REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 93 of 2006

HENRY COLLINS ODHIAMBO OMBEE……...…….……..APPELLANT

AND

REPUBLIC……..……..….RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

Kisumu (Tanui, J) dated 2nd March 2006

in

H.C.CR.C. NO. 3 of 2003

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JUDGMENT OF THE COURT

This is the first and last appeal by Henry Collins Odhiambo Ombee who was convicted by the superior court, Tanui J, for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Upon his conviction he was sentenced to suffer death which is the only sentence provided by law. It had been alleged in an information filed by the Attorney General that the appellant did on 25th March 2002 at Kanyidet Sublocation, South West Gem Location of Siaya District in Nyanza Province, murder Jerusha Matiku ("the deceased") As it is a first appeal, the appellant is entitled to expect from us that we shall subject the evidence on record to a fresh and exhaustive examination, weigh conflicting evidence, and ultimately make our own findings and draw our own conclusions in the matter. Any questions of law raised on appeal must also be dealt with. We must nevertheless remember, and make allowance for it, that we did not have the advantage of hearing and seeing the witnesses -see **Okeno v Republic [1972] EA 32.**

The facts in support of the charge came from eight(8) prosecution witnesses. The appellant also gave an unsworn statement before closing his case. Only one witness however gave eye-witness account of the incident. That was **John Osodo Ojwang** (PW1). He had inherited the deceased as a wife under Luo customs after his brother's death. At about 3.30 in the afternoon of 25th March 2002, Ojwang was at Akala trading centre with the deceased who had just returned from a trip. They then started walking home not far from the trading centre. Suddenly at a point along their way home a man emerged from a bush behind them. The man was the appellant and they knew him as one of the tenants in their premises at Akala trading centre. They had stayed with him since January that year. The appellant was wearing an overcoat and was holding his chest. He ran past the two, then turned round facing them and stopped. He removed his overcoat, pulled out a panga and cut up his old pants. He started jumping about naked saying he would kill both of them as he struck Ojwang on the head with the panga. The deceased screamed as she started running towards their home, some 50 metres or so away. Ojwang struggled with

the appellant but was overpowered and thrown to the ground. The appellant then ran after the deceased as Ojwang collected himself up and chased after him. The appellant caught up with the deceased and savagely attacked her before running into the bush. Ojwang saw him running into the bush naked and found the deceased as she lay bleeding profusely from her injuries. He rushed to Akala Police Post and made a report before obtaining a vehicle to take the deceased to hospital. In the company of others, including Dennis Nyatuoro (PW7), they headed for Kisumu but the deceased died on the way at Kombewa. The body was taken to New Nyanza Hospital mortuary, and Ojwang was taken for treatment. The body was later identified by Solomon Nyiedo Matiku (PW8) and Benjamin Awala Matiku (PW2) in the presence of Pc Isaac Nyongesa (PW5) before a postmortem was carried out on it by Dr. Margaret Oduor (PW6) on 2nd April 2002. Dr. Oduor found the following injuries on the body of the 54- year old deceased:-

(a) cut on the right lower arm below the elbow fracturing both the radius and ulna bones;

(b) Cut on the back of the left leg;

(c) Cut on the face running from left ear to the bridge of the nose;

(d) Cut on the skull bone exposing brain matter;

(e) Cut on the right side of the head slashing the head.

The cause of death in the opinion of the doctor was head injury secondary to the cuts with a sharp object.

The report of the incident was made to Cpl Charles Origi (PW4) at Akala Police Post and he relayed it to his commanding officer at Yala Police Station. Cpl Origi proceeded to the scene and drew a sketch plan. He then used the information supplied by Ojwang to trace the whereabouts of the appellant but did not succeed. Three days later on 28th March 2002, information was received at Riat Police Base that the appellant was seen at Riat market which is about 1km from Akala trading centre. Pc Daniel Kibasu (PW3) together with other officers from Kuriati Patrol Base headed there and arrested the appellant. They escorted him to Akala Police Post and handed him over to Cpl Origi. He was later charged with the offence as stated earlier.

The appellant's story was that he lived in his father's plot in Riat market and it is there that he was found by some three police officers on 28th March 2002. They asked him to accompany them to the police station and he did. They locked him up and later took him to Akala Police Station. There, he was beaten up and shown some jacket found at a place where someone had died and he was being forced to admit it was his. Some people he did not know were also brought and he was beaten up to admit that he knew them. When he persisted in the denials he was charged with the offence of murder.

The superior court believed the eye witness account of Ojwang and found that it was unchallenged. The two assessors who remained in the trial were also of the opinion that the appellant was guilty as charged. In convicting the appellant the learned Judge simultaneously proceeded to sentence him to death. In passing, we must deprecate that procedure, as we have indeed done before. It deprives an accused person of the opportunity of putting forward any facts he may have in mitigation or moving the court in arrest of judgment as provided for in **section 324** of the Criminal Procedure Code. The facts may, for example, disclose that the accused was a minor and ought therefore not to be sentenced to death or if a woman, that she was pregnant and should not suffer the same fate. Other facts may be useful for consideration by the President under **section 332** of the Criminal Procedure Code. It bears repeating therefore that trial courts should observe these procedural requirements.

We must now return to the grounds of appeal put forward to challenge the decision of the superior court. There are three of them as follows:-

"**(1) The learned trial judge erred both in law and fact by denying the appellant an adequate opportunity of participating in the selection of court assessors by failing to summon as many**

assessors as possible from which the 3 assessors are to be selected.

(2) The learned trial judge erred in law and fact by ordering the trial to proceed in the absence of one assessor, without giving the defence an opportunity to be heard on the same.

(3) The learned trial judge erred in law and fact to find(sic) the appellant guilty of the offence charged by entirely relying on the evidence of a sole witness whose evidence was not corroborated at all."

On the first ground, learned counsel for the appellant Mr Abuta referred us to the commencement of the trial on 24th June 2003 when the assessors ought to have been selected. In his submission, it was the requirement under **section 297** of the Criminal Procedure Code that the three assessors required for the trial should be selected from a pool of candidates who must be more that three, invited for that purpose. In the case before us however, only three assessors were invited for selection and were purportedly selected. In his view, there could only be a selection when the assessors were more than three. It was also Mr Abuta's contention that those assessors were not qualified for selection since the provisions of the law under **section 265** and **266** of the Criminal Procedure Code were not expressly followed to the letter. On these submissions Mr Abuta was supported by learned Senior Principal State Counsel, Mr Musau, who conceded the appeal on that basis and called for a retrial. With respect to both counsel, we do not agree.

The record on the first day of the trial reveals as follows:

"**24/6/2003**

Coram Tanui Judge

Mutai for state

Omolo for accused

Appointment of assessors

The following persons were summoned to attend court for appointment as assessors.

1. Lokasiani Radeng

2. Oscar Onyango

3. Nabil Mansur

Accused – No objection

ORDER- The three are appointed assessors for this case. Their duties are explained.

OMOLO: My client wishes to offer plea of guilty to the lesser charge of manslaughter

MUTAI- The state does not accept the plea"

Section 263 of the Criminal Procedure Code requires that the minimum number of assessors shall be three unless under **section 298** one assessor is prevented from attending for good reasons. The learned Judge was alive to this requirement and therefore summoned the minimum number for purposes of selection. In our view, there is no obligation placed on the court to summon more than three candidates or to select the three in one sitting or session. The obligation is to end up with three qualified assessors for the trial and it does not matter how many are summoned for selection or how many times the court would conduct the exercise of selection. In this matter three candidates were invited for selection as

assessors and the appellant was legally represented by an advocate in that exercise. No issues were raised by the accused or his advocate in relation to the qualification or number of assessors. On the contrary the appellant expressly stated that he did not object to all three participating in the trial. The court endorsed its approval and proceeded to advise them about their duties. That was not the position in the authority relied on by both counsel in support of their submissions; that is the recent case of **Geoffrey Oketch Ouko v Republic CR. A. NO 168 of 2006 (ur).** In that case three persons attended court for selection out of a number invited to attend but some of whom did not. The court then simply made an order that they were appointed. No reference was made to the accused or his counsel before that order was made. We stated the procedure as follows:-

"**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(sic) 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."

That authority is materially distinguishable and does not therefore avail the appellant in this matter. As we have already pointed out the appellant and his advocate were involved in the selection of the three assessors against whom they did not have any objection. We would, nevertheless, add that if the trial is intended to start on the day the assessors are selected, then it is desirable to summon more than three persons so that it can be plainly said that the assessors were infact selected. The first ground of appeal must therefore fail.

The second ground of appeal also relates to the propriety of trial with the aid of assessors. The complaint raised by Mr. Abuta is that although the trial commenced with the aid of three assessors, one of them dropped out midstream and the case proceeded with two assessors without informing the appellant.

As far as we can discern from the record, the trial was conducted between 24th June 2003 and 24th March 2004 when all 8 prosecution witnesses and the appellant testified and closed their cases. All three assessors were present throughout. They were also present on 27th April 2004 when submissions were made on both sides and an order was made for summing up on 29th April 2004. Thereafter it was adjourned on several occasions, seven to be precise, mainly due to the absence of one or more of the assessors, until 24th November 2005 when the following order was made;-

"**24/11/2005**

Coram Tanui Judge

Mutai for State

Nyaori for Omolo for accused

Accused present

The two assessors present

Raymond CC.

COURT-

It is noted that one assessor has moved to Nairobi and in his letter he says he will not be available to act as assessor.

ORDER

The remaining part of the trial to be conducted with aid of 2 assessors.

B.K. TANUI JUDGE

ORDER

The case is summed up to assessors who advised me as follows:-

Roksiani Radena- Incident took place during a(sic) day. He is guilty

Nabel Mansur – He is guilty.

B. K. Tanui JUDGE"

We think, with respect, that the learned trial Judge was entitled to invoke **section 298** of the Criminal Procedure Code when it became clear that it was not possible for the third assessor to participate any further in the trial. The appellant was again legally represented and raised no objections to that procedure. In any event the procedure caused no prejudice and we so find. That ground of appeal also fails.

The final ground of appeal attacks the reliance on a single witness to convict the appellant. Mr Abuta however went further and submitted that the evidence of that sole witness required corroboration. Pressed by the Court to clarify whether the evidence required corroboration in law, Mr Abuta clarified that he meant other supporting evidence to strengthen it. In the absence of such other evidence, he submitted, the conviction cannot be allowed to stand.

The single witness whose evidence was alluded to by Mr Abuta was John Osodo Ojwang (PW1). As stated earlier, he was the only eye-witness to the incident and was believed wholly by the trial Judge when he convicted the appellant. The learned Judge stated as follows:

"**It is evident to me that the testimony of PW1 who was with the deceased at the time she was attacked was not challenged. The incident took place during the day. The accused was known to PW1 who said that he was their tenant and that he had known him for about three months earlier on. PW1 saw the accused person who was armed with a panga face him and the deceased and that the man first attacked him and cut him with a panga on the head. PW1 claimed that though he got hold of the man, he was overpowered and was knocked down by the man before he ran after the deceased. According to PW1 as he approached where the deceased lay, he saw the man running away into the bush but when PW1 reached where the deceased was, he noticed that she had several fresh and severe wounds. The deceased died from the said wounds which were inflicted by the accused person. PW1 admitted that though the accused person was their tenant, there was no grudge between him and the deceased."**

As a matter of law, there is no requirement that any number of witnesses shall be called to prove a particular fact. Indeed **section 143** of the Evidence Act expressly provides, thus:

"**143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"**

There are obviously provisions of the law that require corroboration of evidence from certain witnesses, and the evidence of children readily comes to mind. There are other situations where this Court has held, as a matter of prudence, that corroborative evidence be tendered, such as accomplice evidence, retracted confessionary statements or evidence of visual identification by a single witness in difficult circumstances. Authorities in support of those propositions are legion. But, as stated above, the Court has never held that a case cannot be proved on the evidence of a single witness. Mr Abuta did not say so in so many words, but we think the thrust of his concern was the unease that entails a conviction on the strength of the evidence of a solitary witness, particularly in a charge carrying serious consequences. Such unease was addressed in **Roria v Republic [1967] EA 583**, thus:-

"**A conviction resting entirely on identity invariably causes a degree of uneasiness, ……**

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In Abdala Bin Wendo and Another v. R. (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A. at p. 168)

"***Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

It cannot be gainsaid that such evidence must be tested with the greatest care. The evidence given by Ojwang in this case was not merely one of visual identification of the appellant. Nor was it evidence of visual identification under difficult circumstances. Ojwang swore that he knew the appellant who attacked him and subsequently attacked the deceased. That was evidence of recognition which has always been held to be more assuring and more reliable – see **Anjononi v Republic [1980] KLR 59**. The time was 3.30p.m and there is no suggestion that it was other than broad daylight. The appellant stood before Ojwang and the deceased as he(the appellant) stripped naked and spoke to them, threatening death and shortly executing those threats. Ojwang was cross examined at some length by the appellant's advocate but his credibility was not shaken. The learned Judge remarked that the evidence was "unchallenged" but, in our view, that was an unfortunate remark. He must have meant, as we also think, that his evidence remained unshaken. The only allusion to a motive for the attack was a suggestion in cross examination that the deceased had a disagreement with the appellant's wife which suggestion Ojwang denied thus:

"**I had stayed with him for about 3 months. I had not quarreled with him within that period. I have not seen the accused' wife. There had never been any quarrel between my wife and the accused over his wife. There was no quarrel between my wife and the accused. My wife had come back from a visit she had made. I had no panga during the day. I only had a torch and some clothes I was taking home."**

There was no other evidence suggesting that the appellant was provoked by the deceased or Ojwang into committing the offence. In any case, the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility, unless it is expressly so

declared. **Section 9(3)** of the Penal Code so provides. The evidence of Ojwang was fully believed and accepted as truthful by the trial Judge who had the added advantage of seeing him testify in the witness box and therefore was best placed to assess his credibility. On our own evaluation, we find nothing in it to alter that assessment. It was on its own sufficient to found a conviction and we see no reason to interfere with it. That ground of appeal fails.

On the whole, the beastly attack on the deceased with a lethal weapon was premeditated and was caused by the appellant who must face the full consequences of his actions. It is not lost to us that the appellant at first offered to plead guilty to the lesser offence of manslaughter but the offer was rejected by the prosecution, and correctly so. The appeal has no merit and we order that it shall be and is hereby dismissed.

Dated and delivered at Kisumu this 15th day of June, 2007.

R.S.C. OMOLO

…….**……**

JUDGE OF APPEAL

P.N. WAKI

…….**……**

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR