



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

Criminal Case 91 of 2003

REPUBLIC.....PROSECUTOR

V E R S U S

DAVID KINOTI NGURU.....ACCUSED

Criminal Law.

ü Murder ingredients of

ü Malice aforethought actus reus confirms malice

ü Criminal Law and Procedure. Trial commenced with aid of assessors – assessors dismissed before end of trial – whether mis-trial Section 23(3) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya.

ü No prejudice to the accused.

ü In the interest of justice and time, court may recall any witness including defence for re-examination.

RULING

John Kinoti Nguru was charged with the murder of Jessee Kaume on the 30th day of March 2003 at Limauro Village Limauro Sub Location, Nkomo Location in Meru North District within Eastern Province of Kenya.

On the outset I want to say that the trial herein was commenced with the aid of assessors, and indeed the entire evidence of the prosecution was taken in the presence of the Assessors. The last prosecution witness P.W.11 was Dr. Henry Njiru and his evidence was taken in the presence of 2 assessors and the accused was put on his defence in a Ruling delivered by my brother Hon. Mr. Justice Lenaola on 7.03.2007 who ordered that the defence hearing do commence on 3.05.2007. In the event the defence hearing did not commence until 24.06.2008. By that time Section 262 of the Criminal Procedure Code (Cap 75 Laws of Kenya) had been repealed together with all other provisions of the said Code which related to trial with aid of assessors. These other provisions are ss.297, 298, 299 and 300 of the said code.

So on 24.06.2008 I proceeded to hear the defence case without the aid of assessors. After hearing the defence case, I reserved my judgment which was due to be delivered today (12.06.2009) and I would have delivered it except that while preparing my judgment I received a batch of the Court of Appeal

decisions made during its May 2009 Session at Nyeri.

The case of immediate concern to me and this case in particular were **Paul Mwangi vs Republic (Criminal Appeal No.310 of 2008** (unreported) and **Peterson Maina Wanjiku vs Republic (Criminal Appeal No. 49 of 2008)**.

In the former case my decision to discharge the use of assessors was reversed by the Court of Appeal, and the Court of Appeal ordered a re-trial before another judge other than myself, and the Hon the Justice Lenaola who had handled the matter before me.

In the latter case too the trial had commenced with the aid of assessors but after the enactment of **Statute Law (Miscellaneous Amendment Act, 2007 (No.7 of 2007)** which repealed the provisions of the Criminal Procedure Code detailing the use of assessors in murder cases my brother, the Hon Mr. Justice Makhandia discharged the use of Assessors. The Court of Appeal reversed that decision as well. The court said:-

“We think that the learned Judge was not justified in summarily discharging the assessors. The appellant was entitled to be tried with the aid of assessors and the deletion of Section 262 of the Criminal Procedure Code by Act No. 7 of 2007 did not and could not have deprived the appellant of the right which had accrued to him when the new legislation came into force”

The Court of Appeal relied on its earlier decision in the case of **BERNARD KINOTI M’ARACHI VS REPUBLIC CRIMINAL APPEAL NO. 114 OF 2008** (unreported) where my sister, Lady Justice Sitati had applied the same reasoning as myself and Mr. Justice Makhandia. In all of the occasions, neither Justice Makhandia, Lady Justice Sitati nor myself referred to the provision of section 23 (3) of the **Interpretation and General Provisions Act** (Cap 2, Laws of Kenya) which provides:-

“23(3) Where a 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 proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing written law had not been made”.

Section 262 provided that:-

“All trial before the High Court shall be with the aid of assessors.”

As the trial of the accused commence on 13.12.2005 with the selection of three assessors to aid the judge in the trial well before the repeal of that section together with the other provisions relating to trial with the aid of assessors, the accused had by virtue of section 23(3) (e) of the Interpretation and General Provisions Act acquired both a right and privilege to be tried with the aid of assessors. That proposition is with respect, not only I think correct and fair exposition of the law, but, this court is bound by it on the doctrine of **stare decisis**.

That being the position I think it would be unfair both to the prosecution and to the accused to declare the whole trial a nullity or mistrial. It would be unfair to the prosecution because it is costly to round up

all the witnesses, and unfair to the accused because he has already been in custody for well over six years, to submit him to an entirely new trial. He was tried with the aid of assessors when all the eleven prosecution witnesses testified. It is only the evidence of the accused which the assessors did not hear.

In order therefore to save time and to restore the rights of the accused to be tried with the aid of assessors under section 262 of the Criminal Procedure Code as of the time of the commencement of his trial and to adhere to the provisions Act of section 23 (3) of the Interpretation and General Provisions Act and in exercise of the court's power under section 150(1) of the Criminal Procedure Code, I direct **firstly**, that the assessors herein be summoned, and **secondly** that the evidence of the De fence be retaken in the presence of the assessors, and that thereafter the judge shall sum up the case to the assessors, obtain the assessors opinion, and then proceed to write the judgment in the matter.

There shall be orders accordingly.

Dated, Delivered and Signed At Meru This 12th Day Of June 2009

M. J. ANYARA EMUKULE

JUDGE.