



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL CASE NO.26 OF 2003**

**REPUBLIC ..... PROSECUTOR  
VERSUS.**

**1. MUHONJA WAMBURA**

**2. MCHARI WAMBURA ..... ACCUSED.**

**RULING**

The two accused appeared first in court on 9th June 2003 charged with murder. They both pleaded not guilty. Hearing started Wambilyangah J. as then was on 1st October 2003. Two witnesses testified before the said Judge. The case was adjourned for further hearing on 27th October 2003. However by that date Wambilyangah J. had left service. On 27th November 2003 this court ordered the case to start De Novo. However this has not happened. Mr. Ondari for the two accused now applies to this court to declare the trial before Wambilyangah J a mistrial and acquit the accused persons. The State counsel opposed the application on the ground that the court has already ordered the case to start a fresh.

There is no denying that a trial took place before Justice Wambilyangah. Two witnesses testified. Justice Wambilyangah is since retired and therefore cannot be recalled to finalise the hearing. The trial before him was therefore a mistrial. It does not matter that this court had ordered the case to start afresh. The case has not started yet. A mistrial is a mistrial. I therefore allow the application. I hereby declare the trial before Wambilyangah J a mistrial. The accused persons are hereby discharged.

The State however is at liberty to prefer fresh charges against the accused if it so wishes.

**KABURU BAUNI**

**JUDGE.**

**27/7/04**

**Dated and delivered on 27th July 2004.**

**KABURU BAUNI**

**JUDGE**