REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO 22 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

ISAAC KIRUI.....ACCUSED

RULING.

Factual Basis

1. On 27/02/2019 Mr. Omwega for the prosecution applied informally to call one Emmanuel Rono as a prosecution witness. He did so after the defence had formally closed their case. He cited section 212 of the Criminal Procedure Code (Cap 75) of the Laws of Kenya as the enabling provisions of the law. According to the prosecution, Emmanuel Rono had been introduced as a defence witness in his sworn evidence. The prosecution further contends that they did not anticipate that the accused was going to testify as he did, that Emmanuel Rono was the first person, who gave him the first report concerning the death of the deceased. Furthermore, the evidence of the accused in this regard is that Emmanuel Rono was his neighbour in the compound of Ntutu.

2. In addition to the foregoing, there is the prosecution evidence of No 62029 PC Peter Leteipa Rinka (PW5). Pw 5 testified under cross examination that he recorded four witness statements from Douglas Angima, Julius Ledama, Emmanuel Rono and the landlady of the deceased.

3. Mr Kilelel for the accused, conceded the prosecution application. He further submitted that the said Emmanuel Rono was likely to exonerate the accused, if called as a witness.

The applicable law.

4. The right of the prosecution to call evidence in rebuttal to that of the defence, which they did not anticipate is provided for in section 309 of the Criminal Procedure Code. It reads 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"*

5. It is clear that the evidence sought to be produced by the prosecution in rebuttal to the defence evidence, must be new evidence which has been introduced by the defence. That new evidence must be evidence which the prosecution could not by exercise of reasonable diligence have foreseen. Furthermore, in *Day v Rex (1940) 1 All ER 402* the English Court of Appeal quashed the conviction of the appellant because the trial court had admitted rebuttal evidence of the prosecution, when it was clear that the said evidence was in the possession of the prosecution from the start commencement of the case.

Issues for determination.

6. The evidence sought to be adduced in the instant case was in the possession of the prosecution from the commencement of the case according to the evidence of No. 62029 PC Peter Leteipa Rinka (Pw 5). It is not evidence that has arisen *ex improviso,* that is, evidence which the prosecution could not have foreseen, by reasonable due diligence. It is equally clear that even the accused wanted to call Emmanuel Rono as his defence witness, but in the end decided not to do so. In the circumstances, I find that the prosecution has failed to meet the threshold laid down in section 309 of the Criminal Procedure Code. I also find the case of *Day v Rex, supra*, to be persuasive.

7. Section 202 of the Criminal Procedure Code, which Mr. Omwega cited in support of his application, applies to the proceedings in the magisterial courts. It does not apply to the proceedings in the High Court.

8. The upshot of the foregoing is that the application by the prosecution fails and is hereby dismissed in its entirety.

Ruling dated, signed and delivered in open court at Narok this 13th day of March, 2019 in the presence of Mr. Omwega for the state and Mr. Kilele for the accused.

J. M. Bwonwonga

Judge

13/03/2019