



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

Criminal Appeal 286 of 2008

AYORO OWATO

1. SHADRACK

OTIENO

2. JOHNES

ODHIAMBO.....APPELLANTS

3. KEVIN

AND

**.....REPUBLIC
.....RESPONDENT**

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Musinga, J.)

dated 15th December, 2008

in

H.C.Cr.C. No. 115 of 2003)

JUDGMENT OF THE COURT

Shadrack Ayoro Owato, 1st appellant, **Johnes Otieno**, 2nd appellant and **Kevin Odhiambo** 3rd appellant, were tried before the late **Mr. Justice Kaburu Bauni**, sitting with assessors, on an information that charged them with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge were that on 4th December, 2003 at Mukuro Sub-Location Lower Suna Location in Migori District of Nyanza Province, the three appellants jointly murdered **Albetus Ongwech Kithari**, “*the deceased*” hereinafter. Kaburu Bauni, J. heard a total of four witnesses from the prosecution. He then placed all the three appellants upon their defence. Each appellant made an unsworn statement and after hearing submissions from the prosecuting counsel **Mr. Chirchir** and from **Mr. Omari** and **Mr. Okenye** for the appellants the learned Judge summed-up the case for the three assessors who had aided him in the trial. Each assessor after the summing-up by the Judge returned a verdict of guilty against each appellant. Thereafter the Judge said he would give his judgment on notice. He apparently passed on before he could deliver the judgment.

Musinga, J. then took over the trial. On 1st July, 2008 all the parties appeared before the new Judge. Mr.

Meme was then for the Republic. Mr. Omari was for the 1st appellant while Mr. Okenye was for the 2nd and 3rd appellants. Mr. Omari then told the Judge:-

“I pray that the proceedings be typed and the Court proceeds to write a Judgment.”

Apparently Mr. Okenye agreed with Mr. Omari. The learned Judge then directed that he would deliver his judgment on 17th September, 2008 which he in fact delivered on 18th December, 2008. He found each appellant guilty of murder and duly sentenced each one of them to death.

Before we go any further into the matter, we must now point out that by an amendment to **section 201** of the Criminal Procedure Code in 2007, Parliament added **subsection (2)** to **section 201** and the added new section provides:-

“200(2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.” – see Act No. 7 of 2007.

The provisions of **section 200** of the Code apply to trials in the subordinate courts. Those sections are in these terms:-

“200(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor and on the evidence recorded by that predecessor or re-summon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

These are the provisions which the 2007 amendment to the Code applied to trials in the High Court. The evidence upon which Musinga, J. convicted the appellants was wholly recorded by the late Kaburu Bauni, J. Under those circumstances, Musinga, J. was under a duty to inform the appellants that under **section 200(3)** they were entitled to have any or all of the witnesses who had previously testified before Kaburu Bauni, J. be re-summoned and reheard. On the face of the record, Musinga, J. does not appear to have himself carried out the duty imposed on him by **section 200(3)**. But as we have seen the appellants were represented by counsel both of whom know the provisions of **section 200**, particularly **section 200(3)**. Mr. Omari, with the concurrence of Mr. Okenye,

“... prayed that the proceedings be typed and the court proceeds to write a judgment

It would be wrong for this Court to assume at this stage that Mr. Omari and Mr. Okenye were not speaking on behalf of the appellants when they made the above prayer. Accordingly, in terms of **section 200(4)**, we are of the opinion that the failure of the Judge to specifically record that he had informed the appellants of their rights under **section 200(3)** did not materially prejudice the case of the appellants. We can now deal with the facts of the case.

Rose Atieno, (PW1) was the wife of the deceased. On the night of 4th September, 2003, she was in a room and she said she was praying. Her husband had gone to bed. A large group of people descended into the compound and broke down a window and then the door. Seven people came into the room where Rose was. She had a tin lamp on. The time was about 9.00 p.m. According to Rose, she was able to see those who came into the room. We quote her:-

“... I was able to see those who came in. They were Rashid Ayoro (accused 1) Obide Oyieno; Onyango Oyiero. The two are not in court. Also Migeda Oyeiro came in. He is not in court now. The other was Okuno Ayoro. He too is not in court. Also there was Jacob Ayoro. He is not here. The other was Juma Matiku. He is not in court. Out of the seven who came in only Rashid Ayoro – accused 1 who is in court.

When they came in they started beating my husband. They were claiming that my husband killed the son of Ayoro (accused 1). It is accused 1 who was saying that. They were armed with pangas, spears and stones. They stabbed my husband twice with the spear. He was stabbed on the right side of the neck and on the left side. It was Obado Oyuero who stabbed him. They killed him in the house. They then dragged him outside. Apart from the seven in the house there were other people talking outside. I was pulled outside and they took me to the house of accused 1. When we reached there I managed to escape and flee. At home of accused 1 we found the wife of accused 1. When I escaped I ran back to my home. I went to the house of my son Joseph Ongwech. Those seven people who came to my house killed my husband.”

When cross-examined by Mr. Omari for the 1st appellant, Rose insisted:-

“The attackers after killing my husband took me to the home of accused 1. We were immediate neighbours. There is only a fence in between. I saw what the attackers were carrying. Accused 1 had a spear in his hand. That was the only weapon he had. I was able to see him clearly. He was wearing a colonial shirt black and white in colour. The trousers were same colour with the shirt.”

We assume “a colonial shirt” would be a jumper which was the common uniform of government officers like Chiefs, District Officers, District Commissioners and such like officers. Rose was clearly stressing the point that the 1st appellant was her close neighbour and that she saw him in her house the night the deceased was killed and that they even took her to the home of the 1st appellant from which she was able to escape. The other witnesses who testified in the matter were the step-son of Rose, Joseph Boyad and Ongwechi (PW2) and the area Chief Fred Gilbeys Otieno (PW4). These two were, however, not in the house where the deceased was killed and they relied on the information given to them by Rose. They, however, gave the names of the 2nd and 3rd appellants as being among the people Rose had named in their presence. But as we have seen in court Rose only named the 1st appellant. The two witnesses, however, gave the names of the 1st appellant, PW2 calling him Shadrack Ayoro and PW4 calling him Shadrack Ayoro Owato. In her evidence Rose had variously referred to 1st appellant as “**Shadrack Ayoro Ogutu**” and then Rashid Ayoro. But she identified the 1st appellant in court as the person she was referring to.

The other piece of evidence given by the Chief (PW4) was that on 18th September, 2003 at midnight the 1st appellant in the company of his (1st appellant's) wife came to his home so that the Chief could assist him not to be arrested. The appellant offered to the Chief the sum of Shs.9,000/= to get that assistance. The Chief said he arrested 1st appellant and took him with that money to the police station. No police officer, however, came to court to testify and at the end of the case the fate of the money which the Chief said he had left with the police remained unknown.

Dr. Idagiza Akidiva (PW3) performed the post-mortem on the body of the deceased. The clothes of the deceased were blood stained and on external examination, the doctor found a cut-wound at the back of the head of about 6 inches long extending upto the bone, another cut wound at the base of the head, another vertical cut wound on the right ear and a stab wound on the left side of the chest. Internally, there was blood in the chest cavity, and there was perforation on the left auricle of the heart and blood around

the heart. According to the doctor, the cause of death was cardiovascular collapse secondary to perforation of the left auricle of the heart. Rose testified that the people who killed her husband were armed with pangas, spears and stones.

Mr. Musau, the Senior Principal State Counsel, conceded the appeals of the 2nd and 3rd appellants. We think Mr. Musau was right. Rose never said anything about the two and PW2 and PW4 who gave their names in court were not present in the house where the deceased was killed. We shall duly allow the appeals of the 2nd and 3rd appellants.

As for the 1st appellant, he gave an unsworn statement to this effect:-

“I am Shadrack Ayoro. On 18/9/03 police officers came to my home in the morning and arrested me. They took me to police station. There they told me I was to face a murder charge. I did not know who I was said to have killed.”

Rose’s evidence must be treated as that of a single witness identifying the assailants under difficult circumstances. The attack was at night, after 9.00 p.m. She had only a tin lamp in the room but when Mr. Omari cross-examined her about the strength of the lamp or candle as she variously called it, her answer was that the lamp was on the table and that:-

“It was giving enough light.”

She had been kneeling praying while the deceased was already in bed. Obviously she would need lighting to move from where she was to the bed on which her husband was sleeping. She gave details of who speared her husband and how the 1st appellant was dressed. The 1st appellant was her close neighbour and according to her, they even took her to the 1st appellant’s home. She said the body of the deceased was removed from the house and placed outside by those who killed him. The deceased’s body was in fact found outside the house. The assessors who saw Rose testify before them were convinced she was a witness of truth. Of course the learned Judge who wrote the judgment did not actually see her or any other witness testify. But looking at the entire record, there are really no circumstances which could possibly make one conclude that she was not a witness of truth. She was clearly a witness of truth. She did not, for instance, say that the 2nd and 3rd appellants who had in fact been charged together with the 1st appellant had been in the team that had killed her husband. If she had been a dishonest witness it would have been tempting for her to implicate the 2nd and 3rd appellants. We are satisfied Rose was a witness of truth.

We have, however, said she was a single witness who recognized the 1st appellant under difficult circumstances. We have neither seen nor heard her so that we can warn ourselves that even if there were to be no corroboration, we would be prepared to convict. Was there corroboration of Rose’s evidence?

In our view, there was. She said her husband’s attackers were armed with spears and pangas. The injuries which Dr. Akidiva found on the deceased were entirely consistent with the evidence of Rose. She said the killers took out the body after killing her husband. The body of her husband was in fact found outside the house. Then there was the evidence of the Chief about the appellant offering to him Shs.9,000/= so that he would not be arrested. The Chief was of course a person in authority over the appellant. But the appellant was not under arrest for anything and he and his wife voluntarily went to the home of the Chief to offer money so that he would not be arrested. Again, he did not, for example, tell the Chief:-

“I killed Albetus Ongwech Kithari. Take this Shs.9000/= so that you do not arrest me.”

That might have amounted to a confession to a person in authority but as we have said the 1st appellant was not under arrest and voluntarily went to the Chief’s home. The Chief could not but listen to what had taken him and his wife to the Chief. That evidence was rightly admitted. The appellant heard the Chief

give that evidence. In his short statutory statement which we have already set out, he said nothing about that evidence. The evidence of the Chief corroborated the evidence of Rose that the appellant was in fact the ring-leader of those who killed the deceased. The appellant was doing so because he believed the deceased had in some way been responsible for the death of his son. He was not entitled to kill the deceased because of that belief.

On our own consideration of the recorded evidence, we are satisfied that the 1st appellant was convicted on sound evidence which proved beyond reasonable doubt that he and other people murdered Albetus Ongwech Kathari during the night of 4th September, 2003. The sentence imposed on him was lawful. We suppose that sentence must have been commuted by the President to one of life imprisonment. We dismiss the 1st appellant's appeal against the conviction and sentence.

We however, allow the appeals of the 2nd and 3rd appellants, quash the conviction for murder recorded against each one of them, set aside whatever sentence they may be currently undergoing and order that each one of them be released from prison forthwith unless held for some other lawful cause. Those shall be the Court's orders in the three appeals.

Dated and delivered at KISUMU this 4th day of December, 2009

R.S.C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR