



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 18 OF 2006

REPUBLIC.....PROSECUTOR

-VERSUS-

BENSON KUVAKA CHUMBA.....ACCUSED

RULING

1. The accused has applied to recall prosecution's witness number four (PW4) to the stand. The history of the trial is relevant to the application. This trial opened before Azangalala J (as he then was). The judge took evidence of five prosecution witnesses. The judge then joined the Court of Appeal.
2. On 19th March 2013 the case was listed before a new judge, Ngenye J. The Court explained to the accused his rights under section 200 (3) of the Criminal Procedure Code (hereinafter *the code*). The accused elected to proceed with the case from the point at which Azangalala J had left it. His learned counsel, Mr. Koros confirmed that election. The matter was then adjourned.
3. On 31st March 2014, the case was listed before another judge, Ochieng J. Again the accused elected to proceed with the matter from the point it had reached. Fundamentally, he told the court that he had *elected* not to recall any witness. The matter was adjourned.
4. On 7th July 2014, the case was listed before me. Directions under section 200 (3) of the Code having been taken, the sixth witness, PW6, testified. He was cross examined at length by the learned defence counsel. The State indicated it would not call another witness but nevertheless sought an adjournment to 21st July 2014 to allow the learned State Counsel to consult further. On the latter date, the State closed its case without calling any other witness.
5. The accused then made the present application to recall PW4. The application is predicated on article 50(2)(k) of the Constitution. The accused contends that he failed to cross examine PW 4 on the allegation that PW4 saw him dragging the deceased on the material night; and, that upon perusal of the typed record, some questions posed to that witness were not well captured or at all. The State contests the motion.
6. Whenever a new judge takes over a case previously heard by his predecessor, he is enjoined by section 200 (3) of the Code to explain to the accused certain rights. Those rights include the liberty to have the matter heard *afresh* or to *recall* any witness(es). See *Njenga v Republic* [1984] KLR 605.
7. In this case, and on more than two occasions, the accused elected to proceed without recalling any of the five witnesses. He had legal counsel. The matter proceeded and one more witness testified. Since the 19th March 2013 when his rights were first explained to him, the accused has never sought to recall any witness. It is thus surprising that after one more witness and the closure of the prosecution's case, he now makes an about turn and seeks a recall.

8. The accused is entitled to a fair trial. That is the gravamen of articles 50 and 159 of our Constitution. The accused is facing a grave charge. He is entitled to cross examine all the State witnesses. The accused is presumed innocent; he is also entitled to protection of the law. But granted the history I have highlighted, I find the accused was granted a fair opportunity to cross examine PW4. When PW4 testified, learned counsel was present and conducted cross examination. The accused was also granted an opportunity to recall any witnesses on both the 19th March 2013 and 31st March 2014. He opted *not* to do so. It would be unjust and irregular to reopen the matter after the prosecution has closed its case. And the recall would not be without its toll on time and judicial resources. Already, this case has been pending in these courts since the year 2006. The witness who is sought to be recalled testified way back on 19th September 2011.
9. The motion to recall the witness is thus devoid of merit and is dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of July 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

The accused.

Mr. Cheserem holding brief for Mr. Koros for the accused.

Ms. Mumu for the State.

Mr. Kemboi, Court Clerk.