

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL MURDER CASE NO.32 OF 2010

REPUBLIC PROSECUTOR

VERSUS

ARTHER ONYANGO ONDIGO ACCUSED

RULING

1. This matter was heard before Justice Sitati who proceeded on transfer and on 4th November 2014 the matter was listed before me for directions when Mr. Kaburi appeared for Mr. Nyagwencha and stated that the defence would like the matter to proceed from where it had reached. At that stage the accused person addressed the court and stated that he would like the matter to start afresh.
2. Miss Mbelete for the state informed the court that the state had closed its case and therefore the matter was fixed for direction on 2nd December 2014 in the presence of Mr. Nyagwencha advocate for the accused.
3. On 2nd December 2014 when the matter came up for directions Mr. Ayienda appeared for Mr. Nyagwencha and submitted that since the accused had indicated that he would like the trial to start afresh he was leaving it to the court.
4. Mr. Majale for the state submitted that the state was opposed to the matter starting afresh on the basis that the state had closed its case and that securing witnesses to attend trial may not be possible but without giving reason as to why it would not be possible to secure the attendance of the witnesses.
5. Under **Section 200 Criminal Procedure Code** it is the accused person and not the court to demand that any witness be resummoned and reheard. The role of the court is limited to explaining to the accused person his rights.
6. The Court of Appeal in the case of **Peter Korobia Ndegwa -vs- Republic Criminal Appeal No.125 of 1984** had this to say:-

“Section 200 is a provision of the law which is to be used very sparingly indeed and only in cases where the exigencies of the circumstances not likely but will defeat the end of justice if a succeeding magistrate does not or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.....

No rules of natural justice, no rules of statutory protection, no rules of evidence and no rule of common sense is to be sacrificed violates or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosent individual in the system of our legal administration.”

7. **Article 25 (c)** of the **Constitution** provide that the right to fair trial shall not be limited and since the prosecution offered no reasons as to why it may not be possible to secure the attendance of the witnesses and having noted that not much time has passed since the last prosecution witness was heard, I hereby direct that this matter be heard afresh before any of the two judges at the station.

Signed and dated this 9th day of December, 2014

J. WAKIAGA

JUDGE.

In the presence of:

Miss Muthoni for for State

Mr. Nyagwencha for Accused

Dated this 9th day of December, 2014