



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRC NO. 86 OF 2017

REPUBLIC.....PROSECUTION

=VERSUS=

WILSON CHELELGO CHEPONIN.....ACCUSED

RULING

Introduction

1. This is a ruling on an application by the prosecution for the recall of two witnesses for purposes of identification of an exhibit. The application is opposed by the Defence.

Recall by the Court

2. The Court has power to “recall and re-examine any person” “if his evidence appears to it essential to the justice of the case.” The Court has power to adjourn the case for such time as “necessary to enable the cross-examination to be adequately proceed, if in its opinion, either party may be prejudiced by the calling of that person as a witness.” See section 150 of Criminal Procedure Code, which provides:

“150. 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.”

See also **Otim v. R** (1963) EA 253 and **Maalim v. R** (1964) EA 672.

3. The power to recall may even be exercised after close of both the case for the Prosecution as in **Murimi v. R** (1967) EA 542 or for the defence as in **Juma Ali v. R** (1964) EA 461.

4. Article 50 (2) (c) of the Constitution guarantees the right of the accused to cross-examine the witnesses called by the Prosecution and Article 50 (2) (c) the right to adequate time and facility for defence.

Recall by Parties

5. Section 146 (4) of the Evidence Act provides for recall of witness by Parties as follows:

“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.”

6. The primary consideration on an order or application for recall by the Court suo motu, or upon application by the Parties, is that the immutable and unlimitable Constitutional Right to fair trial guaranteed under Article 25 (c) of the Constitution is observed. Of significance to upholding the right to fair trial in this respect is the right to “challenge evidence” by cross-examination under Article 50 (2) (k) and the right “to have adequate time and facility to prepare a defence,” under Article 50 (2) (c).

7. In this case, the Prosecution prays to recall two witnesses for purposes of identification of a fire-arm that the witnesses testified to have

seen the accused with during the incident subject of the trial. The Defence protests that the witnesses are not expert witnesses to identify the fire-arm as the one alleged used in the killing subject of the murder trial. The Prosecution responds that the identification by the witnesses is limited to physical identification of the fire-arm as the gun they had seen the accused with, and that a forensic Expert shall be called to identify the fire-arm from an expert's perspective.

Determination

8. I consider that no prejudice will be occasioned the accused by recall of these witnesses to physically identifying the fire-arm. It is first evidence which will be subjected to the usual considerations as to cogency and credibility. The witnesses could have done what is sought to be done now at the time has just testified, and the Defence may only have submitted that the identification was not reliable, not that it could not be done. The only inconvenience is being required at a later stage to re-look at the evidence of the two witnesses and prepare for cross-examination of the witnesses. It is not too heavy a price to pay in the interest of justice that proved offence be punished. The short delay in recalling the witnesses and any delay that may result from an adjournment for purposes of allowing the defence adequate time to prepare for cross-examination of the witnesses is all in the interests of a fair trial and justice for the accused as well as the Complainant in the case. Moreover, it is significant that the ODPP has not closed its case, and it shall from then to call other witnesses subject to allowance of adequate time and facility for the accused to prepare his defence.

Orders

9. Accordingly, the Court will permit the recall of witnesses for the Prosecution Pw6 and Pw7 for purposes only of identification of the fire-arm allegedly seen with the accused by the said witnesses.

10. If it is so desired, upon recall of the witnesses, the defence shall be granted opportunity by adjournment to prepare for cross-examination of the two recalled witnesses.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.