

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARY SAMMY.....1ST ACCUSED

KIMWELE NYOKA.....2ND ACCUSED

RULING

1. The Accused person is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **25th** day of **April, 2011** at about **11.00 a.m.** at **Usenga Village, Kanzau Sub-location, Kisasi Location of Kitui District** within **Kitui County** jointly murdered **Kinyamasyo Mweti** (Deceased).

2. In an oral application **Ms. Mati**, learned Counsel for the Accused sought this Court's leave to recall **Dr. Mutuku** a prosecution witness who testified for further cross examination prior to her appointment by the State to represent the Accused. She relied upon **Section 146(4)** of the **Evidence Act**. She stated that the statement the Doctor recorded differed with what he stated in Court an issue that needed clarification.

3. The application was opposed by **Mr. Wanjala**, learned State Counsel on the grounds that the Doctor testified and was examined by Counsel who was previously on record. He argued that issues raised by Counsel on the anomalies on the statements could be raised after the close of the defence.

4. The provision of law cited provides thus:

“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.”

5. The provision of the law falls under a section that gives direction on the order of examination of witnesses. The stated provision of the law gives the Court the discretion to permit re-calling of the witness in all cases. An Accused person is entitled to a fair trial as enshrined in the **Constitution of Kenya, 2010 (vide Article 50)**.

6. This is a matter where counsel was retained by the State to represent the Accused after a ruling had been delivered and the Accused informed of the right to address the Court pursuant to the provisions of **Section 306(2)** of the **Criminal Procedure Code**. Although the Accused was represented by a different counsel it may be fair for the current Counsel having abraised herself with what transpired in her absence to seek clarification of issues that emerged.

7. The application has been made before the Accused is called upon to tender her evidence in defense. The prosecution will not be prejudiced if the order sought is granted because it will have the opportunity to re-examine the witness.

8. In the premises I find that it will be in the interest of justice to have the witness re-called for further cross examination. Therefore, the application is allowed as prayed.

9. It is so ordered.

Dated, Signed and Delivered at Kitui this 6th day of June, 2017.

L. N. MUTENDE

JUDGE