



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO.2 OF 2005**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**BERNARD MIRITI .....1<sup>ST</sup> ACCUSED**  
**JOSEPH MAORE .....2<sup>ND</sup> ACCUSED**

**J U D G E M E N T**

The accused **BERNARD MIRITI**, the 1<sup>st</sup> and 3<sup>rd</sup> accused **JOSEPH MAORE** were charged with **JOSPHAT MIRITI**, the 2<sup>nd</sup> accused jointly with murder contrary to S.203 and read with S.204 of the Penal Code. It is alleged that the accused persons murdered **JOSEPH NKUNJA** on the 5<sup>TH</sup> June, 2004 at Kiguru Location. The 2<sup>nd</sup> Accused died before the case was finalised

The case was heard in part by Hon. Lenaola J. who took the evidence of PW1 with the aid of assessors. Hon. Emukule J. took evidence of PW2 and PW3 without the aid of assessors. The case was thereafter taken over by Hon. Kasango J. who ordered it to start afresh. Thereafter the matter was taken over by me. The state recalled PW3 and then closed its case. I then took the defence of the 1<sup>st</sup> and 2<sup>nd</sup> accused.

This is a defective trial for two reasons. The first defect was caused when Hon. Emukule, J. continued with the trial without the aid of assessors yet without making an order discharging them. The second defect was made when I took over the case, and continued from where Hon. Emukule, J. had left off oblivious of the order by Hon. Kasango, J. that the case should start afresh. The Hon. Kasango, J’s Order read:

**“Court – I direct the case do start Denovo in view of the failure of assessors to attend.**

**The accused are raising a Preliminary Objection. The same will be heard on 12.10.2010. The Investigating Officer to be present M. Kasango J.”**

The principle which apply to a case of this nature are now well settled in the Court of Appeal case of **PIUS OLIMA & ANOTHER V REPUBLIC C. A. NO.110 OF 1991** held;

**“Our attention was drawn to authorities that deal with the principles that should be applied when considering a retrial should be ordered or not. These are: Ahmed Sumar – v – Republic 1968 EA 481;**

Manji – v – republic 1966 EA 343; Muyimba & others – v – Uganda 1956 EA 433 and Merali & Others – v- Republic 1971 EA 221. **The principles that merge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, is the interest of justice so required and is no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depend depends on the particular facts and circumstances of each case ”**

The retrial begun on 18<sup>th</sup> of January 2005 when all three accused in the case were arraigned in court. At that stage, the name indicated in the information as that of 3<sup>rd</sup> was not the name of the 3<sup>rd</sup> accused was not in the name of the 3<sup>rd</sup> accused before court. The name in the information read Joseph Meme while the name of the 3<sup>rd</sup> accused in court was Joseph Maore. The information was dated 10<sup>th</sup> December. The year was missing on the date for plea, it seems a new information was presented in court dated 20<sup>th</sup> January 2005. It had the correct names of all the accused including 3<sup>rd</sup> accused.

The first witness was called on 16<sup>th</sup> May 2006. The next two witnesses PW2 and PW3 were fully heard on 22<sup>nd</sup> July 2008, two years and one month after the evidence of PW1 was heard. PW3 was recalled on 17<sup>th</sup> February 2011, two years and eight months after he was first heard in court. In the whole, it has taken the prosecution five years to call 3 witnesses. The prosecution declared the rest of the remaining witnesses difficult to **trace**.

The trial started with three accused persons. By the time I took over the matter there were only two accused, the 1<sup>st</sup> & 3<sup>rd</sup> accused in the information dated 20<sup>th</sup> January 2005. One accused has since passed away. If a retrial were to be ordered at this stage, it means it will be the case against the 1<sup>st</sup> and 3<sup>rd</sup> accused; the 2<sup>nd</sup> accused died before the case was heard and finalized.

The evidence adduced in the case cannot sustain a conviction, if the self same evidence were to be availed at the retrial. I also noted that accused were held for long. It shows that the Police were also having difficulties investigating the case. To order a retrial means it will give the prosecution an opportunity to fill gaps in their case. Justice will not be served.

In conclusion it is my considered view that the interest of justice will not be served if a retrial were ordered in this case. The trial has taken almost six years so far for only three witnesses to be heard. The evidence adduced by the prosecution is purely that of suspicion. There is no direct evidence against the accused. The circumstantial evidence adduced does not irresistibly point to the accused guilt as the circumstances are capable of an innocent explanation.

I think that to order a retrial in the circumstances will be harsh and will create difficulties to the accused. Persons now before court.

For that reason I decline to order a retrial. I acquit the two accused of the charge against them and order for their immediate release from custody

unless they are otherwise lawfully held.

**Dated, Signed and Delivered this 7<sup>th</sup> day of April 2011.**

**LESIIT  
JUDGE**