



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 55 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BRIAN SAVA.....ACCUSED

RULING

Brian sava is charged with the murder of James Njoroge. Nine (9) witnesses have so far testified for the prosecution. Eight (8) of those witnesses have testified between yesterday, 27th May 2019, and today, 28th May 2019. The case has been slotted for hearing for three days from 27th May 2019 to 29th May 2019. These dates were fixed on 7th November 2018. I commend the prosecution for presenting these witnesses on the first two day.

After taking prosecution witness number nine (9), Prosecution Counsel Ms. Ikol sought an adjournment. Learned Counsel told the court that the remaining witnesses, said to be five (5) in number, were not available. She gave her explanation as captured in the court file record why the remaining witnesses were not in court.

Learned counsel further sought orders of this court to allow the police record statement of a woman known as Purity as a witness for the prosecution. Learned counsel told the court that the evidence of Purity is very crucial to the prosecution case. She based her application on Section 150 of the Criminal Procedure Code.

Thirdly Ms. Ikol sought more time to prepare and make available to the defence counsel certain documents the defence required for their defence case. In her submissions Ms. Ikol pointed out that the pre-trial conference was not held in this case and asked the court to conduct the pre-trial conference before proceeding with this matter.

The application was opposed by Ms. Julie Soweto. Ms. Soweto submitted that her client's right to expeditious trial will be compromised if this case were to be adjourned to another date. She submitted that these hearing dates were fixed way back on 7th November 2018 and that the prosecution has had all the time needed to gather all the evidence and avail all the witnesses required. On the issue of the letter to the prosecution seeking certain documents, Ms. Soweto submitted that this was sent to the prosecution in November 2018 and a copy was sent to the court. It was submitted that these documents ought to been made available from the start and that the only reason that these documents were not included in the buddle served on the defence is because they did not exist.

It was further submitted that the prosecution aims to patch up its case as the trial goes on and this should not be done at the expense of the accused person. Ms. Soweto submitted that the accused is in custody though he was granted bond because he could not meet the conditions set in the bond. She submitted that the prosecution had ample time to avail the documents and therefore there is no reason for the delay in prosecuting this matter. Overall, the gist of Ms. Soweto's submissions is that the prosecution has not provided sound reasons to warrant the orders being sought.

I have considered the application. It is true that this case was given three hearing dates, 27th, 28th and 29th May 2019. These dates were fixed on 7th November 2018. In the intervening period this court heard and determined an application for bail/bond. From the ruling of this court on that application it became necessary to take evidence of Protus Induswe Musina (PW1) the witness said to be under threat if the accused were to be released on bond. I recall Ms. Soweto asking this court on the issue of the pre-trial conference and when it should be conducted. The response from this court was that the pre-trial conference would be conducted before the hearing. I take this chance to apologize to the parties that due to an oversight on the part of the court the pre-trail conference in this case was not conducted. However, failure to conduct this conference is not prejudicial to either party. The pre-trial conference is an administrative tool meant to assist the court and parties to prepare for the trial to ensure expediency and to avoid situations where parties are taken by surprise by introduction of material not before brought to their attention. It is only yesterday morning that it occurred to me that the pre-trial conference has not been conducted. By then it was rather late in the day to adjourn the matter and do so. In my view it is also late for the prosecution to ask that the court conducts this conference after it has presented nine (9) witnesses. Suffice it to say that what is required at this stage of the trail is for the prosecution to

ensure that the remaining witnesses and all the necessary materials are availed to the defence and also to facilitate the court in these proceedings.

Boaz Kennedy Obima (PW6) mentioned a woman known as Purity. This is the owner of the house in which Boaz had gone to drink when, as he testified, the accused and another man are approached him and sold to him the phone (MFI-1) allegedly stolen from the deceased. The second time this name featured in evidence is during the testimony of Clinton Obima (PW9). Clinton was asked by the Ms. Ikol whether he knew Purity and he responded that he had heard of her name mentioned as the woman who sells alcoholic drinks in their village in Kawangware 56. I have read Section 150 Criminal Procedure Code. It 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.

A plain reading of this section shows that it is couched in permissive terms. It is clear to me that according to the provisions of this section, it is the court that summons any person as a witness when this becomes necessary. To my mind, this is done by the court on its own motion and not on application by any party. This is why there is a proviso that where the court takes this action then the prosecution or the defence has a right to cross-examination such a person. This section does not assist the prosecution. Further, the police investigated the case and did not deem it necessary to include Purity as their witness. Indeed she is not one of the witnesses listed by the investigating officer.

I have given this issue much thought and in my view it would be prejudicial to the accused to allow the prosecution time to look for Purity and take down her statement so that she could be a witness. It would seem to me that the prosecution is trying to patch up her case as we go along as submitted by the defence counsel. This to me is a dangerous trend. I decline to allow this application to take the statement of Purity and call her as a witness. I find no justification in allowing such an action to be taken.

On the last issue canvassed before me, it is true that the prosecution had ample time from 7th November 2018 when these hearing dates were given to prepare all the witnesses and gather all the evidence required to buttress their case. I am alive to the fact that sometimes plans do not go as expected but then when that happens and justification given then some allowance can be made. When a case is allocated time, it is expected that it would proceed to conclusion unless unforeseeable circumstances intervene. Since this matter was adjourned to tomorrow 29th May 2019, I will give final directions after taking into account the status of this case as dictated by developments of the day.

After the directions I gave that the prosecution supplies the defence with all necessary material to enable the defence conduct its case, it is my belief that this was done. If this is not the case, then the situation will be handled as it arises. I make orders accordingly.

Dated, signed and delivered this 29th May 2019.

S. N. Mutuku

Judge