



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

Criminal Appeal 194 of 2008

- 1. JAMES OMARI NYABUTO**
2. AYUB NYANCHOKA OJWANG.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga, J) dated 23rd

October, 2008

in

H.C.C.R.C. NO. 97 of 2003

JUDGMENT OF THE COURT

The appeal before us raises three main issues. First, whether or not the learned trial Judge erred in proceeding to write and deliver the judgment of the superior court without the benefit of hearing any of the witnesses and upon evidence wholly recorded by another Judge; second, whether or not malice aforethought the main ingredient of the offence of murder had been proved; and thirdly, whether the evidence tendered before the trial court was sufficient to render the appellants guilty of murder by the application of the doctrine of common intention as prescribed in **section 21** of the Penal Code.

JAMES OMARI NYABUTO, the 1st appellant, and **AYUB NYANCHOKA OJWANG**, the 2nd appellant, were tried before the late Kaburu Bauni J for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. After having fully heard the case and received the opinion of the assessors on 23rd July, 2007, he reserved the judgment to be delivered on notice. However, that was not to be since he passed on not long afterwards before he prepared and delivered judgment. Musinga, J being the succeeding Judge acted on the evidence recorded by the late Kaburu Bauni J and convicted the appellants and sentenced them to the mandatory death sentence. It had been alleged in the information laid before the High Court of Kenya at Kisii by the Attorney General that the two appellants and Joseph Nyabuto who died in the course of the trial on 16th September 2003 at Mageche Village, Mageche sub-Location within Gucha District of Nyanza Province murdered Kefa Nyanchoka, the deceased.

The facts so far as material are that on the fateful day at about 5.00 pm the deceased and his brothers among them Fredrick Nyanchoka (PW2), Samwel Monagu (PW3), Ronald Nyachoka (PW4) and David

Kengere (PW7) were at home and were about to eat after having arrived home from a funeral of a close relative. Suddenly they heard voices of many people approaching their home shouting **“today you won’t move from Kisii land”**. They went outside the house and were able to see the appellants and some other people having surrounded the homestead. Those people were armed with bows and arrows, rungs and spears and others were carrying stones. The group proceeded to attack PW2 and his brothers. One of the attackers identified by PW2, PW3 and PW4 as Siriba Orero was the first to shoot an arrow at the deceased. The arrow hit the deceased in the abdomen. The other accused who died during the trial, Joseph Nyabuto, also shot arrows at PW4. When the assailants realized that the deceased was badly injured they ran away. The deceased was rushed to Kisii District Hospital but died on the way.

The witnesses PW2, PW3 and PW4 told the learned trial Judge that the appellants and the assailants wanted the deceased and themselves to vacate the land which they were occupying. They, however, admitted that there was a long-standing dispute between the two families which are closely related.

Following the report of the incident made to the local police the appellants were arrested, but, Siriba Orero disappeared from home and has so far not been apprehended nor traced.

Dr. Oyoo Olande, (PW1) performed a post mortem on the body of the deceased on 29th September, 2003. Externally, the deceased had an injury on his left side of the abdomen. A portion of an arrow was visible. Internally, the lungs were lacerated and the aorta was severed. The doctor concluded that the cause of death was severe internal bleeding.

In their defences which was in the form of unsworn statements the appellants told the trial court that they were not among the people who raided the deceased’s home and killed him.

On the totality of that evidence, the two remaining assessors after the third one dropped out midstream returned a verdict of guilty and the learned Judge agreed with them. He delivered himself thus:-

“From the above evidence, it is not in dispute that on the material day and time the deceased and his brothers were ambushed and assaulted by a group of people. That group included the accused herein. The accused are all members of the same family. The reason for the aforesaid attack was a long-standing land dispute between the two families.

The attack took place in broad day light, about 5.00p.m. These were neighbours and they knew one another well. PW2, PW3, PW4 and PW7 not only heard the voices of the accused when they shouted threats at them but they also saw them armed with dangerous weapons when they stepped out of the house. Evidence from key prosecution witnesses was that the deceased was shot by one Silva Orero who was in the group of the assailants. Silva Orero was never arrested because he disappeared immediately thereafter and he has not been traced to date. The fact that it was not the accused herein who made the fatal shot does not absolve them from culpability, as long as they were with Silva Orero and they were together executing their common purposes.”

The learned Judge then reproduced **section 21** of the Penal Code and concluded:-

“The accused and Silva Orero had a common intention to either kill the deceased and his brothers or cause them grievous harm. They all had malice aforethought as defined in Section 206 of the Penal Code.

The defences that were advanced by the accused are untenable when viewed against the evidence of their recognition by PW2, PW3, PW4 and PW7. I reject those defences.”

The learned Judge then convicted the appellants and aggrieved by those findings, the appellants preferred this appeal which has been argued on their behalf by their learned counsel, Mr Gichaba.

It is plain from the evidence tendered before the trial court that the attack upon the deceased and his brothers took place in broad daylight. The assailants were their neighbours and they knew each other well. The deceased was killed by arrows shot by Siriba Orero, who is at large, and Joseph Nyabuto. The appellants who were equally armed with assorted weapons were in the company of Siriba Orero and Joseph Nyabuto. All had a common purpose of attacking the deceased and his brothers. We agree with the learned Judge that the fact that it was not the appellants who made the fatal shot does not absolve them from culpability as long as they were with Orero and Nyabuto and they were all actively executing the unlawful common purpose. The fact that the appellants are not the actual physical killers of the deceased is immaterial in law.

We shall now dispose of the procedural complaint. It is plain that the late Kaburu Bauni J. died after he had heard and recorded the whole of the evidence in the trial. By dint of the provisions of **Section 200 (1) (b)** of the Criminal Procedure Code a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, **section 200** aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice if a succeeding Judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa V R [1985] KLR 535. In this case the trial Judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over 5 years to conclude. The passage of time militated against the trial being started **de novo**. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants.

Musinga, J in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded. We find no merit on this ground of appeal. We accordingly reject it.

From the outset, the evidence shows beyond doubt that the fatal shots were fired by Orero and Nyabuto. The two appellants together with them were in the group that was armed and had planned to attack the home of deceased. The seemingly only common intention the members of the gang had was that of pursuing the unlawful purpose of attacking, killing and maiming the deceased and his brothers or of destroying their property. The prosecution had shown beyond all reasonable doubt that the appellants shared with Orero and Nyabuto, the actual killers, and other members of the gang a specific purpose which led to the commission of the offence charged and the learned Judge correctly invoked the doctrine of common intention under **section 21** of the Penal Code

Further, as the evidence established that the appellants and others had set out with the intention to cause death of or to do grievous harm to the deceased and his brothers an ingredient of murder under **section 206** of the Penal Code had been satisfied.

It was also argued before us that the charge against the appellants was defective in that it omitted to state that the appellants had been “jointly charged” or “jointly with others not before court”. We would agree. However, we would hasten to add that we are not satisfied that the omission or the irregularity in the charge had occasioned the appellants any failure of justice.

On our part having analysed the entire evidence on record, we are satisfied that the prosecution had proved its case against the appellants beyond all reasonable doubt and we uphold their convictions. The sentences are lawful and we have no reason to interfere. We reject all the grounds of appeal taken before us and find no other ground upon which the appeal can be allowed.

Accordingly this appeal fails and is accordingly dismissed.

Dated and delivered at KISUMU this 9th day of October, 2009.

P.K. TUNOI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

D.K.S. AGANYANYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR