



REPUBLIC OF KENYA



**Towey & another v Khan & 4 others (Criminal Revision E083 of 2022)
[2023] KEHC 1062 (KLR) (Crim) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E083 OF 2022
LN MUTENDE, J
FEBRUARY 20, 2023**

BETWEEN

**GEORGE GULDER TOWEY 1ST APPLICANT
NETSOL KENYA LIMITED 2ND APPLICANT**

AND

**MOHAMED ZAFRULA KHAN 1ST RESPONDENT
DUNCAN KABUI GICHU 2ND RESPONDENT
JAMES MWAURA MWENJA 3RD RESPONDENT
MAKARIOS OMONDI AGUMBI 4TH RESPONDENT
REPUBLIC 5TH RESPONDENT**

RULING

1. Applicants herein, victims in Milimani Criminal Case No. 721 of 2018, a subordinate court, approached this court through a Notice of Motion dated 28th day of April, 2022 seeking orders thus:
 - a. That the application herein be certified as urgent.
 - b. That the Honourable Court be pleased to stay the order dated 7 April, 2022 restricting the scope of participation in the trial of victims of theft in Milimani Criminal Case No. 721 of 2018 Republic v Mohammed Khan and 3 others pending the hearing and determination of this application.
 - c. That the Honourable Court be pleased to call for and examine the record of the proceedings in the Milimani Magistrate Court at Milimani Criminal Case No. 721 of 2018 Republic v



Mohammed Khan and 3 others for purpose of setting aside all of the orders issued on 7th April 2022 by Hon. R. K. Ondieki.

- d. That the Honourable Court be pleased to revise, vary, reverse and/or alter the order relating to the scope of the applicants/victims participation in cross examination to the position that existed as per the order of Hon. Cheruiyot dated 26th September, 2019 and as per cross examination conducted with respect to PW1 to PW4.
 - e. That costs of this application be provided for.
2. The application is premised on grounds that by a Ruling delivered on 26th September, 2019 by Hon. K. Cheruiyot, the applicants were allowed to participate in the trial process, which enabled them to cross-examine and re-examine accused persons; but, only in so far as their two (2) bank accounts were concerned. Following transfer of Hon. K. Cheruiyot, the matter was taken over by Hon. R. K. Ondieki who through a Ruling dated 7th April, 2022, reviewed the order made by his predecessor with regard to participation of the victims (applicants) in cross examination.
 3. Per the ruling of Hon. R. K. Ondieki he directed that the DPP should begin the cross-examination process and where an aspect could be left out by the DPP, affecting the applicants' accounts, they would be allowed to cross-examine the witnesses on that aspect alone. These, according to the applicants, was failure to distinguish between the role of examination-in-chief as conducted by the DPP and cross examination conducted by the victims; and the order grossly undermined the victims' rights to a fair trial.
 4. The application is supported by an affidavit deposed by the 1st applicant, having been authorized by the Board of Directors of the 2nd applicant who reiterates grounds on the body of the application and avers that following advise by his Counsel on record, the victim was allowed to cross examine witnesses in the earlier proceedings until 7th January, 2022, when a witness was stood down by the court on its own motion, which proceeded to set new terms and limited the victims participation, further violating their rights to fair trial.
 5. The 5th Respondent filed grounds of opposition where it stated that there is no illegality, incorrectness or impropriety to invoke courts' jurisdiction. That Hon. R. K. Ondieki correctly upheld the victim's right to participate. That precedent had established that the manner and extent of victim participation in a trial is determined by a trial court.
 6. That the impugned order dated 7th April, 2022 was part of case management in light of Article 50 (2) (e) of the Constitution which enjoins the court to hear and determine cases without unreasonable delay. That the court's decision was in tandem with the Ruling of 26th September, 2019 and in accordance with Article 50(9); Article 157 of the Constitution, and, Section 9(1)(f) of the Victim Protection Act (VPA) and case law.
 7. Further, that unrestricted participation by the victims would prejudice the accused and counter fair trial as guaranteed by Articles 25 and 50 of the Constitution. That the Ruling raised a question of clarity on the evidence that would be admissible therefore was not irregular.
 8. It called upon this court to remit the matter back to the trial court for purposes of further directions on the extent of participation.
 9. The application was disposed through written submissions. It is urged by the applicants that the Hon. R. K. Ondieki lacked jurisdiction to review the decision of Hon. Cheruiyot, as the jurisdiction is a reserve of the High Court. That he acted improperly and ultra-vies. In this regard they relied on the



case of *Samuel Kamau Macharia v KCB and 2 Others*, Civil Application No. 2 of 2011 where the court held that:

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

10. That the victim’s participation is recognized under the *Constitution* and the *Victim Protection Act*, 2014 a role that is also recognized by *International UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Office*. That as held in the case of *Leonard and Maina Mwangi v DPP & 2 others* (2017) eKLR, participation of the victim is a non-derogable right under Article 25 of the *Constitution*.
11. Regarding the extent of the victim participation in a criminal trial, the applicants relied on the case of *Joseph Thendrix Waswa v Republic* (2020) eKLR where the Supreme Court remarked, in obiter dicta, that:

“... The trial Judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim’s interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary.....

- a. The applicant must be a direct victim or such victim’s legal representative in the case being tried by the Court;
- b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;
- c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;
- d. The victim’s presentation should be strictly limited to “the views and concerns” of the victim in the matter granted participation;
- e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;
- f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor;
- g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;
- h. The trial Court should ensure that the victim or the victim’s legal representative understands that prosecutorial duties remain solely with the DPP;



- i. While the victim’s views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;
 - j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim;
 - k. While the Court has a duty to consider the victim’s views and concerns, the Court has no obligation to follow the victim’s preference of punishment.”
12. That the ruling was a limitation of this right to fair trial and that Hon. Cheruiyot was correct.
 13. The 2nd Respondent (Accused 2) in the matter filed submissions. He submits that the Ruling of Hon. Cheruiyot limited the applicants’ Counsel participation only to the extent that concerned their accounts; a ruling that was not challenged therefore remains in force.
 14. That the applicants’ Counsel contravened the ruling of the court by asking questions that did not affect his clients’ account, that is why the court (presided over by Hon. Ondieki) stood the witness down so as to study the ruling delivered by Hon. Cheruiyot; which was in accordance with the Waswa decision (Supra). That the court found that the ruling of the magistrate limited participation only on matters where victims’ accounts were affected and not participation in rem, otherwise the statutory mandate of the DPP would be compromised.
 15. The 5th Respondent argues that in both rulings the court allowed the victims to participate and set parameters of the same. That before the enactment of the current Constitution, victims could not participate in the trial and their advocates were passive observers in the proceedings, a system replicated from the common law adversarial system. But, the Constitution brought a paradigm shift by widening the victim’s participation and guaranteeing the right to fair trial, declaring it one which cannot be limited.
 16. That under the VPA, a victim has a right to directly participate and/or be heard in all stages of the trial depending on the trial and taking into account the nature of the offence. That the scope of participation should be determined on a case to case basis and the extent of participation should not overshadow the prosecution.
 17. That the rights should be applied in a manner that is reasonable in the circumstances and that is not likely to interfere with proper administration of justice, cause interference with prosecutorial discretion or cause excessive delay or compromise or hinder the prosecution of any offence.
 18. That the DPP retains the constitutional mandate to independently control investigations, prosecution and punishment of crime in the interest of the public. That the applicants have not demonstrated any illegality, incorrectness or impropriety to warrant review.
 19. I have considered arguments by respective parties herein. At outset, it must be noted that Section 2 of the VPA defines a victim thus:

“means any natural person who suffers injury, loss or damage as a consequence of an offence.”



20. Revisional jurisdiction of the High court is conferred on it by the *Constitution* and statute. Article 165 (6) of the *Constitution* provides that:

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.

21. Section 362 of the *Criminal Procedure Code* (CPC) provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

22. In the case of *Joseph Nduvi Mbuvi v Republic* (2019)eKLR, which is persuasive, Odunga J. (As he then was) stated that:

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

23. I must therefore interrogate whether the impugned order by Hon. Ondieki was made illegally or with material irregularity.

24. This is a matter where Hon. Ondieki succeeded Hon. Cheruiyot following his transfer, therefore, the matter proceeded following compliance with Section 200(3) of the *CPC*. Evidence of some four (4) witnesses had been recorded and the victims’ Counsel did cross-examine them. Pursuant to the ruling dated 26th day of September, 2019, Hon. Cheruiyot pointed out the extent which the victims would participate in the matter. The order was specific in that the victims were allowed to actively participate in the proceedings for purposes of examination in chief, cross examination and re-examination, if need be, in as far as matters affected their personal and corporate account numbers that were specified.

25. The contention of the applicants is that the succeeding magistrate, Hon. Ondieki, reviewed the scope of the victims participation in terms of cross-examination as previously permitted by his predecessor. This argument in actual sense insinuates that the court deviated from the earlier ruling of the court, the effect being, setting aside of the earlier order.

26. The *Victim Protection Act* (VPA) was enacted to give effect to Article 50(9) of the *Constitution*; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.

Section 9(1)(a) and (2) of *VPA* provides:



- (1) A victim has a right to —
 - (a) Be present at their trial either in person or through a representative of their choice;
 - (2) Where the personal interests of a victim have been affected, the Court shall—
 - a. Permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and
 - b. Ensure that the victim's views and concerns are presented in a manner which is not—
 - i. prejudicial to the rights of the accused; or
 - ii. inconsistent with a fair and impartial trial.
27. That provision of the law recognizes the fact of rights not being absolute, in that they are subjective and qualified to the extent that the victim can only participate in the trial where his personal interest is at stake. Therefore, the victim's participation must be guided to avoid interference with fair hearing taking into account the fact of the accused person not being prejudiced. The stated participation should be consistent with the criminal justice system.
28. The [United Nation Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) provides that:
- “6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
 - (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;”
29. While taking part in the proceedings, the victim is not expected to take up the responsibility of the prosecution or be analogous to the prosecution. In the cited case of [Republic v Joseph Lentrrix](#) (2016)eKLR, at the outset Ali-Aroni J (As she then was) considered whether Counsel watching brief for the family of the deceased in a criminal matter can actively participate in the trial on behalf of a victim. The Court stated inter alia that:
- “However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of Sathyavani and as advocated by counsel for the family herein The above Indian case in that regard is distinguishable as the [Victim Protection Act](#) 2014 gives the parameters of involvement during trial to include; the victim's views and concerns at various stages of the trial as the court may determine either directly by a victim or his/her representatives, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not thorough out the trial and parallel to the prosecution.”



30. Section 13 of the VPA provides that:

Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to—

- (a) Subject to the provisions of the Evidence Act (Cap. 80), adduce evidence that has been left out;
- (b) Give oral evidence or written submission.

31. Reverting to the impugned ruling, it is important to note that the ruling did not emanate from any application. None of the parties sought intervention of the court. After the Hon. Ondieki took over the matter, all parties agreed that the case was to proceed from where it had reached. After PW5 gave evidence in chief, soon after Mr. Simiyu for the victims started questioning him, the court had some difficulty following proceedings hence stood down the witness suo moto so as to have an in-depth look at the ruling of his predecessor prior to proceeding.

32. Having internalized the ruling of his predecessor he came up with the ‘Ruling of the Court’ which ideally should have been ‘Directions’. The learned trial magistrate gave directions inter alia thus:

“...the DPP should begin with cross examination and where an aspect has been left out by DPP affecting the accounts, it is only then the counsel for the victim will be allowed to cover in cross examination...”

33. This, according to the applicants was in variance with the earlier court order which provided that the victims were entitled to participate in the trial process for purposes of examination in chief, cross-examination and re-examination. The court limited the extent of participation to matters that affected their personal and corporate accounts, specifically two accounts.

34. Hon. Ondieki reduced into writing his understanding of the earlier ruling, probably for avoidance of doubt. He did not expressly state that he was setting aside the ruling of his predecessor. Hon. Ondieki agreed with Hon. Cheruiyot by appreciating his determination in respect of the scope of participation which was limited to issues directly affecting the victims accounts. The victims were allowed to re-examine witnesses.

35. But, the court did limit participation to cross examination, and, these would be on issues not addressed by the prosecution. These slightly varied the ruling by Hon. Cheruiyot. The VPA acknowledges the victim’s right and spells out the extent which the victim can take part in the proceedings. The participation in issue, should not be prejudicial to the accused and the general fair hearing of the case.

36. It is notable that Hon. Ondieki exercised his discretion as a trial court and gave directions on how proceedings were to be conducted in accordance with his understanding of the law. The question to be grappled with would be whether this court in its revisionary jurisdiction would be seized of power to call into question the discretion of a magistrate on recording of evidence, unless the proceedings are fatally defective and incorrect. An error in law would be an issue to be addressed on appeal. A misdirection would not be determined on revision.

37. This court would not be seen to be an avenue of controlling every part of the trial court’s proceedings to give an impression that it is micromanaging the trial court. The practice adopted by courts on the question of participation of witnesses differ on case to case basis as it is purely a matter of discretion and interpretation of the law.



38. The only irregularity that is obvious and clearly noted is the order directing the DPP to start with “cross examination” when the DPP could not have cross examined his witness. Based on procedural rules, the DPP’s role is to lead witnesses in chief. This is an irregularity that I call to this court and accordingly quash.
39. The DPP would therefore be expected to lead witnesses in chief, then the victim’s counsel would follow immediately if necessary by examining/cross examining witnesses pursuant to the criminal practice, before the defence counsel cross-examines witnesses arraigned by the DPP. The victims participation addresses its personal interest and also supports the prosecution’s case. In the premises the victims counsel would not be expected to rehash the examination in chief so as to be viewed as a second prosecutor.
40. Notably, Hon, Ondieki did not set aside the Ruling by Hon. Cheruiyot, therefore, it remains in force. Accordingly, the application succeeds to the extent that the impropriety noted and quashed is set aside.
41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 20TH DAY OF FEBRUARY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Musyoka for the 1st, 3rd and 4th Respondents

Mr. Omagwa holding brief for Mr. Kibanga for 2nd Respondent

Mr. Kiragu for 5th Respondent.

Court Assistant - Evance

