



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO.69 OF 2006

REPUBLIC PROSECUTOR

VERSUS

LAMSON OLE KUPELE ACCUSED

RULING

This matter is a retrial following an appeal by the accused. The retrial was ordered by Waki, Onyango Otieno and Nyamu JJJA after it became clear that the initial trial was partly conducted with the aid of assessors and partly without. The hearing of prosecution witnesses was conducted with assistance of three assessors, but the defence case and summing up before judgment was delivered were conducted without the aid of assessors. That was the procedural omission and had nothing to do with the testimony of the witnesses or the witnesses themselves.

The State Counsel, Mr. Marete, has moved this court under provisions of the **Evidence Act**, to allow the evidence of:-

1. **Kimunyak Ole Kupele**
2. **Koringo Ole Koua**

as received in the initial proceedings to be admitted in this matter. The reason for such request is that the two witnesses are deceased although the fact of death has not been confirmed by way of a death certificate.

It is explained that due to the current heavy rains and the state of the roads in Narok, the death certificate may not be quickly obtained without causing undue delay.

Section 34 of the **Evidence Act** addresses admissibility of evidence given in previous proceedings and provides that:

“34(1) Evidence given by a witness in a judicial proceedings is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding for the purpose of proving facts which it states in the following circumstances:-

- a. **Where the witness is dead or cannot be found, or is incapable of giving evidence.....**

And where, in the case of a subsequent proceeding,

- b. **The proceeding is between the same parties.....**
- c. **The adverse party in the first proceeding had the right and opportunity to cross-examine and;**
- d. **The questions in issue were substantiating the same in the first as in the second proceeding.**

I think the scenario obtaining here is what is contemplated by these provisions. I have referred to Miss Gitau, with the greatest of respect is splitting hairs, a subsequent proceeding is any proceeding which comes after the initial one and in my view, includes a re-trial – it is a trial subsequent to the first proceedings. I would under the circumstances allow the evidence of the two individuals named, i.e. **KIMUNYAK ole KUPELE** and **KORINGO ole KOUA** to be admitted as part of the evidence in this matter.

The only issue of concern is whether there is proof of the deaths and unavailability of the two witnesses without undue delay. It is not very clear to me when the deaths occurred. I am not aware of Narok Town being inaccessible due to the on-going rains. What I can confirm is that there have been heavy rains and floods within the area. If the persons died and a death certificate was issued, surely such information from the District Hospital which is within the Town Centre, cannot be an uphill task. I fail to comprehend the delay anticipated – a death certificate is usually prepared upon death, to certify the state of an individual and I direct that the same be made available for purposes of fulfilling the provisions of **Section 34(1)** of the **Evidence Act**.

H.A. OMONDI

JUDGE

30/04/2013