

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO.63 OF 2002

REPUBLIC

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PROSECUTOR

VERSUS

**1. GEORGE OMBATI
ORENGE)**

**2. MACHUKI KEFA
NYARUSA)**

**3. JOSHUA OMBIRO
MAIGO)
ACCUSED.**

**4 . HARUN OMBIRO
SIBOTI)**

RULING

Counsel for the applicant has applied to court to declare the trial of the Accused Persons before Justice Wambilyangah a mistrial and to discharge the accused persons.

Accused first appeared in Court on 17/10/2002 when they pleaded not guilty to offence of murder. Trial started on 20/1/2003 before Justice Wambilyangah. A total of 12 witnesses testified and the prosecution closed its case. Accused were called to their defence which they did on 15th September 2003. Counsels gave their submission and suit fixed for summing up to the assessors on 12th November 2003. However by that time Justice Wambilyangah had left service. The case came up before me on 3/2/04 when court ordered the case to start a fresh. Mr. Kaburi for the accused however submitted that the case having progressed to the stage of summing up and Justice Wambilyangah having left service the court should declare the trial a mistrial and discharge the accused.

The learned state counsel objected stating that since the court have already ordered the case to start a fresh the application is coming late.

I have ordered the submissions. An application for mistrial can be brought and entertained even if the court had ordered for the case to start a fresh. Counsel was therefore in order to bring the application.

It is not in dispute that the case had been heard and almost finalized by Justice Wambilyangah. He has since retired and cannot therefore be recalled to finalise the case. The trial before him is therefore a mistrial. This case is similar to the authority cited to me of STANLEY NJOROGE MUNENE & OTHERS VS. R. HCCR.C.NO.18 OF 2000 where my brother Justice Osiemo declare a trial before Justice Etyang a mistrial.

In the circumstances I declare the trial of the accused persons before Justice Wambilyangah a mistrial.

I hereby discharge the accused person. The state however is at liberty to take any further necessary action it deems fit.

KABURU BAUNI

JUDGE.

8/7/04

Signed dated and delivered on 8th July 2004.

KABURU BAUNI

JUDGE.