



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 4 OF 2015

REPUBLIC

VERSUS

SALIM MOHAMED

RULING

The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that the accused murdered Margaret Njeri Njuguna on 17th January, 2015 at Sikomani area in Lamu West sub-County. The prosecution has so far called seventeen (17) witnesses. Initially, the accused was represented by Mr. Mouko Advocate. The said advocate was replaced by Mr. Shujaa Advocate on 31st March, 2016. By then thirteen (13) witnesses had testified.

On the 3rd May 2016 after PW15, PW16 and PW17 had testified Mr. Shujaa made an oral application to have PW1, PW2, PW3 and PW4 recalled for further cross-examination. The application is premised on the provisions of Section 146 of the Evidence Act. Mr. Shujaa also applied to have the occurrence books for certain dates be produced to enable him cross-examine PW14. The concerned O.Bs are numbers 33/17/1/2015, 36/17/1/2015, 818/1/2015, 118/18/1/2015, 15/1/19/1/2015 and 218/19/1/2015. Mr. Shujaa maintains that the basis of the application is that there is information contained in the statements of the witnesses which was not brought out during examination in chief or cross-examination. His intention is not to impeach the credibility of the witnesses but to place vital information in the court record so as to help the court in determining the case.

Mr. Monda, prosecuting counsel, opposed the application. Counsel contends that the witnesses to be recalled were extensively cross-examined by the previous advocate and no new material information has been placed before the court to warrant their being recalled. The application is an attempt to cover up the defence as it is only the defence counsel who was changed but not the accused person. The O.Bs being requested were referred to during the hearing of an application for bond. Variance of witness statements and evidence cannot be a reason to recall a witness. The application for the O.Bs does not specifically indicate the police stations concerned. The case has been proceeding for some time and all the necessary information had been supplied to the accused and his advocate and no application to recall the witnesses was hitherto made. Counsel further maintains that it is only the investigating officer who is the remaining witness.

Section 146 (4) of the Evidence Act state 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.”

The above provision allows the court to have a witness who has already testified to be recalled. The word used is “**may**”. The implication is that an application to recall a witness may be granted or rejected depending on the circumstances of each case. If it is shown that the purpose of the request to have a witness recalled is to delay the determination of the case then such an application will automatically be rejected. If it is brought to the attention of the court that the accused is aware that the witness to be recalled has either travelled out of the country or it would be difficult to trace him and therefore the application is made for purposes of delaying the case then the request to recall the witness would be declined. In this particular case there was delay in starting off the hearing occasioned by applications made by the accused. However, when the case started, the accused has been co-operative and the case has proceeded very well.

Article 50 of the Constitution provides for fair hearing. Under Article 50 (2) an accused person has a right to fair hearing which includes: -

- (a) to be presumed innocent until the contrary is proved;**
- (c) to have adequate time and facilities to prepare a defence;**
- (g) right to choose and be represented by an advocate;**
- (k) to adduce and challenge evidence;**

The accused is facing a serious charge and if found guilty might be sentenced to suffer death. He should be accorded all the available facilitation to enable him defend himself. It is clear that Mr. Shujaa was not the one representing the accused when the witnesses to be recalled testified. I do understand the position of the state in opposing the application as it is expensive and takes time to have a witness attend court and testify. Once a witness has testified it takes a lot of effort to convince such a witness to come back to court and testify again. However, Section 146 (4) allows the recalling of a witness who has already testified. Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on ulterior motive.

In the case of **MOSES NDICHU KARIUKI VS REPUBLIC Nyeri Criminal Appeal No. 228 of 2008 (2009) eKLR**. One of the grounds of appeal before the Court of Appeal was that the appellant was not accorded a fair trial under Article 77 (2) of the former constitution which is the equivalent of the new Article 50. The Court of Appeal upheld that ground and stated as follows:-

“In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.”

Given the circumstances of the case I do find that the application to have the four (4) witnesses recalled is not made with the intention of delaying this case. The incident occurred on the 17th January, 2015 and we have so far heard seventeen (17) prosecution witnesses. Only one prosecution witness is remaining. Mr. Shujaa did not conduct the defence case when the witnesses to be recalled testified. He is entitled to have them recalled for further cross-examination so that he can defend his client to the full extent possible.

In the end, the application to have PW1, PW2, PW3 and PW14 recalled for purpose of further cross-examination is hereby allowed. The application to have O.B numbers 33/17/1/2015, 36/17/1/2015, 818/1/2015, 118/18/1/2015, 15/1/19/1/2015 and 218/19/1/2015 produced for purpose of cross-examining PW4 is also allowed. This shall be the O.Bs from the concerned Police stations where the case was reported. The state shall have the right to re-examine the witnesses upon further cross-examination by the defence counsel. The state can as well have the investigating officer testify first and then call the recalled witnesses.

Dated and delivered in Malindi this 14th day of June, 2016.

S.J. CHITEMBWE

JUDGE