



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE NO. 3 OF 2003

REPUBLIC PROSECUTOR

- VERSUS -

MWALIMU CHENGO NGARI ACCUSED

RULING

The Accused MWALIMU CHENGO NGARI has been charged with Murder Contrary to Section 203 as Read with Section 204 of the Penal Code. On the 20.2.03 he appeared before the Principal Magistrate, L. Achode for purposes of his Committal for trial before the High Court. The Proceedings show he was addressed by the Court as required by the Provisions of Section 232 (4) of the Criminal Procedure Code and confirmed the contents of the Committal bundle had been read to him at the prison. After his Committal, the court read and explained to him the Provisions of Section 235 (b) of the Criminal Procedure Code. His response was that on the material date he was on duty at Kenya Ports Authority and that those on duty with him at the time had all retired and gone back to their rural home. At this point the court did warn him that failure to supply their names and addresses may result to him being barred to call them during the trial. He then said he would not supply the names nor call them as witnesses.

When the matter came up for plea, the defence Counsel M/s. Osino applied to have the matter referred back to the Committing Court as the accused had managed to get the addresses and names of the witnesses. She said, she had failed to comply with the Provisions of Section 235 (b) requiring the said information to be supplied within 14 days as she was instructed to appear in the matter on a pauper brief after the expiry of the said period. M/s. Mwaniki for the State objected to the grant of the said application on the grounds that the accused had turned down the chance and had said he was not going to call them. Can the accused then have a second chance in the light of what transpired before the committal Court? Does Section 235 provide a reprieve? It reads ("Section 235). After Committal for trial the Magistrate shall:

a) record the names and addresses of the witnesses whom the accused wishes to have summoned at the trial;

b) give to the accused person an alibi warning in the following words or words to a similar effect.

"If, at your trial you intend to say that you are not guilty because you were not at the place the alleged offence occurred at the time it is alleged to have occurred, you must say so. You MUST also supply details of where you were and the names and the addresses of any witnesses who will support you. You may do this now, or you or your Advocate may supply this information in writing to this court and to the prosecution within the next fourteen days. If you do not, you may be

prevented at your trial from saying that you were not present when the alleged offence occurred.”

c) record any details of an alibi defence given by the accused.” Underlining and emphasis mine

(b)The words of Sub-Section as regards the supply of the information does not give any discretion. The information MUST be supplied. However this can be done immediately or within a period of 14 days by the accused or his lawyer. My reading of the accused answer after Section 235 (b) was explained to him, gives the impression that the accused decided not to call the witnesses because he didn't know how to get them or their addresses.

He said,

“I know that all those who were at work with me have since been retired. I do not wish to call them because they have gone to different rural home”.

Underlining mine

At this point the Court explained that he may not be allowed to call the witnesses if he cannot provide their addresses and names. The accused then replied:

“I do not wish to supply nor call any alibi witnesses”

It will be noted at this point, the accused had not been accorded the services of a Counsel. It was after a Counsel was appointed that the issue has been revisited. The last part of Sub-Section (b) gives the court the discretion on whether to allow the accused to pursue his alibi in his defence at the trial. The operative word used is “may be prevented”

I have considered the reasons given by Counsel for accused and the fact that if found guilty the accused will be facing the one and only sentence of death provided for. In the interest of justice, I will allow the application. The file is to be placed before the committing court with a view to taking down the names and addresses of the defence witnesses. The matter is to be mentioned before Principal Magistrate L. Achode on 18.3.03.

Dated and Delivered at Mombasa this 13th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE