



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 166 of 2003

REPUBLIC.....PROSECUTOR

V E R S U S

JOSHUA MWORIA MWITI.....ACCUSED

R U L I N G

The accused is charged with the murder of Grace Karimi on the early night of 13.10.2003 at Kirwire Village Ukuu Sub-Location of Uruku Location, Meru Central District, and Eastern Province.

The trial of the accused commenced in the presence and with the aid of assessors. Of the five (5) witnesses called by the prosecution, four (4) of them testified in the presence of 3 assessors.

When I took over this matter, I dispensed with the use of assessors and proceeded to hear and take the evidence of the investigating officer P.W.5. He is the only witness who testified in the absence of assessors. The prosecution closed its case after the testimony of this witness.

While working on a Ruling whether or not the prosecution had established a prima facie in order to put accused to his defence, I received a batch of judgments of the Court of Appeal delivered at Nyeri during its May 2009 Session. My attention was caught by the decision of the Court of Appeal in the case of **Peter Maina Wanyika vs Republic (Criminal Appeal No. 49 of 2008)**. In that case that court reversed the decision of my brother, the Hon. Mr. Justice Makhandia dispensing with the use of assessors, like I did in this case. In that case eight (8) witnesses had already testified in the presence of Assessors. That court held that the accused had thereby acquired a right to be tried with the aid of assessors and the court could not deprive the accused of that right, and that is, notwithstanding the repeal of Section 262 of the Criminal Procedure Code which provided that:-

“All trials before the High Court shall be with the aid of Assessors”

While noting that the said section and other provisions relating to trial with the aid of assessors were all repealed by the Statute Law (Miscellaneous Amendments) Act 2007 (No 7 of 2007) which came into force on 15th October, 2007, it did not take away the accused’s vested right to trial with the aid of assessors. The Appeal Court followed its decision in **Bernard Kinoti M’Arachi vs Republic Criminal Appeal No. 114 of 2008** (unreported) which was in turn based upon the provisions of Section 23(3) of the **Interpretation and General Provisions Act** (Cap 21 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 proceeding 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.”

Although the language of Section 23(3)(e) of the Act (aforesaid) appears discretionary “**may be institutedor enforced**” the Appeal Court by its two decisions appears to have closed the window of discretion where in a particular case a trial has advanced with the aid of assessors.

In this case, the 4 most important witnesses gave their evidence in the presence of assessors. The evidence of P.W.5, the Investigating Officer, was received in the absence of assessors. In light of the Appeal Court’s decision in the two cases above, the only viable option open to this court are either

(a) to declare a mistrial, and commence the hearing afresh in the absence of assessors, or

(b) recall the assessors and P.W.5 to testify in the presence of assessors, and thereafter the court will form an opinion as to whether or not the prosecution has established a prima facie case to put the accused on his defence and proceed to conclude the trial in the usual way.

In the interest of both time and justice to the accused I direct that the assessors and P.W.5 be recalled to testify. Thereafter the court will proceed in accordance with the procedure for trial with aid of assessors sum up the case to them hear their opinion, and proceed to write judgment. I so order.

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

M. J. ANYARA EMUKULE

JUDGE.