



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

Criminal Appeal 168 of 2006

GEOFFREY OKETCH OUKOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya At Kisumu (Mr. Justice B.K. Tanui) dated 4th April, 2006

in

H.C.CR.C. NO. 16 OF 2005)

JUDGMENT OF THE COURT

The appeal before us once again brings to the fore the problems of conducting trials with the aid of assessors. This is the system which the law, as currently stands, makes assessors part of the court and provides in mandatory tone in *section 262* of the Criminal Procedure Code that:-

“All trials before the High Court shall be with the aid of assessors.”

It also provides in *section 263* that the minimum number of assessors shall be three unless under *section 298* one assessor is prevented from attending for good reasons. Whether the number is three, or two however, the assessors must attend all adjourned sittings until the conclusion of the trial (*s. 299*), save only when admissibility of evidence intended to be adduced is challenged or a point of law arises. We are aware however, that the system has lately come under considerable onslaught and indeed proposals for repeal of the relevant provisions relating to it are currently before Parliament. Nevertheless, for as long as the system remains the law in our books, it must continue to serve the purpose for which it was introduced. We take it from *Kinuthia v. Republic* [1988] KLR 699 at page 702, thus:-

“The purpose of the Assessors is to make sure that, as far as possible in the most serious cases which are tried by the High Court, the decisions of fact have a broad base conforming with the notions of that part of society to which the Accused person belongs. The Assessors are of special value in determining what action amounts to provocation. They are also of great importance in assessing contradictory stories of what occurred in a particular case, and they may be able to guide a Court as to the manners and customs, and so to the truth of what the witnesses have said. It is therefore right and proper that the trial should be with the aid of assessors, in the full sense; they should be allowed to ask

the witnesses questions; they should have exhibits and reports shown and explained to them; and they should give their opinions in general and on special points as the circumstances of a case require.”

In the case before us, the Attorney General filed an Information containing two counts of murder contrary to **section 203** as read with **section 204** of the Penal Code. It alleged that Geoffrey Okech Ouko (the appellant) had, on the 11th day of February, 2005 at Kochogo Central Sub-location in Nyando District of Nyanza Province murdered two persons: Joyce Anyango Ouko and Esther Adhiambo. Of those two counts the Attorney General opted to prosecute the charge involving the murder of Joyce Anyango Ouko and left the other count in abeyance. It is a procedure which this Court has declared before not to be improper and it is within the discretion of the Court to allow or disallow it – see **Shah v. Republic** [1984] KLR 674 following **Gachoya Thiongo v. Rex** [1949]16 EACA 169 and **Mongella s/o Ngui v. Rex** [1934] 1 EACA 152.

The incident involved members of the same family who, on the evidence on record, have had a long running dispute over a piece of land. The land apparently belonged to one John Ouko Apambo who died in 2003. He was survived by three wives and several children. The first wife was Mary Ouko (Mary) the mother of the appellant; the second wife was Joyce Anyango Ouko (the deceased), and the third was Finter Ouko. The deceased was subsequently inherited under the Luo custom by John Ouko Apambo’s nephew, Boaz Ogada Ngombo (PW1). She had a grown up daughter Judith Adhiambo (PW3) and a teenage son, Japheth Ochieng’ (PW4). The homestead of the first wife, Mary, was about 400 metres away from the homesteads of the deceased and the third wife (Finter). Separating them, but nearer the homestead of the deceased, was a road and the land in dispute which was used as a shamba.

At about 6.30 a.m. on 11th February, 2005, the appellant, accompanied by Mary, Finter, a herdsboy (one Onyango Onsongo) and three others, were ploughing the disputed shamba using oxen. At about the same time the deceased woke up to go to a nearby house where her daughter Judith and son, Japheth, were sleeping. She woke them up. As she was moving back to her house followed by her son Japheth, according to Japheth, the appellant came from behind a fence holding a spear, a panga and a rungu. He stabbed the deceased twice on the stomach with the spear and when Japheth turned to ask why his mother was speared, the appellant hurled the spear at him but missed. Japheth then ran off to a safe distance. Judith who had been left in the house heard a voice like her mother’s from behind a 5ft flower hedge saying “*Okech why have you killed me*”. She went out and found her mother lying down and saw her step mother, Mary and Finter together with the herdsboy. When she inquired why her mother was killed she was set upon by the three and beaten up with rungu and firewood. As she lay down screaming, the appellant appeared with a spear and threw it at her but it missed her. He then cut her up with a panga causing serious injuries from which she survived. Japheth also witnessed the attack on Judith from his safe distance. Boaz had been left in bed in the deceased’s house when she woke up. After about twenty minutes he heard screams and he went out. He then saw the deceased removing a spear from the deceased’s body some 20 meters away. Some distance further away were oxen and other people ploughing. When the appellant saw Boaz, he chased him until Boaz hid in nearby houses.

Only Boaz, Judith and Japheth testified for the prosecution as eye-witnesses to the incident. According to the appellant however, the incident was precipitated by an attack by Boaz, the deceased and her two children Judith and Japheth who were armed with a spear, rungu and split wood. They accosted and surrounded the appellant who was lawfully ploughing his mother’s shamba with the assistance of the mother, stepmother, and herdsboy. As Boaz threw his spear at the appellant, the appellant ducked and the spear landed on the deceased’s chest. Boaz ran off. Judith was at the same time attacking the herdsboy but the herdsboy took a panga from the oxen plough and cut her up before the appellant stopped him.

The matter was reported to CIP Dominic Biwot (PW5) of Ahero Police Station and the appellant was arrested. A postmortem carried out by Dr. Joseph Omolo Owiti (PW2) on the deceased confirmed that there was only one injury on the deceased’s body – a penetrating wound on the lower lobe of the left lung, which was the cause of death.

The learned Judge of the superior court made a brief summing up of the facts to the assessors and directed them on the burden of proof before posing the question:-

“What is your verdict?”

The response was:-

“1st assessor - accused is guilty

2nd assessor - accused is guilty

3rd assessor - accused is guilty”

In the subsequent judgment however, there was no mention at all about the participation of or opinions given by the assessors. The appellant was found guilty and was convicted and simultaneously sentenced to death for the offence without giving him an opportunity to offer any mitigation.

Some five grounds of appeal were laid out to challenge the decision of the superior court but the main grounds which were argued as one by learned counsel for the appellant Mr. Onsongo were ground (2) and (5), thus:-

“2. The trial Judge erred both in law and fact in failing to refer to and or give reasons for agreeing with the assessors.

5. The court overlooked the accused’s (sic) rights as regards qualification, selection and engagement of assessors.”

As will become apparent shortly, the consideration of the remaining grounds of appeal argued by Mr. Onsongo will be unnecessary. In urging the two grounds Mr. Onsongo submitted that the failure to state in the judgment that the trial was held with the assistance of assessors and the further failure to give reasons why the learned Judge agreed with the assessors, raised a fundamental issue as to whether the trial was lawfully conducted. For this proposition he referred to the decision in the *Kinuthia* case (supra) which laid out the role of assessors and stated:-

“Assessors should give their opinions both generally and on special points as the circumstances of the case require, having regard to fairness and the principles of natural justice.”

In Mr. Onsongo’s view, there was a special issue raised in the trial relating to a land dispute between the family members which the assessors were specially suited to express an opinion on but the issue was not put to them. All what is on record is a general expression of opinion but it remains unclear whether the learned Judge agreed with the assessors on general terms or specific terms. Citing *Titus Brewer Otieno & Another v. Republic* Criminal Appeal No. 92 of 2006(Ur), Mr. Onsongo submitted that there must be a mention of the assessors in the judgment, irrespective of the verdict they made or opinions they expressed in the matter.

With respect, we think those submissions have no firm legal basis. The guiding provision of the law where a trial is completed with the aid of assessors is **section 322** of the Criminal Procedure Code which states:-

“(1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record that opinion.”

We may compare that provision with **section 283(1)** of the Tanzanian Criminal Procedure Code which we take from this Court’s decision in *Salum v. Republic* [1965] E.A. 365, thus:-

“(1) When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and shall record such

opinion.”

The underlining is ours.

It will be obvious from the underlined portion that the Kenyan provision does not direct whether the opinions of the assessors shall be given both generally on the case and on specific questions of fact posed by the Judge. In our view therefore, the court does not commit any fundamental departure from procedure by failing to frame any special issues or specific questions for the opinion of the assessors. Whether such questions should be framed must depend upon the facts and circumstances of each case. Issues of provocation and insanity readily come to mind. Furthermore, we do not think it is fatal for the court to omit the mention of the assessors in the judgment when they have all simply returned a unanimous opinion which the court agrees with. The emphasis that has always been laid by this Court is that a trial court which disagrees with the opinions expressed by the assessors should explain sufficiently his reasons for so disagreeing. See ***Kihara v. Republic*** [1986] KLR 473. In the ***Kinuthia*** case (supra), the court held:-

“In a case involving controversial evidence which ought to be decided either way, it would be a strong action to overrule the unanimous opinion of the assessors on some points. It is therefore, fundamental that a court gives its reason for disagreeing with the assessors”.

In our view, the failure by the learned Judge to refer to the unanimous opinion of the assessors which he agreed with, and his failure to give reasons for so agreeing, though it may be desirable for completeness of his judgment, was not fatal to the judgment as a whole. If all other things were equal, we would have made a finding that there was no prejudice caused to the appellant and that the defect, if any, in the judgment was curable under **section 382** of the Criminal Procedure Code. But that is not the end of the matter.

Mr. Onsongo referred us to the record on the qualification, selection and engagement of the three assessors who took part in the trial. The record shows that at the commencement of the trial the Judge recorded:-

“ These are the persons summoned up (sic) who are present are (sic) Job Oketch, Dan Cornel Otieno, Sammy Opiyo. The others did not turn up.

Order

The three – Job Oketch, Dan Cornel Otieno and Sammy Opiyo are appointed assessors”.

The submission by Mr. Onsongo is therefore that the Court imposed the three assessors on the appellant as there was no pool of assessors to select from, and furthermore the qualifications of those present were not examined before their selection. It was, he submitted, a fatal omission. With respect, we think there is substance in that submission.

The duty to select assessors is imposed on the trial court by **section 297** of the Criminal Procedure Code which states:-

“When a trial is to be held with the aid of assessors, the court shall select three from the list of those summoned to serve as assessors at the sessions.”

The criteria for such selection are in **section 265** and **266** of the Code. Other than the ages of the assessors which should be between 21 and 60, there are elaborate exemptions under **section 266** which ought to be considered before the assessors are selected. There are also further exemptions published by the Attorney General under **section 266(k)** of the Code. As far as we can see, the Chief Justice has not made any rules regulating the area within which a person may be summoned to serve as an assessor and regulating the selection and summoning of assessors as provided in **section 265(2)** of the Code. Be that as it may, there is nothing in the record before us to show what criteria were considered or followed in

determining the suitability of the three assessors or to show whether the appellant or his counsel were involved in the exercise. It may well have been the intention of the trial court to comply with the law and procedure on selection of the assessors but that intention is not manifest. As such, an honest answer to the question whether the three assessors who participated in the appellant's trial were properly qualified would be, "I do not know". Such doubts must enure to the benefit of the appellant with the result that the whole trial was unsatisfactory since the appellant was entitled to be tried with the assistance of assessors who were properly qualified and selected. Learned Principal State Counsel Mr. Musau conceded the appeal on this ground and we think he was right in so conceding. What is the consequential order in those circumstances?

Mr. Onsongo sought to persuade us that the result would be an outright acquittal by quashing the appellant's conviction and setting him at liberty, but Mr. Musau thought the matter was suitable for an order for retrial.

In considering a similar issue in Muiruri v. Republic [2003] KLR 552, this Court stated as follows:-

"Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See Zedekiah Ojuondo Manyala v. Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's."

It would also ordinarily follow where the appellant did not have a satisfactory trial. This Court has however, stated before, that a retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result – see Mwangi v. Republic [1983] KLR 522.

The alleged offence in this case was committed on 11th February 2005 and the trial of the appellant commenced in March 2005. It was finalised on 4th April, 2006 when the appellant was convicted and so he was in custody for just over one year. The prosecution was not responsible for the irregularity which has resulted in the invalidation of the proceedings. The witnesses as far as we can see are from Nyando District within the proximity of the trial court. Finally as far as we can assess it, the evidence on record may on a proper consideration, lead to a conviction either for the offence charged or a cognate one. A human life has been lost and it is in the interests of justice that the perpetrators of the crime be brought to book in accordance with the law. In all the circumstances, we think the right order to make is one for retrial.

We order that the appeal be and is hereby allowed. The conviction of the appellant is quashed and the sentence of death is set aside. There shall be a retrial of the appellant by a court of competent jurisdiction as soon as is practicable. In the meantime, the appellant shall be remanded in custody for purposes of the retrial.

Those shall be our orders.

Dated and delivered at Kisumu this 23rd day of March, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR