



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 4 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIRUGI MWANIKI.....ACCUSED

RULING

1. This ruling is on an objection on admissibility of evidence namely the statement of one Sergeant Gideon Maruti that the 1st accused attempted to produce during the hearing of the defence case.
2. Ms Mwaniki the prosecution counsel raised an objection against tendering of the statement in evidence on ground that the document is not admissible under Section 33 of the Evidence Act and that a document requires to be produced by the maker.
3. Mr. Ndichu holding brief for the victims supported the objection and added that the defence has not shown that they have made any effort to trace the said witness.
4. Mr. S.K Njuguna for the accused persons attacked the objection on grounds that the prosecution failed to call the witness who recorded the said statement and who was the investigating officer in the case for the reason that his evidence was exonerating the accused persons. Further that the prosecution who said the witness had retired from the police service and went to his home at the Coast could not be traced. It was further argued that if the prosecution were willing, they would have used the information in their officer's record to trace him. Mr. Njuguna said that the defence came into possession of the said statement in the course of the trial for they were supplied with the bundle of the witnesses statements at the commencement of the trial. As such the statement could be used by the defence without any objection by the prosecution.
5. **Section 33 of the Evidence Act** provides for admissibility of statements of witnesses who cannot be called as witnesses and sets out categories under which such evidence may be admitted. The categories are as follows:-
 - a) relating to cause of death;
 - b) made in the course of business;
 - c) against the interests of the maker;
 - d) an opinion as to public right or custom;
 - e) relating to existence of relationship;
 - f) relating to family affairs;
 - g) relating to a transaction creating or asserting e.g a custom;
 - h) made by several persons expressing feelings;

6. It is trite law that documents be produced by the maker save for instances where the law gives exemption. This law refers to documents made by experts forming an opinion about a certain issue to be determined by the court. The Advanced Law Dictionary describes a document as:-

“anything serving as a representation of a person’s thinking by means of symbolic marks.”

7. Pursuant to the said definition of the word “document” I am not convinced that the statement of a witness can be referred to as a document so as to be defined in the application of primary and secondary evidence under the Evidence Act. The statement of a witness is recorded evidence of the said witness for purpose of being used among that of others in proving a case before the court. As such a witness statement does not fall under the description of a document. Essentially, it is different from opinions of experts such as medical, ballistic and government chemist reports.

8. I have considered the provisions of Section 33 of the Evidence Act and in my considered view it refers to dying declarations that may admissible in evidence in a murder trial. The categories set out under the said provision do not include the kind of evidence the accused persons intend to produce. I do not find Section 33 to be applicable to the case before me.

9. It is imperative to look at the law relating to supplying accused persons with witness statements and all documentary exhibits before commencement of the trial.

Article 50 of the Constitution provides:-

(2)Every accused person has the right to a fair trial which includes the right to a fair trial which includes the right

j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence:

k)to adduce and challenge evidence;

10. Based on the right to a fair trial granted by Article 50(2) the accused persons in this case were provided with the prosecution’s evidence which include the statement of the Investigating officer that is in issue herein. The accused persons therefore obtained the statement as their right and the same law that gives them the said right also accords them the right to challenge that evidence. The prosecution omitted to call the investigating officer in this case but had already supplied his statement to the defence. I have not been referred to any law that takes away the right of the defence to use any material supplied to them in challenging the prosecution’s evidence.

11. Consequently, I am of the considered opinion that the defence have a right to use the material supplied to them in exercise of their right under Article 50(2) of the Constitution.

12. I reach a conclusion that the objection raised against the admissibility of the statement of Sergeant Gideon Maruti in evidence is not merited.

13. The objection is hereby rejected and the statement declared admissible in evidence of the defence.

14. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 23RD DAY OF FEBRUARY, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 23RD DAY OF FEBRUARY 2022