



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO. 5 OF 2015

REPUBLIC----- PROSECUTOR

VERSUS

LEONARD OWINO BARASA-----ACCUSED

RULING

1. Leonard Owino Barasa (The Accused) is charged with the offence of Murder contrary to Section 203 as read with Section 204 of The Penal Code. The Particulars of the offence being that on the night of 25th and 26th January 2015 at Sidende West Village, Sidende sub location, within Busia County Murdered Anthony Namukonga Kafwa.

2. Hearing has commenced and after five Prosecution witnesses had testified, The State Counsel requested that the State be allowed to take a statement from one Osundwa as an additional witness. That application was resisted by Mr. Okutta who posed the following questions:-

- a) Who is Osundwa?
- b) Why was he not interviewed earlier by the police?
- c) Will this not be prejudicial to the Defence as the proceedings are fairly advanced?

3. The obligation of a Court of Law in Criminal Proceedings is to see that justice is done to the Accused, the State and the Victim (or like here where the victim died, his family). The State is obliged to place before Court all evidence it can marshal so that this objective can be achieved. But in doing so, the State must proceed in a manner that does not abridge the Accused Person's Right to a Fair Trial.

4. A substantial concern by the Accused is that as the proceedings have advanced so far, the introduction of a new witness may prejudice his Defence. This may not be an insignificant concern but there are ways to safeguard the Accused person. So as to enable him prepare adequately himself for this witness, the statement of the witness must be given to the Accused person and his Counsel way in advance of the next hearing.

5. Second, as often, an effective way of defending a criminal case is to take a holistic approach of the entire Prosecution case, the Defence will be entitled to recall any of the 5 witnesses who have so far testified for further cross-examination.

6. The identity of Osundwa will be revealed in his statement and the Defence will have opportunity to probe further through questions in cross-examination, why it took long to have the witness interviewed.

The Court will then make its own evaluation of the evidence.

7. For the reasons given, I am inclined to allow the Application but with an order requiring that the Statement of the said witness be furnished to the Accused and his Counsel at least 30 days before further hearing of this matter. Secondly the Defence shall be entitled to recall any of the witnesses who have so far testified.

Dated, signed and delivered at Busia this 22nd day of February 2016.

F. TUIYOTT

J U D G E

In the presence of :-

Orwasa -C/Assistant

Owiti- for State

Okuta -for Accused.