

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

HCCR (MURDER) CASE NO. 15 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

AMOS OMONDI AREGO ACCUSED

RULING

The investigating officer, PC Edwin Nyongesa testified that he recorded a statement from the deceased **CALNIX OUMA ADERO** on 6th July 2011 before his death. Before its production, counsel for the accused, Mr Kiseru, objected to its production on the ground that the document had not been supplied as part of the bundle forwarded to him by the prosecution on 30th April 2014. He had never seen the document and prayed that it should not be admitted as it would be highly prejudicial to the accused.

Ms Ongeti, counsel leading the prosecution, expressed surprise that the statement had not been forwarded to the defence as it is the first statement in her schedule of statements and the investigating officer alluded to the said statement in his own statements.

The issue herein concerns admissibility of an otherwise relevant document. Under **section 33(a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the statement by a person who is dead concerning the matter in issue is relevant and admissible. The issue then is whether I should allow the defence to be ambushed by production of the deceased's statement.

Article 50(2)(j) of the Constitution provides that the accused must be supplied with all the statements the prosecution intends to rely on in order to be able to prepare his defence. This duty it has been held in **Thomas Patrick Cholmondeley v Republic CA Crim. Appeal No. 116 of 2007 [2008] eKLR** and **Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission Nairobi Petition No. 317 of 2012 [2012]eKLR** to be a continuous one and is applicable throughout the trial. A document is not inadmissible merely because it was not forwarded to the defence at the commencement of the proceedings. The purpose of this obligation on the prosecution is to enable the accused prepare his defence and any prejudice in the circumstance is removed by giving the defence sufficient time to study the new statements or to recall any relevant witnesses.

In the circumstances, I hold that the statement by **Calnix Ouma Adero** is admissible and it is now marked as exhibit No. 4.

The case is adjourned to enable the defence study the same and inform the court whether it requires to recall any witness for purposes of cross examination in that connection.

DATED and DELIVERED at HOMA BAY this 9th day of July 2015

D. S. MAJANJA

JUDGE

Ms Ongeti, Prosecution Counsel, instructed by the Director of Public Prosecutions for the State.

Mr Kisera instructed by Omonde Kisera and Company Advocates for the accused.