



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

(CORAM: TUNOI, WAKI, J.J.A & DEVERELL, AG. J.A)

CRIMINAL APPEAL NO. 142 OF 2003

BETWEEN

1. JOSEPH ASAWA AGORO)

2. DANIEL OJIJO OBWANGA) APPELLANTS

3. LAWRENCE OMWAI MALA)

AND

REPUBLIC RESPONDENT

(Appeal from convictions and sentences of the High Court of Kenya at

Kisii (Birech, Comm. of Assize) dated 16th March, 2003

in

H.C. Cr. Case No. 40 of 2000)

JUDGMENT OF THE COURT

In this appeal, the three appellants were prosecuted for the murder of Grace Anyango Geda (“the deceased”) on the night of 20th/21st September, 1999. They were all three convicted of murder and sentenced to death.

There is no doubt that the deceased was indeed murdered and her body left in her kitchen which building was then set on fire. The fire was extinguished before the body was burnt.

The prosecution case rested on two main categories of evidence.

The first was evidence that in June 1999, the deceased had been threatened by the 1st appellant that he would kill her. Two witnesses, Elizabeth Orima Akuku (PW 1) and Elizabeth Atieno Ongwen (PW 9) both confirmed that they had separately been told of these threats by the deceased in June 1999. This was about three months before the murder and the superior court rightly held that this did not qualify as a dying declaration carrying any weight evidentially against the 1st appellant.

The second main area of evidence related to the events leading up to the murder. The evidence as to this, briefly summarized, was that the three accused persons came together as a result of an offer to pay Sh.700/= in total to have a certain woman killed. The offer was alleged to have been made by the 2nd appellant, Ojijo, to Lawrence Omwai, the 3rd appellant.

The 2nd and 3rd appellants met the 1st appellant, Joseph Asawa, at a certain place where the murder, preceded by the raping of the deceased, took place.

If this evidence was admissible, it would be very damning against the 1st appellant and, if corroborated, against the 2nd and 3rd appellants. However, the evidence in this connection was all hearsay or double hearsay and was denied by the appellants in their unsworn statements.

There were procedural matters raised by the appellants in relation to the assessors' report.

After the submissions and summing up to the assessors in their presence, there was an adjournment for four hours after which the assessors are recorded as saying -

“We have reached a conclusion of our own opinion. The opinion is joint and will be read by Ayoub Ayaoke Ngeso.”

Section 322(1) of the Criminal Procedure Code provides as follows:-

“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 the defence, and shall then require each of the assessors to state their opinion orally, and shall record that opinion.”

The giving of their opinion jointly was not in accordance with this section. The effect of this breach does not need to be considered in this case because the opinion was not followed by the superior court, and we are determining the appeal without reliance on the assessors' opinion.

The learned Commissioner of Assize in his summing up to the assessors told them that they had to give due weight to the alleged confession depending on all the surrounding circumstances of the case. This was a misdirection since he did not take into account the hearsay nature of the confession evidence.

We now turn to the learned Commissioner's judgment. This contained a thorough analysis of the evidence. In the penultimate paragraph of the judgment, the learned Commissioner of Assize stated as follows:-

“The evidence therefore on the court record, though circumstantial points to complicity of all accused persons in the killing of the deceased.”

It is clear to us that the decision in the superior court was based, at least in part, on the confession evidence, inadmissible due to its hearsay nature. In view of the foregoing, we find that the convictions of the appellants were not safe. The learned State Counsel also concedes the appeal and, we think, rightly so. We allow the appeal, quash the convictions of the three appellants and set aside the sentences of death imposed on them. We order that all the three appellants be set at liberty forthwith unless otherwise lawfully detained.

Dated and delivered at Kisumu this 3rd day of December, 2004.

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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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR