



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL CASE NO. 65 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KIBON KIBELION.....ACCUSED

RULING

1. When this matter came up for prosecution case on 18th June 2019, the defence raised an objection to the effect that the investigating officer who was actually the last prosecution witness ought to have answered questions in relations to one **James Chepkuto** whom he apparently recorded his statement but was not call to testify. This line of argument was opposed by the prosecution who opine that it was not the business of the defence to manage the manner in which they conducted their case.
2. The trial court ordered the parties to submit on this ground alone. The parties have filed their written submissions which the court hereby summarises as hereunder.
3. The accused submitted that they were supplied with the witness statements which included that of the said James Chepkuto. Even though he was not called to testify PW9, the investigating officer ought to answer whatever question he would have answered. This is for the basic reason that he recorded his statements and he is consequently amenable to answer any questions in regard to the same.
4. The accused relied on the **Provisions of Section 50(2), (j) of the Constitution** on the rights of fair trial of an accused person. That the accused person has a right to challenge any evidence adduced and in this case the IO ought to answer on behalf of the intended witness as he supplied the defence with his statements. He also relied inter alia on the cases of **Milton Toroitich Poghon v. Rep (2018) eKLR** and **jamleck Mwaniki Njururi v. Rep (2013) eKLR**.
5. In a nutshell the accused submitted that the investigating officer being in control of the case must answer to every question necessary in the entire matter and therefore he must answer questions regarding the statement of the said witness.
6. The prosecution submitted strongly against the defence submissions arguing that the said witness No 9 was simply answering questions except for the witnesses whom he did not consider necessary to call. That it is the discretion of the I O to choose who he may wish to call and in this case the statement of James Chepkuto was considered repetitive.
7. The prosecution relied on the provisions of **Section 143 of the Evidence Act** in which it is indicated that there was no amount of witnesses who may be called to proof a fact. The defence if need be may call the said witness in their favour assuming that it is considered necessary.
8. Having summarised the party's submissions, it is clear that this matter had reached a penultimate stage when the defence raised their issue. The investigating officer by law is technically the carrier of the case and it is him who determines which witness to call or abandon.
9. In this case he chose to leave out the said James Chepkuto. For the purposes of this suit, the said witness relevancy may or may not matter to this court. His written statements to the extent that it has not been placed under oath remains irrelevant and hearsay. The prosecution must have had some unknown reasons why they left him. The court cannot for that matter speculate and or interfere. The case belongs to the parties and not the umpire.
10. What then should the defence do.? In the matter at hand this court does not find any reasons why the witness should be compelled to answer questions regarding the same. First of all, the intended witness never turned up in court to testify in regard to the case. Secondly and more importantly the statement was not made under oath and therefore it is of not much probative value.
11. It has not been shown under the provisions of Section 33 of the Evidence Act that the witness cannot be availed. He is available and if in the opinion of the prosecutor his evidence is not material then there is no need to call him.

12. As submitted by the learned state counsel, the defence have every opportunity to call him should they deem necessary. Nothing precludes them from calling him and if necessary cross examines him on the statements he made.

13. This position should be distinguished from the famous case of **Bukenya & another v. Uganda 1972 EA 549** for the simple reason that this matter is yet to reach its conclusion and allow the parties to make their final submissions. Secondly this court is not aware for now whether the said witness had something hidden under the sleeves so to speak which may have been adverse to the prosecution's case.

14. In the premises the application is disallowed, let the investigating officer finalise his evidence. He need not answer any question in respect to the statements of the said James Chepkuto although he may answer any issue surrounding him generally.

Dated signed and delivered via video link this 23rd day of June 2021.

H K CHEMITEI

JUDGE