



**Republic v Mwangi; Victim’s Family (Widow & Children) & 2 others (Interested Parties)
(Criminal Case 46 of 2017) [2022] KEHC 11031 (KLR) (Crim) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CRIMINAL
CRIMINAL CASE 46 OF 2017
JM BWONWONG’A, J
MAY 25, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID MUCHIRI MWANGI ACCUSED

AND

VICTIM’S FAMILY (WIDOW & CHILDREN) INTERESTED PARTY

VICTIM’S FAMILY (FAMILY & SIBLINGS) INTERESTED PARTY

LAW SOCIETY OF KENYA (BROTHERS & PUBLIC) INTERESTED PARTY

RULING

The submissions of the 2nd and 3rd interested parties

1. Counsel for the 2nd and 3rd interested parties (Mr. Omari and Mr. Ongaro, respectively) made a joint submission in support of their oral application dated November 16, 2021 to be allowed to make opening speeches and to cross examine witnesses.
2. They have submitted that section 4 (2) (b) of the *Victims Protection Act* (hereinafter referred to as VPA) grants a victim the right to be heard in criminal proceedings before any decision affecting them is made. Additionally, section 13 of the VPA allows a victim to adduce evidence either in person or through an advocate.
3. Furthermore, they cited decision of this court (Aroni, J) in *Republic v Joseph Lendrix Waswa*, Criminal Case No. 34 of 2014, (2014) e-KLR, in which that court granted limited participation to counsel for the victims in respect of the following stages.



1. At the close of the prosecution case on the issue whether the accused has a case to answer.
 2. Final submissions if the accused is put on his defence.
 3. On issues of law arising in the course of the trial.
 4. Upon application at any stage of the trial for consideration by the court.
4. This decision was upheld by the Court of Appeal and the Supreme Court.
5. Counsel also cited the decision of this court (Kimaru, J) in *Mary Kinya Rukawaru v Raghunathan & another* (2014) e-KLR, in which that court observed that article 50 (7) of the *Constitution* of Kenya grants to the court the powers to allow a complainant to communicate to the court through an intermediary. That court further observed that section 9 (2) of the *VPA*, 2014 grants to a complainant in criminal cases, a right of audience before the court in the course of the trial to make representations. They pointed out that section 9 (2) *VPA* sets out the scope of the victim’s participation as shown below herein below in this ruling.
6. Furthermore, counsel cited *Republic v Veronica Gitabi & PC Issa Mzee*, Criminal case No. 41 of 2014, in which that court held the VPA allows the advocate for the victim to address the court only on matters of law. Additionally, they also cited the Indian case of *Sathyavani Ponrani v Samuel Raj* [CRL O.P(MD) No. 5474 of 2010, in which that court observed in part that:
- “The public prosecutor conducts the prosecution whereas a victim ventilates his grievance. A public prosecutor conducts the case with a sense of detachment whereas the victim is attached to the case. A decision made in a case does not impact a public prosecutor which is not the case with the victim who is the affected party.”
7. Counsel further submitted that cross examination by the advocate for the victim does not supplant the rights of the accused to a fair trial.
8. Additionally, counsel also submitted based on the decision of this court (Lesiit, J) in *Republic v Fredrick Ole Leliman & 4 others* (2016) e-KLR, that “counsel for the victims shall if necessary examine the prosecution witnesses immediately following examination in-chief by the prosecution and before the defence.”

The submissions of the 1st interested party.

9. Messrs Kago & Company advocates filed written submissions in response to those of the 2nd and 3rd interested parties. They cited section 4 (2) (b) of *VPA* and proceeded to submit that a victim has a right to be heard in criminal proceedings before any decision affecting them is made.
10. Based on section 9 (2) of the *VPA* counsel submitted that the views and concerns of the victims can be presented at the stage of the victim impact assessment stage and an advocate holding a watching brief can only be an assistant to the public prosecutor. The watching counsel liaises with the public prosecutor in a gentleman’s agreement on how best to bring out the truth.
11. Based on the provisions of the VPA counsel has submitted that the application of counsel for the 2nd and 3rd interested parties lack merit and they cannot be allowed to make an opening speech or to cross examine witnesses; because there are no issues that affects them directly.
12. Furthermore, based on *Republic v David Muchiri Mwangi*, HCCCR No. 46 of 2017, counsel submitted that the court can only allow them limited participation through their advocates. Counsel



also cited *Republic v Joseph Lendrix Waswa*, supra. They further submitted that the advocates for the 2nd and 3rd interested parties are not secondary prosecutors and can only participate where such participation touches on issues affecting their clients.

13. Counsel further submitted that that this is not an inquest and as representatives of the victims they have no right to impeach the prosecution witnesses, some of whom are their clients.
14. Additionally, counsel has also submitted that counsel for the 2nd and 3rd interested parties have not demonstrated how the rights of their clients (victims) will be affected and/or prejudiced if they are not allowed to cross examine witnesses and/or make an opening statement at this stage. The participation of the victims is not an omnibus participation as alluded to by counsel for 2nd and 3rd interested parties.

The submissions of the accused

15. Dr. Khaminwa for the accused has submitted that by virtue of the Constitutional provisions and the VPA, 2014 victims have a right to participate in criminal proceedings. He further submitted that the participation of the victims should be qualified and should be exercised upon meeting certain conditions. The parameters of the victim's participation during trial are set out in section (9) (1) and (2) of the VPA. section 9 (1) provides that:

“ A victim has a right to –

- (a) be present at the 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 the law decided in a fair hearing before a competent authority or, another independent and impartial tribunal or a 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 detail.

Sub-section 2 provides that:

“ 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.”

16. Counsel further submitted that the participatory rights of the victim are closely related to the rights of the accused to a fair and expeditious trial. They should be granted in a judicious manner which does not cause undue delay in the proceedings.
17. Counsel cited the decision of the Supreme Court in [Joseph Lendrix Waswa v Republic](#) (2020) e-KLR, which sets out the guidelines that govern participation by the victim in criminal proceedings. Those guidelines are as follows:

“Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under section 3 of the Supreme Court Act as the court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:

- “(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 no occasion an undue delay in the proceedings;
- d. the victim’s representation 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 question and should ensure that neither the victim nor the accused are 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 representation understands that prosecutorial duties remains 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.” Counsel finally submitted that article 157 of the Constitution creates the independent office of the Director of Public Prosecutions (DPP) and that the victim’s participation cannot be active and parallel to that of the prosecutor. In that regard, the Supreme Court in *Joseph Lendrix Waswa v Republic*, supra, held that:

“We agree this view and adopt it as the correct position in law. We are of the view that the victim has no right active role in the decision to prosecute, or the determination of the charge upon the accused will finally be tried. This is the sole duty of the DPP. While the victims of a crime can participate at any stage of the proceedings as deemed appropriate by the trial judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the Constitution and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

18. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9 (2) (a) of the Victims Protection Act, victims are assisting the trial judge to obtain a clear picture of what happened (to them), and how they suffered, which the Judge may decide to take into account. Victims participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean the court’s Judgement will follow the wishes of the victims, the trial Judge will, of course, take into account the law, facts, all different interests, and concerns, including the rights of the defence and the interests and of a fair trial to arrive at a sagacious decision.”
19. Furthermore, counsel has submitted that allowing a victim to cross examine witnesses is tantamount to allowing him to wear the hat of a secondary prosecutor.
20. Counsel has therefore submitted that counsel for the 2nd and 3rd interested parties should not be allowed to make opening speeches and to cross examine witnesses.
21. He has therefore urged the court to dismiss the application dated November 16, 2021.

Analysis and determinations

22. I have considered the submissions of the parties and the authorities cited in the light of the applicable law. As a result, I find the following to be the issues for determination.
 1. Whether counsel for the 2nd and 3rd victims have a right to make opening speeches at the start of the trial.
 2. Whether counsel for the 2nd and 3rd victims have a right to cross examine the prosecution witnesses.



Issue 1

23. I find that counsel for the victims do not have a right to make opening speeches for the simple reason that it does not directly affect their clients. The making of opening speeches which has its origin in the English jury system was and still is the preserve of the public prosecutor which essentially informs the court theory of the prosecution case. It is only those decisions that directly affect the victims that warrant the participation of counsel for the victims. For instance, the victim impact statement during sentencing of a convicted person in terms of section 329C and 329D of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya, is an example of a matter that directly impacts upon the victims. Another example of matters that directly impacts victims is in relation to bail matters in which they have a right to participate.
24. Allowing the victim or through his counsel to make an opening speech is tantamount to allowing him to be a secondary prosecutor; which is legally impermissible.

Issue 2

25. I find as persuasive decision of this court (Lesiit, J as she then was) in [Republic v Fredrick Ole Leliman & 4 others](#) (2016) e-KLR, that “counsel for the victims shall if necessary examine the prosecution witnesses immediately following examination in-chief by the prosecution and before the defence.” This is necessary to safeguard the fair trial rights of the accused which include a speedy trial. Furthermore, I find that counsel for the 2nd and 3rd victims have no right to cross examine witnesses called by the prosecution. If counsel is allowed to cross examine the witnesses, this might lead to impeaching the credibility of the witnesses, some of whom might be the victims, whom they are representing in court. If they were to do so, they will be assuming the role of the advocates for the accused; which is legally impermissible.
26. In the premises, the application dated November 16, 2021 fails and is hereby dismissed in its entirety.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF MAY 2022.

J. M. BWONWONG’A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant.

Ms. Maina for the Republic.

Mr. Omollo holding brief for Dr. Khaminwa (S.C.) for the accused.

Mr. Ongaro for Law Society of Kenya and siblings.

Ms. Wango holding brief for Mr. Kago for the widow and children.

Mr. Omari and Mr. Masaki for the parents

