



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

CRIMINAL CASE NO. 3 OF 1998

REPUBLIC RESPONDENT

V E R S U S

KENGA KOMBE NZAI & ANOTHER ACCUSED

RULING

The murder trial here has come to an end and I am now hearing Submissions. Mr. Oyoo for defence has on his part submitted but objects to Mr. Gumo replying because the Defence called no defence witnesses.

Mr. Oyoo in his submissions had touched on legal matters including confessions, application of Act No. 5 of 2003 regarding confessions and whether or not application can be retrospective. *Tuwamoi V Uganda* [1967] EA87 Principle and alibi.

This court would like to hear the prosecution on these, but I have read Sections 212, 310 and 161 of the Criminal Procedure Code and cumulatively I understand them to say that at the end when accused person ends his case and submits the prosecution shall have a right to reply except where there is no witness called for the defence and where there is no such witness and only accused himself gave evidence, the prosecution has no right of Reply UNLESS the Solicitor General or Attorney General has himself appeared in person.

This is a very drastic rule depriving the court of having the benefit of State Counsel's legal reasoning on pertinent legal issues the defence advocate has raised and which in themselves may be decisive of the case. This limitation or rather exclusion is arbitrary and exclusionary and seems to me to have no basis. If it is meant to save time then justice is disadvantaged. Section 161 of Criminal Procedure Code should be amended. Otherwise with the law as it is I cannot hear Principal State Counsel in reply. The case therefore is concluded. I shall advise assessors on a date to be given for direction.

A. I. HAYANGA

JUDGE

12.8.2003

ORDER

Direction to Assessors on Friday 15th August 2003 at 10.00am.

A. I. HAYANGA

JUDGE

Assessors be paid today's sitting allowances.

A. I. HAYANGA

JUDGE

Accused persons to be produced on 15th August 2003.

A. I. HAYANGA

JUDGE