



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL CASE NO. 9 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CORNELIUS TURGUT CHOBO .....1<sup>ST</sup> ACCUSED**

**NICOLUS KIPKEMBOI ROTICH.....2<sup>ND</sup> ACCUSED**

**SOLOMON KIPKENEI CHAMASE.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The DPP has requested for warrants for 2 witnesses who have despite having been bonded to attend court for purposes of giving evidence declined to attend. One is said to be a family friend of the 1<sup>st</sup> accused person and the other is the mother of the 1<sup>st</sup> accused, who the DPP asserts is crucial witness as she is said to have the person with whom the deceased subject of the murder trial herein was before his death.
2. Counsel for the accused confirmed from the 1<sup>st</sup> accused person the stated relationship of the said witnesses to the accused person.
3. Under section 125 (1) of the Evidence Act:-

***“125 (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or for giving rational answers to those questions by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.***

4. No cause preventing the two witnesses from testifying was asserted by the defence.
5. Being competent in terms of section 125 (1) set out above, the two witnesses are compellable under section 128 of the Evidence Act and are subject to the mechanism for compelling attendance of witnesses under section 144-149 of the Criminal Procedure Code, of particular reference being ss. 145 and 146 thereof:

**“145. Warrant for witness who disobeys summons**

***If, without sufficient excuse, a witness does not appear in obedience to the summons, the court, on proof of the proper service of the summons a reasonable time before, may issue a warrant to bring him before the court at the time and place as shall be therein specified.***

**146. Warrant for witness in first instance**

***If the court is satisfied by evidence on oath that the person will not attend unless compelled to do so, it may at once issue a warrant for the arrest and production of the witness before the court at a time and place to be therein specified.”***

6. However, there is on the court file **no** record of any summons having been issued to the said two witnesses; only the three doctors who are sought to produce the relevant post-mortem report, mental assessment reports, and the medical examination form P3 have previously been summoned upon request by the DPP made on 1/4/2019.
7. Consequently, before exercising the court’s power to issue warrant of arrest for the witnesses to compel their attendance, the court not having been furnished with “*proof of the proper service of summons*” and or “*evidence on oath that the person will not attend unless compelled to do so*”, shall give the said 2 witnesses an opportunity to comply with summons for witnesses under section 144 of the Criminal

Procedure Code to be issued by the court requiring them to attend court at the next hearing.

8. In default of attendance in obedience to the said summons, the court shall on proof of proper service issue immediate warrants of arrest under section 145 of Criminal Procedure Code as appropriate.

**Orders**

9. Accordingly, pursuant to section 144 of the Criminal Procedure Code, Summons of the Court requiring attendance in court to give evidence on a date to be fixed in consultation with counsel for the accused and for the DPP shall issue through the relevant DCIO to:

**1. Gladys Cheptomoi and**

**2. Philip Sirma.**

*Order accordingly.*

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF NOVEMBER 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Songok for the 1<sup>st</sup> and 2<sup>nd</sup> Accused.

Mr. Chepkonga for the 3<sup>rd</sup> Accused.

Mr. Abwajo, Prosecution Counsel for the State.