



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO.18 OF 2000**

**1. STANLEY NJOROGE MUNENE**

**2. PETER MWAURA WANJIKU**

**3. JULIUS MWANGI MULANDI -DECEASED**

**4. STEPHEN WACHIRA WANDARI**

**5. FRANCIS KAMAU NGANGA**

**6. SAMUEL KIBOCHA KIHIA**

**7. THUO THIONGO**

**8. JAMES KARIUKI KAMAU**

**9. BERNARD MUIGAI MUIRURI**

**10. STEPHEN KUNGU NGANGA**

**11. ANTONY NJENGA MULONGO**

**12. MORGAN NGANGA NJUNGE**

**13. JOHN MWANGI KAMAU.....ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The accused persons were arrested on 30th June, 1999 and they were arraigned in court on 25th September, 2000 when the plea was taken. They pleaded not guilty to the charge and the case proceeded to hearing. The prosecution called 52 witnesses and closed its case on 23rd May, 2003 and the defence closed its case on 22nd September, 2003. Submissions were closed on 24th September,

2003 and the matter was fixed for summing up to the assessors on 21st October, 2003. But on 15th October, 2003 through the Kenya Gazette Notice No.7282 of 2003 the trial judge was suspended and the President appointed a tribunal to investigate his conduct along with others who had also been suspended. The tribunal is due to start its investigations in December, 2003.

Defence counsels led by Mr. Kilokumi have applied on behalf of the accused persons for orders that this court do declare the trial before Etyang J a mistrial and that the Attorney General be at liberty to take whatever lawful decision he may think fit in relation to the death of councilor Charles Maina Wa Njuguna. Kilokumi submitted that by Gazette Notice No.7282 of 2003 the trial judge was suspended and a tribunal has been appointed to investigate his conduct.

If the hearing was before the subordinate court and in the event the trial magistrate ceases to exercise jurisdiction, the magistrate who succeeds him will take over the conduct of the case and continue with the trial under Section 200 of the Criminal procedure Code. But there is no such a provision if the hearing is in the High Court. Counsel relied on case law and cited three authorities.

First he cited the case of **FURUGENCE V. R. 1972 EA 161**.

Here the appellant was convicted by a judge who took over the conduct of a case from another judge after the close of the prosecution case. On appeal it was held that the continued trial was a nullity.

Secondly he cited **R. V. JONNAH ORAO ANGUKA – CRIMINAL CASE NO.41 OF 1992** where the evidence was concluded but before the judge could hear the closing speeches by counsel and sum up to the assessors he died. On application the trial was declared a mistrial and the accused was discharged. The last authority cited by counsel was **R. V. MARGARET WAMBUI AND ANOTHER – CRIMINAL CASE NO.50 OF 2003**. In this case the trial judge had taken evidence of 16 prosecution witnesses when he resigned. On application the trial was declared a mistrial.

Mr. Oira adopted the submissions of counsel and urged the court to declare the trial before Etyang J a mistrial and discharge the accused persons. Mrs. Onya the learned state counsel for the state concurred with the case law stated. **BLACKS LAW DICTIONARY (7TH ED)** defines mistrial as a trial that the judge brings to an end without a determination on the merits because of a procedural error or serious misconduct occurring during the hearing.

The two authorities cited by counsel are distinguishable from the present case. In **JONNAH ANGUKA'S** case the judge had died and in **MARGARET WAMGUI'S** case the judge had resigned. But in the present case the trial judge has only been suspended and the President has appointed a tribunal to investigate his conduct which will start its investigations in December, 2003. We cannot for sure tell how long it will take. I agree with counsel that the trial of the accused persons cannot be tied to the uncertain destiny of a particular judge who is now awaiting investigations.

The end of justice will be served by a declaration of the trial so far a mistrial and therefore I declare the trial before Etyang J a mistrial and the accused persons are discharged. This is a situation for which neither side is blameable and therefore I order that the state be at liberty to present fresh charges against the accused persons if it so wishes. If the state so decides to prefer fresh charges against the accused persons, the hearing date to be taken on priority basis and the hearing to continue on day to day basis until completion.

Orders accordingly.

**Dated and delivered at Nairobi this 14th day of November, 2003.**

**J.L.A. OSIEMO**

**JUDGE**



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