



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 57 OF 2016

LESIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

FREDRICK OLE LELIMAN..... 1ST ACCUSED

STEPHEN CHEBURET MOROGO2ND ACCUSED

SILVIA WANJIKU WANJOHI3RD ACCUSED

LEONARD MAINA MWANGI4TH ACCUSED

PETER NGUGI KAMAU5TH ACCUSED

APPLICATION BETWEEN

PETER NGUGI KAMAU5TH ACCUSED

AND

REPUBLIC.....RESPONDENT

RULING

1. The Applicant is the 4th accused in this case. Mr. Michuki acts for him in this matter. The Applicant has applied to have certain exhibits admitted by the court and particularly the report of the Government Chemist expunged from the record.
2. The Prosecution, led by Mr. Mutuku has opposed the application. His position was supported by the victims’ advocates, Mr. Fred Ojiambo, SC and Prof Sihanya.
3. I have considered the application, and the submissions by both sides.
4. The issue of admissibility of the impugned evidence was never raised at the time when the evidence was adduced by the prosecution. Had such an objection been raised, then the court would have been guided by **Section 144** of the **Evidence Act** which stipulates thus:

“144. (1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be admissible.

(2) The court shall admit the evidence of any fact if it thinks that the fact, if proved, would be admissible and not otherwise.

(3) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the court is satisfied with such undertaking.

(4) If the admissibility of one alleged fact depends upon another alleged fact being first proved, the court may, in its

discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.”

5. The impugned evidence has already been adduced by the prosecution and the same admitted into evidence. There is still a pivotal witness involved in the process of collecting evidence who is yet to testify. In one way, the objection is premature for that reason. However, even after the witness testifies, the defence can still address that issue of the evidence in submissions, at the close of either or both the prosecution and the defence case.

6. Nothing justifies this position better than the fact that the work of the court does not end with admission of evidence. That is when the work of a judge begins. A trial court has a noble duty of examining, analyzing and evaluating the entire evidence adduced before it. The purpose of that examination and analyzes includes drawing conclusions on various aspects of the case. Of integral importance when it comes to exhibits, documentary reports and other evidence, and all other relevant material, the court has then to make various determinations. These determinations are made whether or not any objections have been raised challenging such evidence. The determinations include, and is not limited to the following:

- a. *Whether the collection of the particular evidence was in compliance with the relevant law;*
- b. *Whether the chain of custody has been sufficiently proved;*
- c. *Whether the evidence was properly admitted in evidence;*
- d. *What is the probative value of the adduced evidence?*

7. In any event, that matter does not end there because the appellate court will make similar determinations if they arise, and draw their own conclusions. This is not the final court in the matter. The case of **Paul Nganga Wanjiru V Rep**, cited by Mr. Michuki, counsel for the Applicant herein, which by the way arose out of a trial by this court, is a case in point. The appellate court is guided, *inter alia* by **Section 175** of the **Evidence Act**, found under Chapter VI titled - **IMPROPER ADMISSION AND REJECTION OF EVIDENCE**, which stipulates thus:

“175. The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.”

8. It is very clear that Mr. Michuki raised his objection prematurely. He should raise them at the appropriate time as explained in this ruling. In the result, the objection is dismissed at this stage.

SIGNED, DATED AND DELIVERED IN OPEN COURT IN PRESENCE OF ALL THE PARTIES AT NAIROBI THIS 29TH DAY OF OCTOBER, 2020

LESIT, J.

JUDGE