



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 7 OF 2014

REPUBLIC PROSECUTOR

VERSUS

JAPHET KOBIA alias KARWAMBA 1st ACCUSED

JAMES KIUNGA NTOITHILAI 2nd ACCUSED

GODFREY KARAURI KARITI 3rd ACCUSED

SIMON MUTUA 4th ACCUSED

RULING

1. The accused have been charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya*. The prosecution has already paraded three (3) witnesses.
2. On 7th March, 2019, Ms. Aketch, Counsel for the accused applied for the recall of **PW2** and **PW3**. She contended that the accused are facing a serious charge and that there were issues which had not been properly addressed. That if the said issues are not brought out, it would be prejudicial to the accused.
3. The application was opposed by Mr. Gitonga, the prosecution Counsel. He submitted that the accused have throughout been represented by two different advocates. That the trial is yet to be concluded and that if there are any issues pending, there is still an opportunity for the defence to raise this issue.
4. I have carefully considered the submissions of Learned Counsel. The record shows that throughout the proceedings, the accused have been represented by Counsel. During the testimonies of **PW1, PW2 and PW3** on 22/5/2018, 19/6/2018 and 19/10/2018, respectively, the 1st, 2nd and 3rd accused were represented by Mr. Igweta, Advocate while the 4th accused was represented by Mr. Murithi, Advocate.
5. The record is clear that, at no time during the proceedings did the accused seek either to change their advocates or did they seek clarification from the Court on a point of law or fact during the examination of the witnesses.
6. *Section 150 of the Criminal Procedure Code, Cap 75 Laws of Kenya* confers this court with jurisdiction to recall and examine any person at any stage of a trial or other proceeding under the Code. In **Juma Ali vs. R [1964] EA 486**, the court cautioned that this power must be exercised judiciously and reasonably and not in a way likely to cause prejudice to an accused.
7. In **Dominic Kimaru Tanui v Republic [2014] eKLR**, the Court held that valid reasons have to be provided so as to enable the court to consider an application for the recalling of witnesses. The Court relied on **Elijah Omondi Owino v. R (Nairobi High Court, Criminal Appeal No. 464 of 2009)** where Warsame J, as he then was, held:-

" ... It was incumbent upon the advocate for the applicant to state the reasons why it was necessary to recall the two witnesses who had given evidence and who were cross-examined by the applicant. The court is guided by reasons and without stating the reasons for recalling the two witnesses, it is not open to the applicant to expect the court to merely recall the two witnesses simply because there was a request or an application made for their recalling. I think the magistrate was right in refusing to recall the witnesses without being given sufficient explanation for the said cause. It is clear that the applicant was given an opportunity to cross examine the two witnesses and in the absence of any basis to say that the applicant may have been prejudiced or is likely to suffer by reason of non further cross-examination by his advocate, then the court had no option but to refuse the application for recalling the two witnesses."

8. In the present case, Counsel for the accused only stated that there were issues that had not been raised previously. She did not specify what these issues were. Further, it was not clear when the said undisclosed issues arose whether it was before or after the said witnesses had testified. I take note that it took considerable effort on the part of the prosecution to call the affected witnesses due to the intimidation they were facing.

9. This court is minded that, it has a duty to find out the truth and administer justice fairly and impartially to both the accused and the community.

10. In the absence of any basis to hold that the accused may be prejudiced or are likely to suffer prejudice due to lack of further examination of **PW2 and PW3** by their current advocate, I do find that the application is without merit and the same is hereby dismissed.

DATED and DELIVERED at Meru this 14th day of March, 2019.

A. MABEYA

JUDGE