



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO.138 OF 2003**

**LESIIT J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MOSES MUTHERI KANATHI.....ACCUSED**

**JUDGMENT**

The accused person MOSES MUTHERI KANATHI is charged with murder contrary to section 203 read with section 204 of the penal code. The particulars of the offence are that on the 29<sup>th</sup> of November 2002, at Athiru Gaiti Location of Naathu Location Ngandone Sub Location Naatha grazing area in Meru North District murdered Meeme Kirungu.

This trial was begun by Hon. Onyacha J. On the 18<sup>th</sup> July 2005, the prosecution called aid of assessor Hon. Onyancha J. had only the evidence of the Doctor. The case was subsequently taken over by Hon. Emukule J. Judge Emukule had the evidence of PW 2 to PW 6 without the aid of assessors. I took over the case on the 17<sup>th</sup> February 2011 on that day the prosecution closed its case. I subsequently took the case of the accused. The short summary I have given of the manner of in which the proceeding were conducted is a clear indication that this trial is a nullity.

The question I will be asking myself is whether I should order a retrial. Faced with a similar question, the Court of Appeal in the case of **David Kiplagat Bunei Vs. Republic** Criminal Appeal Case No. 370 of 2006 observed:-

**“We have considered the past decisions of this Court which includes the decision in the case of Richard Omolo Ajuoga V. Republic, Criminal Appeal Case No. 223 of 2003, in which several past cases were considered and fully analyzed as to what circumstances need to be considered before a re-trial is ordered. We have considered the decisions in the case of Pascal Ouma Ogolo V. Republic Criminal Appeal No. 114 of 2006 (unreported), Henry Odhiambo Otieno V. Republic Criminal Appeal No. 83 of 2005 (unreported) and the case of Bernard Lolimo Ekimat V. R., Criminal appeal No. 151 of 2004 (unreported). In the Ekimat Case, it was stated:-**

**There are many decisions on the question of when appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only**

**be made where interests of justice require it.”**

I have stated that this trial was defective for reason this court discharged assessors before the case was concluded therefore denying the accused a statutory right he was enjoying. The above case has set out the principle that should inform the court when deciding whether a retrial should be ordered. The interest of justice is the cardinal principle that should inform that decision. The other principle include a determination whether an order for retrial will occasion in justice or prejudice to the appellant; whether it will accord the prosecution an opportunity to fill up gaps in his evidence as the first trial; and whether upon consideration of the admissible or potentially admissible evidence a conviction may result.

In determining whether a conviction may result if a retrial was ordered, I have considered the admissible and potentially admissible evidence. There were two witnesses who were present at the scene of the incident. These were PW3, Adriano Kaberia M’thirari and PW5, Joshua Muroki. The evidence of these two witnesses was contradictory in all matter particulars. PW5 testified that he was in the company of PW3, the deceased and one Jacob looking after cattle at Naathu. PW5 testified that the accused person found them and that he started talking with the deceased. Pw5 said that he could not here what they were talking about claiming they were young men and that he was an old man who could not understand there language pw5 however said he had the accused asking the deceased whether he the accused should not kill him he the deceased. He said that he had a loud sound like of a gun sound and immediately thereafter the accused ran away. He did not know where the shot come from. He also said he did not see any one with a magazine of a gun.

Pw3 testified that he was a distance away from where the sound of the gun shot came from. He stated that he was in the company of PW5 the deceased the accused when he had the gun shot. PW3 contradicted himself because he said he ran toward where the gun shot sounded from and that it is from that place he found the deceased sprawled on the ground bleeding from the head with pw5 one Jacob and the accused standing around. He said that pw5 was holding the magazine of a gun while the accused was hold the gun. He said that the accused ran away with the gun and the magazine after he arrived at the scene.

There was one more person named by pw3 and 5 who was not called as a witness that is one Jacob. From the evidence of the two eye witnesses it is very clear that the truth was not told. For stance in his evidence denied being in the same place with the accused, deceased, PW5 and one Jacob. He therefore did not witness who shot the deceased his evidence however implicated PW5 and the accused as having handled parts of a lethal weapon but fell short of connecting them with the offence.

The evidence of Pw5 totally contradicted PW3’s evidence first of all he denied ever seeing the magazine of a gun at the scene whereas PW3 said that he was the one holding it after the gun shot. Pw3 also contradicted the evidence of PW5 when his evidence totally omitted any reference to anyone having a gun at the scene. It was pw5 testimony that he had a sound of gunshot but that he would not tell where it came from.

That was the evidence of the two eye witnesses who testified in this case. That evidence can be only be described as evasive, and the witness who gave it has incredible and unreliable. If this self evidence was adduced at the retrial it is doubtful that it could result into a conviction.

I contrasted the evidence of pw3 and 5 against that of the accused. The accused’s defence was that he went to herd cattle with PW3, 5 one Kagumba and the deceased. He said that while herding the cattle he was talking with the deceased. He said that Kobia had a gun that he removed the magazine and that he gave the magazine to pw5. The accused stated that he heard a loud explosion and due to shock, he ran away from the scene all the way home. He said that he learnt later that the deceased was shot died he denied shooting the deceased.

When one contrast the accused defence and the evidaence of PW3 and 5, one can see that Pw5 must have handled the magazine of a gun. Just before the gun shot was heard. PW5 must have been lying when

he denied seeing any magazine when there was the evidence of two people who said that he was holding it. It also means that pW5 knew who fired the shot that killed the deceased. He was therefore covering up for somebody. That somebody remains a mystery because of two reasons. One PW3 implicated the accused while the accused implicated one Kobia. I suspect that the said Kobia may be PW3. But the most important reason is the fact that without the evidence of a Firearm Examiner connecting the cartridge recovered at the scene to the gun which was later recovered. That evidence is lacking and therefore there is no nexus between the deceased death and the accused.

I find that the evidence adduced if it were to be represented at the retrial could not result in a conviction. I also find that if a retrial was ordered it could give the prosecution an unfair advantage in that it will use that opportunity to fill up gaps in his evidence.

I have also considered whether any injustice or prejudice will be occasioned to the accused if a retrial was ordered. The accused was 16 years old when he was arrested on the 2<sup>nd</sup> of December 2002. He was therefore a child he has spent 9 years in custody during the pendency of this case. He has lost all his youthful while in confinement. He was a student at the time of his arrest and he lost his chance to complete his secondary school studies. I do think that the accused has already suffered great injustice and prejudice first of all due to the delay in the finalisation of his case and secondly, due to the personal difficulties he has faced and will continue to face due to lost opportunities. I also find that ordering a retrial after subjecting the accused to such a protracted trial due to no fault of his own will cause the accused unnecessary difficulties.

I have come to the conclusion that the interest of justice will not favour an order of a retrial in this case. I therefore decline to order a retrial. Consequently I find the accused not guilty of this offence and acquitting of the charge of murder accordingly.

**Dated, Signed and Delivered at Meru this 5<sup>th</sup> day of May 2011.**

**LESIT, J.**  
**JUDGE.**