



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. E001 OF 2022

AHMED ABDULLAHI MAALIMACCUSED

VERSUS

REPUBLIC RESPONDENT

RULING

1. The accused, *Ahmed Abdullahi Maalim*, faces a charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The particulars are that on 22nd December 2021 at around 19:30 hours at Nur Hotel and Restaurant along Muyuyu Street, Eastleigh in Starehe Sub-county within Nairobi County, he murdered *Abdi Nasir Abdullahi*.

2. The accused was arraigned in court on 27th January 2022. He pleaded not guilty to the charges. The trial commenced on 28th March 2022 and four prosecution witnesses have already testified.

On 29th March 2022, when the case was scheduled for further hearing, the defence counsel, *Ms. Kalii*, raised an objection to the taking of evidence from one, *Abdi Rashid Abdul* who was scheduled to testify as PW4. The objection was based on grounds that the defence had not been supplied with his witness statement.

3. Learned Prosecuting Counsel, *Ms Ogwen*, in response, informed the court that PW4's testimony only related to production of a document which had already been supplied to the defence; that he did not therefore need to record a statement as his evidence would be confined to production of the agreement contained in the document he intended to produce in evidence as an exhibit. She averred that the witness was competent and was exempted from recording a statement by *section 35* of the *Evidence Act*.

4. *Ms Kalii*, in response, submitted that PW4 was not an expert witness and that there was no law which exempted a party to an agreement from recording a witness statement. She urged the court not to allow the witness to testify since the defence had not been furnished with his witness statement as required by the law.

5. On his part, *Mr. Manwa* for the victim's family associated himself with the submissions made by the learned prosecuting counsel. He asserted that the defence had been served with the document the witness was supposed to produce in evidence. He averred that there was no requirement, express or implied, under the law, directing that an author of a document needed to record a statement before they testified on the contents of the document. He submitted that the objection by the defence counsel was not founded on any legal provision.

6. I have considered the objection by learned counsel *Ms. Kalii* as well as the oral submissions made by learned counsel *Ms. Ogwen* and *Mr. Manwa* in opposition to the objection. I find that the only issue for my determination is whether the objection as raised is merited.

7. In determining the objection, I find that *Article 50 (2) (j)* of the *Constitution* is relevant. This article guarantees an accused person a right to be informed in advance of the evidence to be relied on by the prosecution during the trial and to have reasonable access to that evidence.

8. The prosecution's duty of disclosure was discussed by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley V Republic, [2008] eKLR*. The court noted that the prosecution is required to provide an accused person in advance of the trial with "all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

9. Further, in the persuasive authority of *Dennis Edmond Apaa & Others V Ethics & Anti Corruption Commission, [2012] eKLR* the court (*Majanja J*) 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. The right of an accused person to be informed in advance of the evidence to be adduced by the prosecution during the trial is one among the cluster of rights guaranteed under Article 50 (2) of the Constitution intended to ensure that accused persons are accorded a fair trial. These rights should be read together as a whole not in isolation.

11. However, it is important to note that the right of an accused person to a fair trial must be balanced with the victim of the offence's right to access justice and the public interest generally. This was the import of the Court of Appeal's decision in ***Kamau Mbugua V Republic, [2010] eKLR*** where the court stated as follows in respect of an accused's right to a fair hearing within a reasonable time:

“The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions. ”

12. Ngenye J in ***Robert Muli Matolo V Republic, [2015] eKLR*** when faced with a situation similar to the one prevailing in this case with regard to PW4's evidence stated as follows:

“Where a witness is intended to adduce evidence that analyses a crucial document that shapes the prosecution's case, no excuse can be tenable that the witness ought not to record his statement. This may however exclude statements of obvious witnesses who produce documents such as Medical Examination Reports (P3 Forms), Treatment Notes and Post Mortem Reports. The scenario presented by the present case is such that PW3 would analyse the mobile phone call data from the accused's phone. His evidence would not be tendered in court in a flash of a second. He would give a detailed account of the information in the data report and what conclusions he arrived at. That is evidence that cannot be wished away or assumed. Simply said it was important that he recorded his statement. In the absence of his statement, the expert report (data analysis) ought to have been furnished to the defence at the commencement of the trial, or, as ordered by the court, before PW3 testified.”

13. Similarly, in the present case, I do not find any reason that would justify the prosecution's argument that it was not necessary for PW4 to record a witness statement before he was put on the witness stand on grounds that the agreement he was to produce in evidence had already been availed to the defence. Although it is not disputed that the said agreement had already been furnished to the defence, I find that no prejudice would be occasioned to the witness, the prosecution or the victim's family if PW4 was to record a statement to lay a foundation for his intended production of the agreement as an exhibit. It is not reasonable to expect that the witness will just produce the document in evidence without saying anything about it. Contrary to Ms Ogwen's submissions, Section 35 of the Evidence Act is not applicable to the scenario necessitating the defence's objection. The provision deals with admissibility of evidence in civil proceedings and is totally irrelevant to the matter at hand.

14. Having found as I have above, it is my finding that the interests of justice in this matter would be better served if PW4 was ordered to record a witness statement which would be served on the accused person's learned counsel well before PW4 was called upon to testify in the trial. This would give the defence an opportunity to prepare to challenge PW4's evidence when he eventually testifies to eliminate any possibility of an ambush on the defence.

15. It is my considered view that the fact that PW4 had not recorded a witness statement before he was put on the witness stand did not make him an incompetent witness to warrant issuance of an order barring him from testifying in support of the prosecution case.

The defence has not advanced any reason to challenge the competence of PW4 as a witness other than the fact that he had not recorded a witness statement prior to the date he was meant to testify. As I have stated above, that is not a good reason to declare any witness incompetent. It is my finding that PW4 is a competent witness within the meaning of section 125 of the Evidence Act and there is no legal basis for barring him from testifying in this case in support of the prosecution case.

16. Consequently, I disallow the defence's objection but in the interests of dispensing substantive justice, I order that PW4 shall record his witness statement in the next 14 days which shall be served on the defence thereafter and in any case not later than 30 days from today's date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kalii for the accused

Ms Ogweno for the state

Mr. Manwa for the victim's family

Ms Karwitha: Court Assistant