



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 6 OF 2005

REPUBLIC PROSECUTOR

VERSUS

FELIX MUTWETA MAGHANGA ACCUSED

RULING

The accused **FELIX MUTWETA MAGHANGA** was charged before the High Court Mombasa with the offence of **MURDER CONTRARY TO SECTION 203 as read with S. 204 PENAL CODE**. The accused entered a plea of **'not guilty'** to the charge and his trial commenced before **HON. MR. JUSTICE L.N. NJAGI** on 26th June 2006. Following the transfer of Justice Njagi to Nairobi this court took over the matter by which time the prosecution had already closed their case having called a total of eleven (11) witnesses. **MR. KADIMA** Advocate acting for the accused opted not to make any submissions on **'no case to answer'** and the matter was reserved for ruling on 9th December 2010.

I have carefully perused the proceedings before Hon. Justice Njagi. I note that a total of eight (8) witnesses testified in the presence of assessors. This was at the time the trial commenced a requirement of the law viz S. 262 and S. 263 of the Criminal Procedure Code. Following the enactment of the **STATUTE LAW (Miscellaneous Amendments) Act 2007**, this legal requirement that assessors sit in on murder trials was abolished. Although the record does not indicate that my learned brother at any point formally discharged the assessors in this case, evidence of the last three (3) witnesses **PW9, PW10, and PW11** was taken without assessors sitting in court. This following the decision of the Court of Appeal in the case of **BERNARD KINOTI M'ARACHI –VS- REPUBLIC (2008)** was unprocedural. In that case their lordships held that where a trial is commenced with the aid of assessors the accused acquires the right to have his trial completed with the presence of assessors. Any discharge of the assessors before the conclusion of the trial denies the accused this acquired right and thus renders the proceedings invalid. Being a court subordinate to the Court of Appeal and based on the doctrine of **'stare decisis'** I am bound by this decision. The fact that three (3) prosecution witnesses testified in the absence of assessors renders the whole trial invalid. As such I have no option but to declare a mistrial in this matter and order that the case begin de novo. It is so ordered.

Dated and Delivered in Mombasa this 9th day of December 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Kadima for Accused

Mr. Onserio for State

M. ODERO
JUDGE
9/12/2010