



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
CRIMINAL CASE NO. 57 OF 2016

REPUBLICPROSECUTOR

V E R S U S

FREDRICK OLE LELIMAN.....1ST ACCUSED

STEPHEN CHEBURET MOROGO.....2ND ACCUSED

SILVIA WANJIKU WANJOHI.....3RD ACCUSED

LEONARD MAINA MWANGI.....4TH ACCUSED

PETER NGUGI KAMAU.....5TH ACCUSED

RULING

1. The court has considered the application by Mr. Mochere for the 4th accused.
2. I have also considered the response by the State.
3. I have also considered the response by Mr. Ahmed Jele counsel for the victims.
4. I noted that according to the Counsel for the 4th accused, which the State did not deny, the defence was served with booklets of photographs. These include the booklet marked PMFI 27 in this case.
5. The defence has expressed the desire to put these photographs to PW2, 3, 5, 6 and 7 for further cross-examination. The photos are of the container which has been the subject matter of this case.
6. I have taken into consideration the following provisions:

Article 25(c) which provides that the right to a fair trial is a right and fundamental freedom which shall be limited.

Article 50 (1) Right of an accused to have any dispute that can be resolved by operation of the Law decided in a fair and public hearing before a court.

Article 50 (2)(e) Right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay.

7. To put the record straight this court has not invoked **section 150** of the **Criminal Procedure Code**. Neither has the application been premised on that Section.

8. **Section 146(4)** of the **Evidence Act** provides:

“(4) The court may in all cases permit a witness to be recalled either for further examination – in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

9. This section does not provide any threshold or guide in the manner in which that application is to be applied. The operative word used is **“permit”**.

10. The defence through Mr. Mochere has indicated that with the late supply of exhibits containing photographs of a container which has been at the centre of some of the witnesses, they felt it was necessary to place the photographs for the five witnesses they have identified to see.

11. Mr. Mochere explained that the court was grappling with description of the container and that the witnesses had to use grills within the court room to describe it. He felt it will be important to clear the description using the photographs in PMFI 27.

12. Under **section 146(4)** of the **Evidence Act**, the court has ample power to permit the re-calling of any witness either for further exam-in-chief or for further cross-exam. The rider is that such power must be dictated by exigency of the situation, and fair play and good sense as a safe guard guided by the requirements of justice. This obviously depends with the unique facts and circumstances of the case. See **Rajeswar Prosad Musra vs. State of West Bengal & Another 1966 SCR(1) 178.**

13. The power to re-call a witness must be exercised judiciously and no capriciously or arbitrarily and must only be exercised in order to meet the ends of justice and must be for strong and valid reasons.

14. Having considered the arguments by both sides, and having carefully considered the content of the witnesses sought to be re-called, I do find as follows:

15. PW2 and 3 are the two witnesses whose evidence touched on the container and who used the court room grills to describe the container. It does appear to me that it will be essential to have the two witnesses for further cross-exam.

16. For PW4, 5, 6 and 7 I find it wholly unnecessary to re-call them for purpose expressed in counsel's submission. I am not satisfied that it is essential to have them re-called for further cross-exam. I find it will not serve the interest of justice to exercise the courts power to permit the request sought. In their regard therefore that request is declined.

17. In the result, I will permit the re-calling of PW2 and 3. The defence will be permitted to re-call the two limited to the cross-examination of the two on the descriptions of the container on issue in this case based on the photographs PMF127. Outside of that limitation cross-exam will not be allowed.

18. Those are my orders.

DATED AT NAIROBI THIS 16TH DAY OF MARCH, 2017.

LESIIT, J

JUDGE