



**Republic v Isabwa & 6 others (Criminal Case 29 of 2015)
[2023] KEHC 496 (KLR) (Crim) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 29 OF 2015
JM BWONWONG'A, J
JANUARY 30, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ERIC MUNYERA ISABWA 1ST ACCUSED

RAPHAEL KIMANI GACHII 2ND ACCUSED

MUSTAFA KIMANI ANYONI 3RD ACCUSED

STEPHEN ASTIVA LIPOPO 4TH ACCUSED

JANE WANJIRU KAMAU 5TH ACCUSED

MARGARET NJERI WACHURI 6TH ACCUSED

SIMON WAMBUGU GICHAMBA 7TH ACCUSED

RULING

The Case for the accused persons

1. The ruling is in respect of the oral application of the accused that their hand set cell phones be returned to them for their defence including the cross examination of a prosecution witness (PC Quintus Odeke), who was scheduled to testify on January 25, 2023. This witness is a Safaricom Liaison officer.
2. The said application was made following the standing down of IP Absolom Kagesa Maleya (Pw 33), who had been taken ill and was hospitalized on January 24, 2023.
3. Mr Ongaro for the 3rd accused and on behalf of his colleagues applied for the following. The release of the cell phones of the following.



1. Raphael Kimani Gachii 2nd accused
 2. Mustafa Anyoni 3rd accused
 3. Stephen Astiva 4th accused
 4. Jane Wanjiru 5th accused
 5. Margaret Njeri Wachiuri 6th accused
 6. Simon Wambugu Gichimba 7th accused
4. Additionally, Mr Ongaro on behalf of Stephen Astiva and Mustafa Kimani applied for the following.
1. Nairobi High Court (Kimaru, J as he was then) Misc Application No 244 of 2016 *[Law Society of Kenya & 3 Others v Attorney General & Others](#)* (Kimaru, J as he was then).
 2. Nairobi High Court Criminal Case No 57 of 2016 *[R v Frederick Ole Leliman & 4 Others](#)* (Lesiit, J as she then was)
 3. Nairobi High Chief Magistrate’s Court Criminal Case No 479 of 2015, *[Erick Munyera Isabwa & 6 Others](#)*.

The case for the prosecution

5. Ms Peris Maina for the prosecution opposed the application for the release of the cell phones of the accused. Her opposition was on the basis that the said phones are prosecution exhibits, in Nairobi Chief Magistrate’s Court Criminal Case No 479 of 2015, *[Erick Munyera Isabwa & 6 Others](#)*.
6. She further submitted that all the accused in that lower court case are charged with robbery with violence. They are also the same accused in this trial.
7. It was her further submission that the cell phones were produced as exhibits in the lower court by C I Mwangi on June 6, 2022.
8. She also submitted that they are not opposed to the supply of the proceedings in all the three cases; except that she is opposed to the supply of the proceedings in Nairobi Chief Magistrate’s Court Criminal Case No 479 of 2015, *[Erick Munyera Isabwa & 6 Others](#)*. According to her that is still an active case, which is still on-going.
9. Ms Peris Maina also joined the defence in applying to be supplied with proceedings in those cases except for the proceedings in Nairobi Chief Magistrate’s Court Criminal Case No 479 of 2015, *[Erick Munyera Isabwa & 6 Others](#)*.
10. Finally, Ms Peris Maina sought directions of the court on how to proceed with the taking of the evidence of PC Quintus Odeke.

Issues for determination

11. I have considered the submissions of the parties and the applicable law.
12. As a result, I find the following to be the issues for determination.
 1. Whether the cell phones should be released to the accused.
 2. Whether the proceedings in the lower court should run concurrently with the current proceedings in the High Court.



3. Whether the accused are entitled to be supplied with the proceedings in those three cases.
4. What are the appropriate directions to be issued regarding on how to proceed with the taking of the evidence of PC Quintus Odeke.

Issue 1

13. The cell phones are potential prosecution exhibits in this case and they intend to produce them at an appropriate time. The accused will have the opportunity to cross examine the witness or witnesses who will be testified about those cell phones.
14. Furthermore, the advocates for the accused have been supplied with the call data extracted from those cell phones.
15. The defence counsel indicated that the call data that was extracted from those phones was without their consent. This is an issue that may be raised during trial.
16. I find that it is not appropriate to order for the release of these phones to the accused as this might prejudice the prosecution case.
17. I therefore decline to order the release of the cell phones to the 2nd accused, the 3rd accused, the 4th accused, the 5th accused, the 6th accused and the 7th accused.

Issue 2

18. The issue as to whether the proceedings in the lower court should run concurrently with the current proceedings in this court is a problematic question. The proceedings in the lower court are still active proceedings, in which there is pending a ruling by the trial court. A strong case has to be made out to stay them pending the hearing and determination of this case.
19. First, the accused in the lower court are the same accused in this case; only that in the lower court they are being tried on charges of robbery with violence, which also carries a sentence of death.
20. Second, the accused have to defend themselves in this court and in the lower court. I find that this is costly and time consuming, which might embarrass them in the course of these two trials.
21. Furthermore, the original documents which are required in this court are exhibits in the lower court. This clear from the evidence of IP Absolom Kagesa Maleya (Pw 33) in this court, who identified the inventory (MFI 34) of the exhibits he recovered in the premises allegedly occupied by Mustafa Kimani and Stephen Astiva and the sketch plan (MfI 33) of the house allegedly occupied by Erick Munyera Isabwa and Margaret Wanjiru. Pw 33 was unable to produce the originals of those two documents, because they had been produced in the lower court. There was a failed attempt by prosecution to produce certified copies of the two documents in this court; which failure was due to lack of compliance by the prosecutor to comply with the law regarding the production of secondary evidence as set out in section 68 of the *Evidence Act* (cap 80) Laws of Kenya.
22. There was even a further attempt by the prosecution to have the ruling rejecting the admission of that secondary evidence, to be reviewed.
23. In the circumstances, I find that it is necessary to order for stay of the proceedings in the lower court pursuant to this court's powers under article 165 (6) and (7) of the *Constitution* of Kenya; which provisions provide as follows:



- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
24. It is clear from the foregoing provisions that this court is clothed with discretionary powers to act on its own motion in order to ensure that the accused have a fair and expeditious trial as directed by the Constitution of Kenya in article 50. I hereby on my own motion (suo motu) stay the proceedings in the lower court; pending the hearing and determination of this case.

Issue 3

25. The Constitution Kenya in article 50 (2) (j) directs that the accused to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence during trial.
26. That evidence includes evidence in the possession of state organs that is necessary for the accused to conduct their defence effectively including effective cross examination of the prosecution witnesses.
27. The proceedings in the above three cases are in the possession of the court and they should be availed to the defence.
28. I hereby order that the defence be supplied with the proceedings in the above three cases.
29. The position of the prosecution in their application that they be supplied with the proceedings in those cases is surprising.
30. They are the ones who simultaneously filed and proceeded with the charges in both courts. It was within their power to proceed with the charges of murder first and later with the robbery charges. Having decided to simultaneously prosecute both cases, they produced some exhibits, over which they lost control and had to apply, since these were now court exhibits in the lower court. The prosecution ought to have foreseen the consequences of their prosecutorial decisions and to avoid doing so.
31. It is good judicial practice to prosecute a charge of murder first, and later proceed with a charge of robbery if it is found to be necessary.
32. It is in the interests of justice the prosecution too be supplied with the same proceedings as the defence. This has been made possible since the trial in the lower court has now been stayed pending the completion of this trial. Moreover, equality of arms between the parties demands that the prosecution be supplied with those proceedings. Therefore, the issue of prejudicing the trial in the lower court does not arise. To deny the prosecution from using those exhibits will amount to impermissible discrimination.
33. It therefore follows that the objection by Ms Maina is hereby overruled; since the trial in the lower court has now been stayed. The issue of that trial being active is now moot.

Issue 4

34. The evidence of PC Quintus Odeke will be taken after both the defence and the prosecution have been supplied with the proceedings in the foregoing cases. This is necessary to avoid a situation of taking his evidence in chief as proposed by the defence and be cross examined later, when the requested for proceedings in those cases are ready. This piecemeal litigation strategy should be avoided, for it might prove to be inconvenient and costly to the parties, counsel, witnesses and the court.



It is so ordered.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JANUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr Kinyua: Court Assistant

Ms Ogweni, Ms Maina and Ms Parklea for the Republic

Mr Ongaro holding brief for Mr Wachira for the 1st accused

Mr Ongaro holding brief for Mr Olanddo for the 2nd accused

Mr Ongaro for the 3rd accused

Mr Ongaro holding brief for Mr Mutitu for the 4th accused

Ms Nyamongo for the 5th and 7th accused

Mr Ongaro holding brief for Mr Mabachi for the 6th accused

