



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 58 OF 2015

REPUBLICPROSECUTOR

V E R S U S

GABRIEL ANAMI ACCUSED

R U L I N G:

1. This is a case of murder in which the accused is alleged to have murdered D O S on the 25th day of May, 2009 at Itenyi sub Location, Muranda Location of Kakamega East District within Kakamega County. The case is ongoing and so far 5 witnesses have testified.
2. On 03/05/2017 Mr. Ondieki counsel for the defence submitted that one of the remaining witnesses, one F O was present in court when the first 3 witnesses testified and that as such the said F O should not be allowed to testify. It was also Mr. Ondieki's submission that it is surprising that the said F O who was 5 years old in May, 2009 is now a witness. Counsel also submitted that the defence was not supplied with a statement of the said witness since he was not indicated on the information as a witness.
3. Mr. Juma Ochieng prosecution counsel opposed the application. He submitted that infact the statement of F O was supplied to defence and that defence has not raised any issue regarding the statement. The prosecution counsel also relied on section 150 of the Criminal procedure Code, Cap 75 laws of Kenya (CPC) in urging this court to disallow the objection. Section 150 of the CPC provides as follows :-

“ 150 .. **Power to summon witnesses, or examine person present**

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.”

4. After carefully reading through the submissions and the law I find that the mere fact that a person was present in court when another witness was testifying does not automatically disqualify such person as a

witness. Further, and contrary to what defence counsel submitted there is nothing on record to show that FO was in court when PW1 – PW3 were testifying. Infact both PW1 – PW2 who are the key witnesses said that there was no other person around the scene when the accused allegedly attacked the deceased. And even if FO was present, his evidence would be subject to cross examination by the defence so as to satisfy the court as to the veracity of such evidence.

5. In my considered view therefore the fears raised by defence counsel, are unwarranted in the circumstances. In any event defence counsel has not disputed the prosecution contention that the defence was supplied with the statement of the intended PW6,F O.

6. For the above reasons I find that the objection is unwarranted and the same is dismissed. The prosecution is at liberty to call F O as a witness if they so choose.

It is so ordered.

Ruling delivered dated and signed in open court at Kakamega this 13th day of June 2017

RUTH .N. SITATI

JUDGE

In the present of

Mr. Ondieki.....Accused / Objector

Mr. Juma Ochieng.....state / Respondent

Polycap.....Court Assistant