



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 8 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHNSON NZAU MUTUA.....1<sup>ST</sup> ACCUSED**

**JOHN KIAMBA MUTUA.....2<sup>ND</sup> ACCUSED**

**BENSON MWANZIA NYELE.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons were jointly tried by this court on one count of murder and so far eight witnesses have testified.
2. The 8<sup>th</sup> witness was No. 23114 CIP Lawrence Wahome Muchoki who testified on 10/4/2019 and he was cross examined by Nzilani for the 1<sup>st</sup> and 2<sup>nd</sup> accused persons and Mbuthia for the 3<sup>rd</sup> accused person. On 27.6.2019, learned counsel Mr. Makundi for the 1<sup>st</sup> and 2<sup>nd</sup> accused persons sought to move court to reopen the case and have Pw8 recalled so that he may testify regarding an alleged confession that Pw6 had denied its existence. The application was supported by learned Counsel Mr. Mbuthia for the 3<sup>rd</sup> accused who submitted that he did not have the benefit of hearing the evidence of Pw6 that seemed to be in conflict with that of Pw8. He submitted that the prosecution's case should be reopened so that the issue of the confession could be determined.
3. The state opposed the application on the grounds that there is no provision under the Criminal Procedure Code to allow the defence reopen the prosecution case and recall witnesses for examination in chief but only for cross-examination. Further that the counsels present during the testimony of Pw8 had full instructions to proceed with the matter and duly cross-examined the said witnesses and hence the only window available is for the defence to recall Pw8 for cross-examination and the defence can submit on the confession after the close of the defence case. He urged the court to make a finding that the application was not procedural and dismiss the same.
4. The singular issue for determination is whether the court may allow the application for reopening the case and allow Pw8 to testify so as to challenge the confession. The law applicable is Section 150 of the Criminal Procedure Code which provides as follows :-

***“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.***

5. This section, grants the court a wide discretion to elicit evidence of its own motion during a trial. The scope of the powers conferred upon the trial court were considered in the case of *Manyaki d/o Nyaganya & others v. R.* (1958) E.A. 495. In *Murimi v. Republic* (1967) E.A. 542 the court observed that a “just decision” of the case arose when (a) there had been no case to answer, (b) when the defence had left the prosecution unproved beyond reasonable doubt, and (c) when the prosecution could have called the missing witness
6. These cases provide that the said provision of the law confers a discretion upon a trial Court to summon or call any person as a witness or examine any person in attendance though not summoned as witness or recall and re-examine any person already examined. The basis on which a trial Judge should invoke his powers under this section depends on the facts of each particular case; and that section by no means permits a trial judge to turn into an investigatory Court since his primary role in the legal system is to adjudicate disputes between two contending parties. Finally, the operation of the section is also subject to the proviso attached to it.

7. In the instant case I do not think that Pw8 was an essential witness for the just decision of the case since the prosecution has not closed its case as more witnesses are yet to be called. The accused persons have also not testified and at this stage, the court still needs to hear the remaining witnesses. In any case the defence was at liberty to seek to recall Pw8 for further cross examination if need be but they seem not interested in that yet that was the only legal avenue. However the present application might run into problems because the defence cannot recall the prosecution's witness to be examined in chief yet the prosecution was through with that process and are not intending to recall that particular witness. A dilemma could arise in the event the prosecution indicates that it does not wish to examine in chief the witness. In that scenario the defence will do nothing as it cannot examine the witness in chief and then cross examine him. The only window is for the defence to recall the witness for cross-examination purposes only. It is noted that the defence counsels duly cross examined the particular witness at length on the confession document which was duly produced as an exhibit. It is not procedural at this stage to have the witness recalled for purposes of being examined again in chief this time by the defence. If the defence is not interested to seek for further cross examination then they still have a chance to submit on the issue of the confession at the tail end of the proceedings.

8. The proviso to section 150 allows such witnesses recalled to be cross-examined by the prosecution or the defence counsel and the case of Joseph Ndungu Kagiri v R (2016) eKLR, is relevant in that Justice Mativo observed as follows:

*“The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.”*

9. The above case seemed to suggest that there may well be situations which would persuade a trial Judge to allow recall of witnesses and such a situation would be valid only if it is based on sound reasons.

10. In the instant case, the record bears witness that the accused persons were represented by counsel during the hearing of the testimony of Pw6 and Pw8 and this being a 2013 matter the court does not wish to prolong the trial which has already been protracted for almost six years. This is unless learned counsel imputes lack of instructions on the part of counsel who held his brief. In my view the objection raised by the prosecution counsel to the intended calling of Pw8 is justified because the application by the counsels for the accused is not valid for purposes of Section 150. I am of the view that their arguments in relation to the confession shall be considered when the trial is concluded.

11. The principles upon which a trial judge should approach a confession are now well settled. In *Kulukana Otim v. R* (1965) E.A. 253, the trial Judge did not recall the evidence in respect of a witness called Ongom to whom the appellant had confessed his part in the crime and on appeal it was held that the trial Judge was not duty bound to call Ongom since he had not found his evidence essential to the just decision of the case.

12. In this regard I find that the court is not satisfied that Pw8 should be recalled for purposes of being examined in chief as contended by the defence even though the court is fully aware that it has powers to call witnesses for purpose obtaining proper evidence under Section 173 Evidence Act that provides that:

*(1) A judge or magistrate may, in order to discover or to obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to object to any such question or order, nor, without leave of the court, to cross-examine the witness upon any answer given in reply to any such question..*

The above scenario might be the ideal situation when the need for recall is on the court's own motion. This is not the case herein. The defence has not persuaded me that the request to examine the witness afresh by the defence is based on any legal foundation. There is no need to reopen a case which is still ongoing and has not been closed yet.

13. I have accordingly come to the conclusion that the application to reopen the case herein lacks merit. The same is dismissed. The defence is at liberty to recall Pw8 only for further cross examination if need be. Otherwise the parties herein are directed to proceed to fix the matter for further hearing.

It is so ordered.

**Dated and delivered at Machakos this 10<sup>th</sup> day of July, 2019.**

**D.K. KEMEI**

**JUDGE**