



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 119 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS KAUNYANGE.....ACCUSED PERSON

RULING

1. The accused person has been charged with the offence of Murder Contrary to **Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya**. The particulars of the offence are that on the 8th Day of September 2018 at Kautine Village, Nkanda Sub location, Antuambui Location, Igembe North Sub County within Meru County with others not before court murdered **Ken Koome**.

2. The accused person filed application dated 3rd February 2020 pursuant to **Section 146 of the Evidence Act, Article 50 (2) of the Constitution and Section 72 of the Interpretation of General Provisions Act**. The accused person seeks this court to reopen the prosecution case that was closed on 21st January 2020 and recall the prosecution witnesses **Pw1, Pw2, Pw3, Pw4** for the purpose of further cross-examination.

3. The application was supported by the sworn affidavit of **Vivian Aketch** the current advocate on record in the matter. She averred that the accused person was initially represented by Mr. Marete Advocate and the said advocate had since been replaced by her. That by the time she took over four witnesses had already testified and she only cross examined the investigating officer, the doctor and scene of crime officer who testified after she had taken over the defence case.

4. That Pw1, Pw2, Pw3 and Pw4 had testified and had been cross- examined by Mr.Marete Advocate. That there was information contained in the statements of Pw1, Pw2, Pw3 and Pw4 which were not brought out during examination in chief and cross-examination. That the accused person's intention is not to impeach the credibility of witnesses but to place vital information in the court record so as to help the court in determining the case.

5. The application was canvassed orally on 27th February 2020. The Applicant submitted that he wishes to have prosecution witnesses to clarify certain issues since the Investigating Officer and the Scene of Crime Officer knew nothing about the exhibits they produced e.g. the photographs. He also seeks to clarify his relationship with Pw4 and bring out the fact that the deceased was killed by a mob That the accused person has been charged with the offence of murder which is a serious offence and his liberty is at stake.

6. In support of his submission the accused person relied on the cited case of **Republic v Salim Mohammed [2016] eKLR** where the court held that the **Section 146 (4)** of the Evidence Act allows the recalling of a witness who has already testified. Recalling a witness is part of the right to fair hearing and it should not be felt that the court shielded the witnesses from further cross-examination unless it can be shown that the request to have the witnesses called is based on ulterior motive. He also relied on the case of **Moses Ndichu vs Republic Nyeri Criminal Appeal No. 228 of 2008 (2009) eKLR** cited in **Salim Mohammed (Supra)** where the Court of appeal held that the failure to recall the complainant for purpose of further cross-examination by the Appellant caused prejudice to the Appellant.

7. **Ms. Mbithe** for the state, opposed the application and relied in the authorities of **Republic Vs Paul Kiptoo[2018]eKLR and Republic Vs David Kilale and Another HCC at Nakuru Criminal Case No.50 of 2008**, where the Court held that though the language of **Section 146 (4) of the Evidence Act** is permissive or directory "may in all cases" the provision is usually mandatory where the prosecution has yet to close its case. Thereafter it is entirely discretionary, and the court is bound to inquire into the motive of recalling witnesses long after they have testified and had been cross-examined and re-examined by competent counsel. It was submitted that the accused person was represented by a competent advocate who cross-examined all the witnesses and it would set a bad precedent to start the matter afresh every time a new advocate comes on record.

8. **Ms Mbithe** further submitted that the application does not disclose the vital information the defence missed during cross examination. That the right to fair hearing enshrined in Article 50 of the Constitution also presupposes fair hearing which includes expeditious trial. That the court also has to consider the rights of the victim under **Section 9(b)** of the **Victims Protection Act**. Recalling Pw1 the father of the deceased would be undesirable as he would undergo a bad memory of his loss. That the 1st Reason is clarification of the photos which does

not need four witnesses. The other reason is that Pw4 was not the Sub Area of the village. The accused person did not however give the name of the Sub Area of the Village.

9. The provisions relevant to recalling of witnesses is anchored on Section 150 of the Criminal Procedure Code and Section 146 of the Evidence Act. Section 150 of the Criminal Procedure Code Provides as follows;

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

10. Section 146(4) of the Evidence Act states:

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

11. In **Clement Maskati Mvuko v Republic [2018] eKLR** the court sitting on appeal on a case which the trial court had recalled a witnesses stated as follows;

“A reading of Section 150 of the CPC shows that it empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.”

12. In this case the accused person lays emphasis for the recalling of Pw1, Pw2, Pw3 and Pw4 so as to clarify the accused person's relationship with the deceased, to confirm the photos of the site visit and to confirm that Pw4 the Sub Area came from another region. I do note that the accused persons counsel had ample time to cross examine Pw6 & Pw7, police officers who testified with regard to the course of the investigations. Pw6 & Pw7 were not present when the photographs were being taken but confirmed that the scene had been visited by I.P. Mweu and Sgt Tanui who documented the scene. The relationship of the accused person and the deceased and/or prosecution witnesses can be best dealt with if he is to be placed on his defence. As relates the designation of Pw4, Pw4 was clear that he is the Sub Area of Irende Village which clearly is not within the region of the alleged crime.

13. Lastly it is clear from the evidence of the prosecution witnesses that their theory is that the deceased was killed by the accused as opposed to a mob. Pw1-Pw4's statement was to this effect. The accused person had ample time to cross-examine the prosecution witnesses to this end.

14. With the foregoing reasons I do find that the Applicant has not provided justifiable reasons to recall Pw1, Pw2, Pw3 and Pw4. The application is unmerited and is hereby rejected. The case will proceed from the point reached.

HON.A. ONG'INJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA SKYPE THIS 28TH DAY OF MAY 2020 DUE TO THE PRESIDENTIAL

DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONG'INJO

JUDGE