



**Republic v Mburu (Criminal Case 35 of 2020)
[2024] KEHC 10662 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 35 OF 2020
DO CHEPKWONY, J
AUGUST 16, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ZACHARIA NDUNGU MBURU ACCUSED

RULING

1. This is a ruling that arose out of an argument between Counsel for the parties on whether to call witnesses whose statements had not been filed and availed to the defence at the beginning of the trial.
2. The Accused herein is accused of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code Laws of Kenya.

The particulars of offence are that,

‘On 18th day of August, 2020 at unknown time at Ng’ethu sublocation in Gatundu North Sub county within Kiambu County, the accused murdered Simon Njoroge Nyoike.’

3. The Accused pleaded not guilty to the offence and his trial commenced on 29th November, 2022 whereupon three witnesses being Kamau Ndung’u (PW1), Samuel Kirai Ndung’u (as PW2) and Emily Wambui Nyambura (as PW3) have so far testified.
4. When this matter came up for hearing on 28th September, 2023, the Prosecution sought for an adjournment to call more witnesses after PW3 had testified. Ms. Wambui Counsel for the Accused interjected and stated that she had just been served with a witness statement of one Antony Njoroge, a Chief of Makwa location in Gatundu Sub County. She urged the court to expunge the said statement since it had been supplied to them after three prosecution witnesses have testified and it is clear that the statement had been made just to corroborate the evidence of the three witnesses being PW1, PW2 and PW3 who have already testified.



5. In response, Ms Ngesa counsel for the Prosecution confirmed that she had indeed served the defence Counsel with the statement dated 3rd March, 2023 which was in line with their mandate of continuously reviewing the files and advising the investigating agencies on loopholes and gaps to be filled in a case.
6. She went on to state that the statement is not prejudicial to the Accused for the reason that the Chief was not in court when PW1 and PW2 testified. She also stated that the Chief had recorded an independent observation as a public officer and urged the court to admit the said statement so that the said Chief can testify on the next hearing date.
7. In rejoinder, the defense Counsel stated that the offence herein occurred on 18th August, 2020 and the statements were recorded at that time. She stated that it was after PW1 and PW2 were cross-examined about a Chief they had kept referring to that the Investigating officer had the Chief record a statement. She stated that the prosecution had not found it fit to have the chief record a statement and therefore the statement is an afterthought and prejudicial to the accused person's case.
8. Having carefully listened to both Counsel in their argument over whether or not put the statement of the Chief of Makwa Location in Gatundu and allow him to testify, I have also noted sentiments of each Counsel and read through the evidence that has already been adduced to determine. It is trite that the Prosecution is required to provide an Accused person with all the evidence (to mean copies of witness statements) and all relevant documents, that it wishes to rely on its case before trial.

This was the position of the court in the case of JUma –VS- Republic [2007] EA 461 where it was stated;

“We hold that the state is obliged to provide an Accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence...”

9. This requirement is in line with Article 50 (2) of *the Constitution* that provides that an Accused has a right to be informed in advance of the trial which is in accordance to the right to fair trial. The court also relies on the persuasive authority in the case of Dennis Edmond Apaa & Others V Ethics & Anti-Corruption Commission, [2012] eKLR where the court held that:

“The words of Article 50(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received.”

10. In line with this authority, this court agrees that the Prosecution has a ongoing continuous duty to provide information in a case as an when it is received as long the same is given to the in advance to enable him or her prepare his/her defence. In this case, while the court admits that the Prosecution have filed the statement after the evidence of three witnesses has been adduced/heard, it finds that the



same will not be prejudicial to the Accused as he will have a chance to cross examine the Chief, who is the make of the statement.

11. In the circumstances, the statement of Antony Njoroge be and is hereby admitted and the same having been served upon the defence, the court directs that the matter proceeds for further hearing after the defence has gone through the same.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF AUGUST 2024.

D.O. CHEPKWONY

JUDGE

In the presence of;

Martin - Court Assistant

M/s Ndeda Counsel for the state

M/s Wambui Counsel for Accused

Accused

