



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

Criminal Appeal 7 of 2006

ALLOYS OMONDI NANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Kisumu (Tanui, J) dated 10<sup>th</sup> November, 2005*

in

H.C.CR. C. NO. 2 of 2002

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JUDGMENT OF THE COURT

The appellant *Alloys Omondi Nanga* was convicted by the superior court (Tanui, J) of the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code and sentenced to death. He appeals to this Court against the conviction and sentence.

On 10<sup>th</sup> March, 2001 at about 3.30 p.m. *Petro Oloo Ochieng* (deceased) and his wife *Roselida Nyangweso Oloo* (Roselida) attended the funeral of their neighbour and relative, *Francis Nanga* (Nanga). The appellant who is the son of *Francis Nanga* attended the funeral. Many other people attended the funeral. Roselida and the deceased sat down at one place. According to Roselida, as prayers were going on the appellant walked round the crowd three times after which he entered into his house and came out armed with a panga. He started walking round the crowd for the fourth time saying,

***“I am going to kill Oloo Ochieng; I am going to kill Oloo Ochieng.”***

The appellant then stood behind the deceased and cut him three times at the back of the head. The mourners ran away. Some of the mourners were screaming. The appellant ran away but was arrested by ***Michael Oduor Oloo*** (Michael), ***Augustine Orengo Okoma***, (Okoma) and others and the panga taken away from him. He was taken to Luanda A.P’s camp. The deceased died immediately. His body was collected from the scene on the same day at 10.30 p.m. by ***I.P Maurice Juma*** (Juma).

The appellant gave sworn testimony at the trial. He testified that he was at the funeral and when his mother was giving eulogy, mourners started running away. When he turned he saw somebody lying down bleeding from the head but he did not find out whether he was alive or not. The people claimed that his white trouser had blood stains and arrested him. He denied cutting the deceased with a panga and said that he had not met him on that day.

The appellant called his mother ***Dina Awinyo Nanga*** (Dina) as a witness. She testified that when she was giving eulogy she saw people running away saying,

***“he has killed, he has killed, he has killed”.***

Thereafter she confirmed that somebody had been killed and saw a dead body lying on the ground. She testified that the appellant was preparing a shade for visitors at the funeral.

One of the three assessors did not turn up on the day scheduled for the summing-up . The trial Judge summed up the case to the two assessors who were present. The two assessors reached a unanimous decision that the appellant was guilty of the offence of murder.

The trial Judge considered the evidence and concluded:

***“The evidence of PW1 is clear. She is a neighbour of the accused person and that she knows him very well. The attack on the deceased took place during broad day-light and there could not have been any suggestion of a mistaken identity on the part of PW1, PW2 and PW3. PW1 stated that the cuts were directed on the head of the deceased and this was confirmed by a post-mortem report. Although PW1 had claimed that the deceased was cut three times but the post-mortem report states that there were 2 cuts. That is a minor***

*discrepancy in my view. DW2 who was called by the accused admitted that the accused had carried about a panga during the funeral. In the result, I agree with the assessors that the accused is guilty .....*”

There are nine grounds of appeal in the memorandum of appeal and two grounds of appeal in the supplementary memorandum of appeal. Mr. Karanja, learned counsel for the appellant argued the first ground in the supplementary memorandum of appeal first. That ground of appeal states:-

**“1. The appellant’s trial was a nullity as the Appellant was not accorded fair trial in accordance with section 77(1)(d) of the constitution in that:-**

**(a) The appellant was not represented by a legal representative of his choice as required by section 77 (1) (d) of the constitution**

**(b) The Honourable Judge did not inquire whether the appellant consented to his purported representation by state appointed counsel**

**(c) The Appellant did not instruct nor consent to the representation by the State appointed counsel**

**(d) The counsel who conducted the appellant’s defence did so without the consent, permission or other instruction from the appellant and never sought instructions or spoke to the appellant regarding the appellant’s defence**

**(e) The appellant was not permitted to defend himself before the court in person.”**

The court file shows that by a letter dated 18<sup>th</sup> January, 2002, which is in a printed form, the Deputy Registrar wrote to Nishi Pandit Advocate partly as follows:-

**“Sir,**

**High Court criminal case No 2 of 2002. Original criminal case No. SRM's SYA 243 of 2001 of the Siaya Senior Resident Magistrate’s Court – Republic versus Alloys Omondi Nanga.**

*By directions of the Honourable the Chief Justice, I have to request you to undertake the defence of the accused in the above case at the usual remuneration which will be paid on submissions of your bill .....*

The letter which is copied to the Attorney General, officer – in – Charge of G.K Prison Kisumu informs the advocate, among other things, that the prisoner whom she is requested to represent is at G.K prison Kisumu and requests her to interview the prisoner as soon as possible for the purpose of preparing his defence and ascertaining what witnesses, if any, he wishes to call for his defence.

The record however, as Mr. Karanja correctly states, shows that Nishi Pandit attended on the date that the appellant entered a plea of not guilty to the charge and on several other occasions but not the entire duration of the trial. On 25.9.2002 when the case was scheduled for hearing Miss Pandit stated:-

*“My client wishes to offer plea of guilty to manslaughter.”*

The case was mentioned on several occasions thereafter and it is not clear what happened to the offer of the plea of manslaughter. On 3.10.2003, Miss Oketch informed the court in the presence of the appellant:-

*“I have just taken over the conduct of the case on behalf of the accused. I need adjournment.”*

The application for adjournment was allowed and the hearing of the criminal case was adjourned to 25<sup>th</sup> November, 2003. The record shows that Miss Oketch attended throughout the trial up to 11<sup>th</sup> November, 2005 when the judgment was delivered.

The original record of the case further shows that the firm of Oketch & Co. Advocates was paid Kshs.29,000/-

*“being payment in respect of pauper brief in High Court Cr. C. No. 2 of 2002.”*

*Section 77 (2) (d)* of the constitution on which Mr. Karanja relies but which he erroneously refers to in the supplementary memorandum of appeal as *section 77(1)(d)* provides:-

“77 (2)

*Every person who is charged with a criminal offence*

(a) .....

(b) .....

(c) .....

(d) *Shall be permitted to defend himself before*

*the court in person or by a legal representative of his own choice.”*

*Section 77 (14)* of the constitution which Mr. Karanja did not refer to is relevant. It provides:-

“77 (14)

*Nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense.”*

Mr. Karanja contended that according to the appellant he wanted to conduct his own defence as he could not afford a lawyer; that both Miss Pandit and Miss Oketch did not take instructions from the appellant; that there is no record of how Miss Oketch came on record for the appellant and that the two advocates do not by mere appointment become legal representative of the accused’s choice.

*Section 77 (2)(d)* of the constitution is one of the provisions in the Constitution designed to ensure that an accused gets a fair trial. By that provision, an accused person has a constitutional right in a criminal trial to defend himself before the court in person or by a legal representative of his own choice.

In this country there is a long standing practice in our criminal justice system of giving free legal aid to indigent accused persons charged with murder undoubtedly to ensure that justice is done to such an accused person.

That practice has been extended to appellants who have been convicted of the capital offence of robbery under *section 296(2)* and attempted robbery with violence under *section 297(2)* of the Penal Code. Free legal aid is not however enshrined in the constitution or in any statute and the Government has no obligation to give free legal aid. In the Court of Appeal, however, *rule 24(1)* authorizes the Chief Justice or the Presiding Judge of the Court of Appeal to assign an advocate to represent an applicant or appellant in criminal application or appeal if it appears desirable in the interest of justice.

It is in light of that time-honoured practice in the High Court that the Chief Justice assigned Miss Pandit to represent the appellant in the trial. According to the record Miss Oketch later took over the defence of the appellant. The two advocates were not admittedly appointed by the appellant and were thus not the legal representatives of his own choice. By *section 77 (14)* of the constitution, the appellant was not legally entitled to free legal aid from public funds.

Logically a right to a legal representation of ones choice may only arise where an accused person has the means to engage a counsel of his own choice. Where however an accused is given free legal aid he has no choice of the counsel who is to represent him. He has however a right of election – he can decide to accept the counsel assigned to him or to reject him and defend himself in person.

In this case however, there is no material to support the constitutional issue raised. The record does not show that the appellant ever raised an objection in court or in writing to any of the two advocates or informed the court that he wanted to conduct his defence in person. The letter requested Miss Nishi Pandit to undertake the appellant's defence and requested the advocate to visit the appellant in prison to interview him for purpose of preparing his defence and ascertaining what witnesses he intended to call. Miss Nishi Pandit appeared in court on several occasions when the appellant was present. The plea of not guilty was entered in the presence of Nishi Pandit. At one time Nishi Pandit informed the court that appellant was offering a plea of guilty to manslaughter. This could not have happened if Nishi Pandit had not taken instructions from the appellant. Miss Oketch took over the defence from Nishi Pandit on *3<sup>rd</sup> October 2003* and applied for adjournment in the presence of the appellant. The appellant did not raise any objection to being represented by Miss Oketch. The hearing

started after about one month after Miss Oketch took over thereby showing that she had ample time to interview the appellant and prepare the defence. Miss Oketch continued to appear for the appellant for the next two (2) years without any objection by the appellant. After the close of the prosecution case Miss Oketch informed the trial Judge that the appellant would give sworn evidence and call one witness. She could not have said so without the instructions of the appellant.

In the circumstances of this case it is clear that the appellant neither rejected any of the two advocates assigned to conduct his defence nor informed the court that he intended to conduct his own defence in person. Instead he acquiesced to the assignment of the two advocates to conduct his defence and benefited from the legal services for which the Judiciary ultimately paid. In the above scenario, we do not find any substance in the constitutional issue raised.

However this case shows that not every accused person appreciates the free legal aid given by the government and that it is therefore prudent that where free legal aid is given that an accused person should be required to indicate his acceptance of the counsel assigned to him or otherwise in writing or alternatively the trial Judge should inform the accused person of his right to reject the counsel and to record his remarks before the plea is taken. If he declines the counsel assigned to him it should be made clear to him that the only other alternative is for him to act in person. We strongly recommend such a practice and that appropriate forms be designed, if necessary.

The appellant complains in the other grounds of appeal, among other things, that the learned Judge failed to evaluate the appellant's defence and completely ignored it; that the trial Judge ignored evidence tending to support the appellant's defence, that the learned Judge erred in law in solely relying on the evidence of Roselida to convict the appellant while she was not a truthful nor an independent witness.

This is a first appeal and as this Court has said on numerous occasions the first appellate court has a duty to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether the Judgment of the trial court can be upheld (see **OKENO VS. REPUBLIC [1972] EA 32**). As the case of **Okeno** (supra) clearly shows mere failure to evaluate the evidence by the trial court does not in all cases lead to an acquittal. The Court has to be satisfied that the

irregularities complained of occasioned a failure of justice. In that case the court said in part at page 36 para 1:

*“Notwithstanding the form taken by the High Court’s judgment, we are nevertheless satisfied that the Judges did make their own evaluation of the facts although this is not made to appear clearly ..... we are satisfied that the irregularities undoubtedly contained in the first appellate judgment did not in fact occasion a failure of justice and that had the Judges discharged their duties in accordance with the law as laid down in the long line of authority they must have inevitably come to the same conclusion.....”*

It was indisputable in this case that the deceased was cut with a panga and killed at the funeral of Francis Nanga. Even the appellant and his mother testified that the deceased was killed at the funeral. The accused defence was that although he was at the funeral he did not see the deceased and is not the one who cut the deceased with a panga. The wife of the deceased Roselida however gave evidence that she was seated with the deceased, that the appellant went round the crowd three times, then entered into his house and came out with a panga. Thereafter he went round the fourth time saying that he was going to kill Oloo Ochieng and that the appellant struck deceased with the panga at the back of the head three times.

Although Okoma did not specifically say that he saw the appellant cut the deceased with the panga his evidence supports the evidence of Roselida substantially. Okoma testified that :-

*“While I was at the funeral the deceased’s wife was giving eulogy when I heard Alloys Nanga making noise and people started running away. I was behind the mourners. I also heard a noise and heard explosion of a panga and when I looked I saw Oloo Ochieng lying down and Alloys was carrying a panga where he was seated. I heard Alloys shouting saying “Oloo you are still here.” Alloys then tried to run but he was got hold of. I was about 15 metres away from where the deceased was seated. Then Alloys started running when I looked at the direction.”*

Okoma stated in his evidence in cross-examination that he witnessed what took place and that the deceased was cut behind the head.

According to Oloo, he found the deceased seated facing down and when he went near him he found the appellant standing behind him holding a panga which he took away:-

Oloo said in part:

*“Before reaching the scene I heard people screaming. Some were saying Alloys had killed Oloo. When I reached near I saw Mzee Oloo seated and facing down and holding a walking stick. I did not know whether he was dead or alive I went near him and I found Alloys standing behind him. I did not know why he was seated facing down. I know the accused ..... I got to the home of Alloys and then I saw the deceased had been cut. I was then assisted by others and we took the panga away.”*

The appellant testified that he was arrested because some people said that his trouser was blood stained. This was a case which was dependent on the credibility of the witnesses particularly the credibility of Roselida. The incident occurred during the day. The deceased was a neighbour of the father of appellant. Both are related for Roselida said that the appellant was the son of her brother in law implying that the deceased was the appellant's uncle.

The evidence of Roselida could alone be relied on, if it was found to be credible (see section 143 of the Evidence Act; **ABDALLA BIN WENDO & ANOTHER VS. R.** – (1953) 20 EA C.A. 166 at page 168).

Although the trial Judge did not specifically say so, he believed the evidence of Roselida and thus disbelieved the evidence of the appellant that he is not the one who cut the deceased. The trial Judge saw the witnesses give evidence and this Court should not disturb his findings based on credibility of the witnesses unless it is clear that no reasonable tribunal could make such a finding (see **Ogol vs. Muriithi [1985] KLR 359**).

Like the Judge we find the evidence of Roselida is credible. It was in addition substantially supported by other evidence. The appellant and his mother were evasive and their evidence self serving and could not be believed.

In the result we have come to the conclusion that the conviction of the appellant was proper and safe.

This appeal has no merit and is accordingly dismissed.

**Dated and delivered at Kisumu this 24<sup>th</sup> day of November, 2006.**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**