REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 27 OF 2013

REPUBLIC …..... PROSECUTOR

VERSUS

DERREL MARTIN MOMANYI alias ABDULATIF …..... ACCUSED

RULING

The State closed its case on 15th September, 2014. The accused was put on his defence and he testified on 11th November, 2014. The accused called one more witness his brother who testified as defence witness number two.

The matter was fixed for submissions on 10th December, 2014. However, Mr. Nyongesa, State Counsel, made an oral application under Section 309 of the Criminal Procedure Act seeking to call more evidence to rebut the *alibi* defence adduced by the accused.

Section 309 of the Criminal Procedure Act states as follows:

> **"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."**

The main considerations for the court under Section 309 is whether the accused's evidence introduced new matter which could not be foreseen by the prosecution. The Section gives the court the discretion to allow the prosecution to adduce more evidence to rebutt it. Mr. Nyongesa contends that he wishes to challenge the alibi defence.

The intention of any criminal process is to know the truth. This is a murder case. The prosecution called seven witnesses and closed its case. It is clear to me that the prosecution did not expect the accused to adduce the defence of alibi. Under Section 309 it is indicated that the court may all move evidence by the prosecution if the prosecutor could not through the exercise of due diligence have foreseen the issues or matter brought by the accused.

In view of the the nature of the offence, I do find that the request by the prosecution is not unreasonable. The possibility of calling for further evidence is provided for under Section 309 of the Criminal Procedure Act. I do allow the Prosecution's request to call for more evidence as prayed. The accused, through his counsel, will be able to cross-examine the witnesses and challenge their evidence.

In the end, the prosecution's application under Section 309 of the Criminal Procedure Act is allowed. The prosecutor to serve the defence counsel and the accused with the witness statements of the new witnesses the prosecution wishes to call. This should be done within fourteen (14) days hereof.

Delivered and dated this **17th** day of **December, 2014** in the presence of:

Said J. Chitembwe

JUDGE