



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Criminal Case 48 of 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**PHILIP KIPKEMOI LELE ..... ACCUSED**

**RULING**

The accused in this case, Philip Kipkemoi Lele is charged with the offence of Murder, contrary to Section 203 as read with Section 204 of the Penal Code. He is alleged to have murdered one Julius Kipkurui Bett on the 3<sup>rd</sup> day of December, 2005 at Chebunyo village in Bomet District of the Rift Valley Province.

At the close of the prosecution's case on 15<sup>th</sup> June, 2009, this Court adjourned the proceedings in order to consider the evidence so far adduced and to rule on whether the prosecution had established a prima facie case warranting the accused person to be put on his defence. The Defence has submitted that the evidence adduced by the prosecution is such that no case has been established against the accused person. The prosecution on the other hand argues that a prima facie case has been established.

In order to determine the above question, it is incumbent upon the trial court to review the evidence so far adduced and weigh the same in the light of the Law as provided for in the various Statutes and other sources, including but not limited to precedent setting decisions. In the course of my doing so in this case, it became apparent that these proceedings are affected by the Statute Law (*Miscellaneous Amendment*) Act No. 7 of 2007 which repealed Section 262 of the Criminal Procedure Code thus doing away with the requirement that trials before the High Court be conducted with the aid of assessors. When the trial commenced on 6<sup>th</sup> June, 2006, after the recording of a plea of not guilty on 1<sup>st</sup> February, 2006, three assessors were appointed. They participated in the trial of the case before the Hon. Mr. Justice Luka Kimaru, up to and including the proceedings of 6<sup>th</sup> June, 2007 when the hearing of the case was adjourned to the 7<sup>th</sup> of November, 2007. As at that date, the prosecution had called five witnesses. When the trial resumed on that date, the learned judge considered the change in the criminal procedure brought about by the amendment of 15<sup>th</sup> October, 2007, and proceeded to discharge the assessors under an order recorded as follows:

*“Order: The assessors in this case are discharged in view of the amendment of the CPC which took effect on the 15<sup>th</sup> October, 2007”.*

The state had no witness on that day so the trial was adjourned to 26<sup>th</sup> February, 2008. It appears from the

record that the matter was mentioned on 28<sup>th</sup> January, 2008 when it was fixed for further hearing on 20<sup>th</sup> March, 2008. Quite unfortunately, the trial judge was transferred to Nairobi thereby necessitating the taking over of the proceedings by myself on 19<sup>th</sup> May, 2009.

To avoid delaying the trial and by consent of both parties, the Court directed that the same continues from where the Hon. Mr. Justice Kimaru had left it and further evidence was taken, without the requirement that proceedings be typed at that instance. The typing was however done after the 6<sup>th</sup> prosecution witness, the only witness available at the hearing of 19<sup>th</sup> May, 2009. For reasons recorded, and which I need not cite in this ruling, the trial herein was again affected *and delayed* following the appointment of a judge to preside at the Kericho High Court making it unnecessary for visiting judges to come from Nakuru. At the direction of the Chief Justice, however, I again resumed the conduct of these proceedings and recorded the evidence of the 7<sup>th</sup> and final prosecution witness on 15<sup>th</sup> June, 2009.

There can be no dispute that the discharging of the assessors on 6<sup>th</sup> June, 2007 has a direct bearing on the trial as a whole, in view of the decisions passed recently by the Court of Appeal in regard to the October, 2007 amendment to the Criminal Procedure Code. In the Court of Appeal decisions in PETERSON MAINA WANJIKU –VS- REPUBLIC delivered on 15<sup>th</sup> May, 2009 [unreported] (*in an Appeal arising from Nyeri H.C.CR.C.NO. 8 of 2006*) and BENARD KINOTI M'ARACHI –VS- REPUBLIC – Criminal Appeal No. 114 of 2008 [unreported], the Honourable Judges of Appeal gave effect to the application of Section 23(3) (e) of the Interpretation and General Provisions Act, (Chapter 2 of the Laws of Kenya) and held that the discharging of assessors in circumstances similar to those presenting themselves herein was not proper. The provisions of Section 23(3) (e) of Cap 2 are as follows:

*“Where written Law repeals in whole or in part another written Law, then unless a contrary intention appears, the repeal shall not:-*

(a). .....

(b). .....

(c). .....

(d). .....

*(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Law had not been made”. (Underlining by this Court)*

As was the case in the above cases before the Court of Appeal, the accused person before me acquired the right under the old Law, to be tried with the aid of assessors, which right was still subsisting at the time the amendment NO. 7 of 2007 came into effect. Perhaps it may go on record that the above decisions by the Court of Appeal now give the High Court and legal practitioners an opportunity to own up to the fact that two schools of thought emerged from the enactment repealing Section 262 of the Criminal Procedure Code leading to an interpretation of Section 23(3) (e) of the Interpretation and General Provisions Act in a manner which imported the Legislature’s intention in doing away of the requirement of assessors, whose participation in trials had proved quite cumbersome and a clear impediment to the speedy dispensation of justice. Thus the words “*unless a contrary intention appears*” were given prominence when in fact the amendment was a blanket repeal without any saving or transitional provisions being enacted. The words “*legal proceedings ... may be continued*” were also interpreted as giving the trial Court some discretion in that regard. That said however, it is now quite clear that no such discretion exists in view of the two decisions of the Court of Appeal.

Going by the holding of the Court of Appeal in the said authorities, which authorities are binding on this Court, the taking away of the right of the accused herein to be tried with the help of assessors no doubt

renders the proceedings herein irregular to the extent that whatever the outcome thereof, justice will not be seen to have been done. That being the case, I find that I must, as a matter of course, terminate these proceedings at this stage being of the view that to allow the same to continue, whilst being aware that doing so is an exercise in futility, would be both imprudent and irresponsible to the point of being callous.

I must make it clear however, that my reaching the above decision, must not be construed as an imputation of any wrong doing on the part of my brother judge the Hon. Mr. Justice Kimaru, since I am not in the least qualified to sit in appeal over his Lordship's decisions. My decision is based on my considered belief and conviction that the course of action taken herein is one that any responsible Court must take, faced with the present predicament. Much as the judiciary is not responsible for the making and/or amending the Statutory Law it is its vested and honourable duty, sometimes with far reaching consequences, to interpret and apply the Law as formulated by the Statutes. To do otherwise would be to abdicate its responsibility to do what is right in the interests of justice.

In light of the above, therefore, I declare the proceedings herein irregular and strike out the same. The prosecution having only closed its case two days ago, a retrial, under the new dispensation is hereby ordered. The accused shall be tried afresh before another judge other than myself or the Hon. Mr. Justice Kimaru, and shall remain in custody pending the determination of the criminal case.

DATED signed and delivered at KERICHO this 17<sup>th</sup> day of June, 2009

**HON. M.G. MUGO**

**JUDGE**

**In the presence of:**

Mr. Koech for the State.

Mr. Kipyegon for the Accused.