



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 35 OF 2017

REPUBLIC.....APPLICANT

VERSUS

EMMANUEL KIPCHUMBA AYABEL.....RESPONDENT

RULING

1. The respondent was charged with the murder of one Joseph Onyango on 30th July 2017. The matter proceeded to full hearing and on 1st of March 2021 the applicant closed its case for want of ability to secure more witnesses. By this time 4 witnesses had already testified.
2. The applicant thereafter approached the court asking that it be allowed to reopen the case so as to introduce a confession allegedly made by the respondent. The respondents counsel vehemently opposed the application and the court directed that a formal application be made by the applicant which it has complied.
3. In the said application dated 29th June 2021 the applicant through the supporting affidavit of **Odero Vena** the learned state counsel states that it was unable to procure the other key witnesses as they have all relocated and all efforts to trace them have been fruitless. That the confession statement by the accused in their custody was very crucial and was not within her knowledge at the time of closing the case.
4. She went on to invoke the inherent powers of this court and argue the court to allow the matter to be reopened. That there would not be any miscarriage of justice.
5. The respondent on the other hand has opposed the application vide the submissions on record by his counsel Mr Mongeri who said that reopening the case is prejudicial to him as it hinders the speedy trial and conclusion of this case and runs contrary to Article 50 of the constitution which envisages speedy trial of matters.
6. That the applicant has all along been aware of the last adjournment granted by the court and therefore there must be an end to litigation. He relied on the case of **REPUBLIC V. ADDIKADIR AHMED MOHAMED (2013) eKLR**.
7. The court has perused the application, and the submissions by both the applicant and the respondent. It is true that this matter has taken a long time and has been heard by three judicial officers. As a matter of fact, the applicant had been granted a last adjournment.
8. The court is however alive to intricacies of matters such as this one where several persons are involved in its trial or determination. This court took over the matter and was able to hear one witness. The issue of confession however is central to such kind of matters. The respondent would naturally have desired that this matter is concluded considering the period the same has been in court.
9. Taking into account the provisions of Article 50 of the Constitution and the inherent latitude given to this court i find the application meritorious for the simple reason that this shall be a single witness and the respondent shall have the opportunity to cross examine him or her. There is no prejudice save on time that he stands to suffer.
10. The interest of the deceased and the family as well ought to be taken into perspective. Although there is no apparent reason why the prosecution was unable to procure the alleged evidence i find the same germane for the just determination of this matter.
11. Section 150 of the Criminal Procedure Code provides as hereunder;

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court

shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

12. I do therefore find that this is a proper forum to invoke the above provisions. The applicants ought to be granted at least a chance to call their witness.

13. In the premises the application is allowed, the prosecution case is reopened for it to present the evidence touching the alleged confession **ONLY** and the respondent shall be accorded the opportunity to cross examine the said witness if necessary.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4TH DAY OF NOVEMBER 2021.

H.K. CHEMITEI.

JUDGE