

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 166 OF 2003

REPUBLICPROSECUTOR

VERSUS

JOSHUA MWORIA MWITIACCUSED

RULING

After the close of the prosecution case, Mr. Kariuki, Learned Counsel for the State sought to reopen their case and applied to be allowed him to recall the Investigation Officer to produce the statements of deceased witnesses. He purported to rely on **Section 34 and 72 of the Evidence Act**. The application was opposed by Mr. Mbaabu, Counsel for the accused, who urged that the statement of a deceased witness has no probative value; that there is no provision of law that allows the production of such evidence. Counsel also argued that the application is an afterthought because the Investigation Officer was in court the day before, when the case was heard and the application was not made. Further, Counsel was of the view that the prosecution did not state of what value the statements were; that the witnesses could not be cross examined on the statements and that the same cannot be produced on oath or affirmation; that the Investigation Officer cannot be subjected to cross examination to test the veracity and credibility or truth of the statements. It was Counsel's view that if that application were allowed, the defence would suffer prejudice.

I have considered the application made by the State Counsel and the objection thereto. The State Counsel's position is that the witnesses are dead. In my view, if the statements of deceased witnesses were to be produced by the Investigation Officer, the defence would not have the opportunity to cross examine the witness to test the veracity of the statements and also the credibility of the witness. It would result in an injustice to the defence as it offends the tenets of fair hearing.

After the defence Counsel said that the application was not based on any Statute or the Constitution, the State Counsel purported to rely on **Section 34 and 72 of the Evidence Act**. **Section 34 of the Evidence Act** deals with admissibility of evidence given in previous proceedings. It is true that this case had been partially heard before other Judges and evidence of some witnesses taken. An application was made to start the case *de novo*, which the prosecution never opposed. However, Counsel did not apply to have the said evidence already on record to be relied upon. His application was that the Investigation Officer produce the statements of deceased witnesses which does not fall under **Section 34 of the Evidence Act**. **Section 72 of Evidence Act** is equally not applicable because it relates to admissibility of documents where the makers cannot be found. Witness statements are not documents. Consequently, the application is without merit and is rejected and dismissed.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

23/2/2016