



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

CRIMINAL APPEAL 92 OF 2006

1. **TITUS BREWER OTIENO**
2. **FRANCIS OTIENO OTIENOAPPELLANTS**

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mr. Justice Tanui) dated 17th March, 2006

in

H.C.CR.C. NO. 103 OF 2003)

JUDGMENT OF THE COURT

TITUS BREWER OTIENO and **FRANCIS OTIENO OTIENO**, the appellants, were convicted 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 the two appellants and Vincent Ouma Otieno and Sisha Omondi Omollo on the 2nd day of September, 2003 at Lumumba Estate within Kisumu City in Kisumu District of the Nyanza Province, jointly with others not before court murdered Steve Omondi Kwaya, the deceased. The Attorney-General however, entered Nolle Prosequi in respect of Vincent Ouma and Sisha Omondi Omollo before the hearing.

The somewhat protracted trial was held with the aid of assessors and upon its conclusion the appellants were convicted in a judgment which Mr. Onsongo advocate for the appellants has attacked on the ground that it does not comply with the mandatory requirements of **section 169(1)** of the Criminal Procedure Code.

The learned trial Judge in his judgment merely outlined the evidence of the prosecution witnesses and then that of the appellants in a more or less chronological order and concluded without any analysis or comment at all that:-

“Having considered the evidence as a whole, I accept the testimony of PW2 as truthful.”

He then in a terse sentence rejected the appellants’ alibi without even considering it and found them guilty

and convicted them as charged. Again, with due respect to the learned Judge, he gave no reason whatsoever for accepting the testimony of Ketty Adhiambo Kwaya (PW2) who was the main prosecution witness and the only eye witness called by the prosecution.

In our view, the judgment failed to comply with the provisions of **section 169(1)** of the Criminal Procedure Code which requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision.

It is manifest from the record that the appellants put forward a defence of alibi but this defence does not appear to have been considered by the learned trial Judge at all. It must follow therefore in the circumstances that we cannot say what his finding would have been on that defence.

After the summing up, the assessors returned a unanimous opinion of not guilty but the learned trial Judge made no mention of them and gave no reasons for disagreeing with them. Though a Judge is not bound by the finding of the assessors under **section 322(2)** of the Criminal Procedure Code, a Judge who disagrees with the unanimous opinion of the assessors should explain sufficiently his reasons for so disagreeing. See ***Kihara v Republic* [1986] KLR 473**.

We have carefully considered the submissions canvassed by both Mr. Onsongo and Mr. Musau, for the Republic. We think that the omissions rampant in the unsatisfactory judgment of the learned Judge constituted a fatal irregularity in the conduct of the trial. It follows therefore that the appellants did not have a satisfactory trial. In the circumstances an order for a retrial is the proper order to be made.

In the result we allow the appeals of the two appellants, quash their convictions, set aside the death sentences passed against each of them, and direct that the appellants be retried by a competent court. They shall be remanded in custody pending their retrial. Those are the orders of the court.

Before we rest this appeal, we bring to the attention of the Attorney-General two aspects of this case which have caused us some concern. Kondele Police Station though informed in good time of the impending attack on the deceased showed a lamentable lack of interest in not acting to save his life despite pleas by his father.

It would appear again that consciously or otherwise, crucial witnesses appear to have been left out probably to forestall any successful prosecution. Also, the judgment convicting the appellants was delivered on **17th March, 2006** and this appeal was registered on **2nd May, 2006**. Though we would encourage expeditious disposal of appeals, no convincing reason has been given as to why this appeal jumped the queue leaving hundreds of others down the line.

Dated and delivered at Kisumu this 23rd day of June, 2006.

P. K. TUNOI

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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