



**Republic v Aori & another (Criminal Appeal E023 of 2021)  
[2023] KEHC 22880 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E023 OF 2021  
WA OKWANY, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**YOAKIM MOSES AORI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MOTURI KENGERE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The Respondents, who were Accused persons before the trial court, were on September 2, 2021, acquitted in Criminal Case No 569 of 2017 of the offence of obtaining registration by false pretences contrary to Section 320 of the *Penal Code*. The state appealed against the acquittal through this appeal. The appeal was however withdrawn on April 18, 2023 thus precipitating a protest from counsel watching brief for the complainant and in a ruling rendered on June 15, 2023, this court reinstated the appeal for hearing and directed that it be canvassed by way of written submissions to be filed and exchanged before July 25, 2023.
2. Counsel watching brief for the Complainant proceeded to file submissions and when the matter came up for mention on mention on July 25, 2023, Mr Chirchir, learned Counsel for the Appellant made an oral application asking this court to the expunge the submissions filed by the Complainant's Counsel expunged from the Court Record.

**The Submissions of the Parties**

3. The Prosecution Counsel submitted that the Complainant's Counsel had usurped the powers of the Office of the Director or Public Prosecutions (ODPP) in filing the said submissions. Counsel argued that Article 157 of the *Constitution* grants prosecutorial duties to the ODPP which is an independent



body. He added that Section 9 of the *Victim Protection Act*, which Counsel for the Complainant had relied on in filing the submissions was only applicable during trial and not on appeal. According to Mr Chirchir, Counsel for the complainant should not be allowed to participate in the appeal since he fully participated in the trial before the lower court and did apply for private prosecution.

4. The Prosecution Counsel also submitted that Section 348 of the *Criminal Procedure Code* stipulates that only the DPP has powers to institute appeals in criminal trials upon acquittal and that the Complainant's Counsel. He referred to the decision in Petition No 23 of 2019, *Joseph Lendrix Waswa vs Republic* (2020) eKLR where the Supreme Court issued guidelines on how advocates watching brief ought to conduct themselves during trial and not on appeal.
5. On his part, Mr Morigori, learned Counsel for the complainant, submitted that he was merely assisting the Court to arrive at a fair decision since the ODPP had not been keen with pursuing the appeal. He argued that the DPP's powers remained intact. He also relied on the decision in *Joseph Lendrix Waswa vs Republic* (*supra*) where the advocate who watched brief in the case was allowed to file submissions. Counsel also urged the Court to consider his submissions.

### **Issue(s) for Determination**

6. The main issue for my consideration and determination is whether the victim should be allowed to participate in the criminal appeal.

### **Analysis and Determination**

7. It is now well appreciated that the law in our country recognizes the place of victims in a criminal trial. The rights of a victim in a criminal trial are enshrined by the *Constitution* under Article 50 as follows:-

- "(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
- (9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."

8. The *Victim Protection Act* No 17 of 2014 was enacted to give effect to Article 50 (9). The relevant section of the Act in respect of this Application is section 9 which provides thus:-

- "1. A victim has a right to-
  - a. be present at their trial either in person or through a representative of their choice;
  - b. have the trial begin and conclude without unreasonable delay;
  - c. give their views in any plea bargaining;
  - d. have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;
  - e. be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;



- f. have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and
  - g. be informed of the charge which the offender is facing in sufficient details.
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.
  3. The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf."
9. In Petition No 23 of 2019 Joseph *Lendrix Waswa vs Republic (supra)* the Supreme Court recognised the need to protect victims in criminal trials in line with the [Constitution](#) and the [Victim Protection Act](#) as follows: -
- “63. The emerging picture therefore, is that the criminal justice processes should empower victims and that their voices should be heard –not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the cause.....
  - 70. ....A victim can participate in a trial in person or via a legal representative. So then, who determines the manner and extent of a victim’s participation in a trial?
  - 71. Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim’s views and concerns, their impact on the accused person’s right to a fair trial, and subsequently, in the judge’s discretion, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.”
10. The principle that emerges from the above decision is that the court may allow a victim in a criminal trial as long as the court takes into account the rights of the accused person and ensures a just and expeditious determination of the case.
  11. A perusal of the Record of Appeal reveals that Counsel for the Complainant was present in court and participated during the trial. I note that when the Appeal was withdrawn before the Deputy Registrar, it was Counsel for the Complainant who brought the same to the attention of the Court thus necessitating an Application for reinstating of the Appeal.



12. The Court is now called upon to determine whether the filing of submissions by the Complainant's Counsel amounted to a usurpation of the powers of the DPP under Article 157 of the Constitution. In the above-cited case of *Joseph Lendrix Waswa vs Republic (supra)* the Supreme Court outlined the principles governing the participation of victims in criminal trials thus: -

- 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."

13. The overriding objective of the courts should be to ensure fairness and justice in any criminal trial. This means that a determination on the extent of participation of a victim either personally or through their representative should be considered through the above parameter. At the same time, the court must determine whether such participation would contravene or override the role of the State which is independently represented by the ODPP.

14. In the case of *Gideon Mwiti Irea vs. Director of Public Prosecutions & 7 Others* Petition No 151 of 2015; [2015] eKLR, the court held that: -

"...As stated earlier, a victim can participate either in person or through an advocate. To my mind therefore, nothing stops an advocate from drawing up affidavits when he or she is



representing a victim in criminal proceedings. Such actions do not in my view amount to investigation of a crime and therefore usurping of the mandate of the 2<sup>nd</sup> Respondent.”

15. In the present case, Counsel watching brief for the complainant filed submissions which are now on Record. It is this action of filing submissions that counsel for the state objected while arguing that it amounted to usurping of the role of the ODPP. In my considered view however, the filing of submissions does not amount to usurping the role of the ODPP as such an action cannot be an interference with the independence of the DPP. I say so because the filing of submissions by the Complainant’s Counsel does not in any way prejudice the Respondents who were the Accused persons. In any event, submissions are not binding on the court as they are merely the opinion of the respective advocates intended to persuade or guide the court in arriving at a decision. Indeed, submissions only exist for purposes of aiding the Court to arrive at a fair and just determination.
16. In the circumstances of this case, I find that there is nothing hindering the ODPP from filing its submissions upon considering the merits and demerits of the Appeal. If anything, the effect of filing of submissions by the victim’s Counsel will be to speed up the appeal process in the interests of justice to do.
17. In conclusion, I find that the oral application to expunge the victim’s submissions is not merited and I hereby dismiss it.
18. I direct the ODPP to expedite the appeal by filing and serving its submissions within 21 days from the date of this ruling. The Respondents will in turn file their submissions within 21 days after service by the ODPP.
19. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**W. A. OKWANY**

**JUDGE**

