Case Number:	crim app 86 of 96
Date Delivered:	22 Nov 1996
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Philip Kiptoo Tunoi, Abdulrasul Ahmed Lakha, Richard Otieno Kwach
Citation:	Peter Nyabuto Omambia v Republic [1996]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.C. NO. 33 OF 1993
Case Outcome:	Dismissed
History County:	Kisii
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KWACH, TUNOI & LAKHA, JJ.A.)

CRIMINAL APPEAL NO. 86 OF 1996

(Appeal from the Judgment of the High Court of Kenya at Kisii (Justice Mbaluto) dated 21st April, 1995 in H.C.CR.C. NO. 33 OF 1993)

****

BETWEEN

PETER NYABUTO OMAMBIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT OF THE COURT

The appellant appeals to this Court against his conviction by the superior court (Mbaluto, J.) following a judgment delivered on April 21, 1995. He was jointly charged with two others (who were acquitted) with the murder of Ogenche Omambia on August 4, 1992 at Bogisiankio Village in Kisii District of Nyanza Province contrary to section 203 as read with section 204 of the Penal Code.

It is not in dispute that on August 4, 1992 when the deceased came out of his house the appellant stabbed him on the neck with the panga he had apparently killing him instantly and the panga was seen to have blood stains. The prosecution called ten witnesses in support of the charge and the appellant made an unsworn statement and called no witnesses. He said that the main prosecution witnesses had not told the truth.

The learned trial judge considered with great care the evidence for the prosecution and the denial of his involvement by the appellant, and came to the conclusion that the evidence for the prosecution clearly established that the deceased was cut at the back of the neck about 8 cm. long and a fracture about 6 cm. in length at the back of the skull and that the appellant had inflicted these injuries. The cause of death was head injury with possible intracranial bleeding. In his judgment there was sufficient evidence to establish beyond reasonable doubt that the appellant murdered the deceased as charged.

There were two eyewitnesses. The first testified that he accompanied the appellant to the house of the deceased where he stabbed him on the neck with the panga he had upon the deceased coming out of his house. After the deceased had been stabbed his two children started to scream. At this point the other two accused persons got hold of the children and killed them. According to this witness the jembes used to dig the graves into which the deceased and his children were buried were brought by him and the second eye witness.

The latter testified that on the material night he was at his house when he heard some noises. When he went to where the noises were emanating from he found people outside the house of the deceased. He found that the appellant had fought with the deceased and that the latter was dead. His body was lying outside his house. At that time the appellant was armed with a panga which had blood stains.

On our part, we have ourselves evaluated the evidence and agree with the conclusion reached by the learned trial judge. This was a clear case of murder. The assessors gave a unanimous opinion that the charge against the appellant was proved as laid and, with utmost respect, we agree with them and the trial judge.

On appeal before us it was strenuously submitted by Mr. Nyamori, for the appellant, that the appellant had missed the chance of raising the defences of self defence and provocation which were disclosed by the appellant in his statement under inquiry wherein he referred to a quarrel and fight with his brother who stabbed him with a knife. This was because the prosecution had not produced the P3 Form and the statement under inquiry had not been produced in evidence. The latter was the result of a trial within a trial occasioned by the objection of the appellant's advocate that the statement was inadmissible. The learned trial judge held, properly in our view, that the statement was inadmissible. Having so held, the learned trial judge could not look at it to consider those defences. The P3 Form, however, should have been produced.On the evidence, therefore, there was no question of any selfdefence. Nor did the defence of provocation arise thin the meaning of section 207 of the Penal Code. We are satisfied that no miscarriage of justice has been occasioned.

In the result, the appeal against conviction fails and it is dismissed.

Dated and delivered at Kisumu this 22nd day of November, 1996.

R.O. KWACH

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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