. The pleas were taken on 4th September, 2003 and judgment was delivered on 5th December, 2008. Five judges, in all, heard the case and there were several interruptions, all due to their abrupt transfers. For example, Lenaola, J. heard the prosecution case while Emukule J. heard the defence case and later wrote the judgment without any recourse to **section 201 (2)** of the Criminal Procedure Code. Again, though Lenaola, J. had conducted the

trial with the aid of assessors, Emukule, J. when he took over, excluded them without any explanation whatsoever and no one knows what happened to them. Thus, there was no summing up to them and they did not give their opinion. Their omission from the trial without explanation constituted a breach of the law as it then stood. Consequently, the trial was rendered a nullity.

As to the evidence on record, the prosecution called eleven witnesses to testify. The key witness was **Shamsia Wold**, the wife of deceased. She testified that the deceased had left home at about 6 p.m. and did not return until at about 8 p.m. when she had gone to answer to a call of nature. On her return she saw a group of about six to seven people struggling with the deceased outside their house compound. Suddenly she heard a gun shot which she claimed was fired by the appellant, John Bunge. She, however, admitted that it was dark but she maintained that she had identified this appellant by means of moonlight. This testimony was made before Sitati J. and is at great variance with that given to Lenaola, J. and Onyancha, J. in which she stated that she had not seen this appellant but that the name of the said appellant was given to her by the deceased. In our view, the evidence of PW1 as it stood cannot amount to positive identification of the appellant, John Bunge. It is contradictory and lacks support from any other source. The shooting occurred at 8 p.m. She could not have seen where the bullet came from in the absence of any light and it is, also, not certain that she was capable of seeing a bullet whizzing by at night with naked eyes.

In view of the foregoing, and taking into consideration the fact that the State does not support the convictions, and concedes the appeal and does not seek retrial, we are satisfied that this appeal is for allowing.

Consequently, the appeal is allowed, the conviction of each appellant is quashed and the sentences of death imposed by the superior court are set aside.

We order that the appellants be set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of October, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR