



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 32 OF 2015

DANMARK OCHIENG OTIENO.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

RULING

When this matter came up for defence hearing today; accused stated that he was not at the scene when the offence herein was committed.

Ms. Wafula, learned counsel for the state applied to call rebuttal evidence on the ground that accused had raised new evidence.

Mr. Ojuro, learned counsel for accused submitted that accused had not raised new evidence since he had admitted that he had been at the scene but that he had left before the offence was committed.

I have considered the submissions by the state and the defence. Section 212 of the Criminal Procedure Code states:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter

I have considered the case of ***Mohamed Sanga Mwazombo v Republic [2015] eKLR***, in which the court held that witnesses can be recalled under section 212 of the Criminal Procedure Code. The court went further to state that:

Under Section 212 of the Criminal Procedure Code, the prosecution may be allowed to adduce more evidence in reply to the defence evidence so as to rebut what the accused would have stated in his defence. Under that Section, the court would consider whether the defence evidence could not have been foreseen by the prosecution by the exercise of reasonable diligence.

I have considered the line of defence adopted by the accused and it no doubt raises new evidence that was not brought forth during the hearing of the prosecution case.

I have therefore come to the following conclusion:-

- The drafters of the law in enacting Section 212 of the Criminal Procedure Code must have foreseen a situation where a party would raise new evidence that could not have been foreseen by the adverse party

- That the state is therefore within the law to apply to rebut the defence case
- The court shall after the new evidence is adduced determine if it contradicts, impeaches or defuses the impact of the evidence offered by the defence or whether the prosecution intends to use it to clarify its evidence adduced earlier and make the appropriate decision
- The defence will not be prejudiced if new evidence is tendered for the reason that it will have an opportunity to test its newness in cross-examination

It is therefore hereby ordered:

- a. The state is hereby granted leave to tender rebuttal evidence
- b. The state has 30 days from the date of this order to supply the defence with a list of witnesses and statements of witnesses it intends to call

DATED, SIGNED AND DELIVERED THIS 10th DAY OF July .2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix
Accused - Present
For Accused - Mr. Ojuro
For the State - Ms. Wafula