



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, SHAH & BOSIRE J.J.A)
CRIMINAL APPEAL NO. 27 OF 1999**

BETWEEN

**FRED KIPCHUMBA CHEPKWONY.....APPELLANT
AND
REPUBLIC.....RESPONDENT**

**(Appeal from a conviction and judgment of the High Court
of Kenya in Embu (Mr. Justice Etyang, J) dated 7th
March, 1997**

in

H.C.CR. CASE NO. 1 OF 1995

JUDGMENT OF THE COURT

This appeal arises out of a conviction for the offence of manslaughter, entered by the superior court (Etyang', J). The appellant was one of the three accused persons in the superior court. Of the three, one Cosmas Mulwa is dead. The second one, Kenneth Nyaga Muthenya, lodged an appeal against conviction and sentence. That appeal, being Criminal Appeal No. 47 of 1998, was allowed by this Court, sitting at Nyeri, on 10th May, 1999 on the ground that the whole trial was nullity and ordered an expeditious retrial before any other judge. Criminal Appeal No. 47 of 1998 was allowed as the trial itself was a nullity, only two assessors having taken part in the whole trial ab initio. This court said:

"with respect to the learned judge the trial had not started so section 298(1) which applies to absence of an assessor during the course of a trial with the aid of assessors was not applicable at that stage. Section 263 of the Criminal Procedure Code, which is mandatory provides as follows:-

"263. When the trial is to be held with the aid of assessors, the number of assessors shall be three"

It therefore follows that when a trial is to be held with the aid of assessors the trial court cannot start the trial with less than three assessors, as to do so would vitiate the trial. Section 298(1) of Criminal Procedure Code applies only where the trial has already commenced. The appellant's trial was in the result illegal"

The same result must, of course, follow here. We are concerned at the absence of a representative from the office of the Attorney General although that office was notified of the hearing date, for this appeal, on 11th August, 1999. It is a matter of concern and lament. It is not for the first time that this has happened.

We allow this appeal and set aside the conviction and sentence and in the interest of justice we order an expeditious retrial before any other judge of the High Court.

These are our orders.

Dated and delivered at Nairobi this 20th day of September, 1999.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O BOSIRE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.