



Director of Public Prosecutions v Maero (Criminal Case E011 and E012 of 2022) [2022] KEHC 11431 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E011 AND E012 OF 2022
WM MUSYOKA, J
JULY 28, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

FERINE PINQUETT MAERO ACCUSED

RULING

1. When this matter came up for hearing yesterday, Ms Kagai, prosecution counsel, raised a preliminary issue with respect to the participation of Mr Malenya, as an advocate for the defence, in the proceedings. She asked that Mr Malenya disqualify himself from acting for the accused person.
2. The background to that application, according to Ms Kagai, is that there was an inventory that was prepared on March 8, 2022, at about 5.00 PM, by the police officers who were investigating the matter. The inventory related to items taken from the scene of crime, and which form part of the evidence that the prosecution intends to rely on. The inventory was signed, by among others, some police officers, Mr Malenya, and members of the families of the deceased and the accused. She cited the decision in *Maina Njenga v Republic* [2017] eKLR (Ngenye-Macharia J), where it was held that where an advocate found himself in a position where he might be called as a witness, whether by the prosecution or the defence, because he was at the scene of the crime, there would be a conflict of interest, he cannot, thereafter, act as an advocate for the accused. She submitted that there was need to balance the right to legal representation with a situation where there is a conflict of interest. She stated that the prosecution had no issue with Mr Malenya, until she perused the police file, in the course of preparing for trial, and established that he was at the scene of crime, and had signed the inventory, and a conflict of interest scenario had arisen, as he could be called as a witness by either side.
3. Dr Malala, appearing for the family of the victim, supported that application. He asserted that Mr Malenya should have disclosed that witnessing role that he played at the scene. He said if defence counsel is called as a witness, it would embarrass the court, and put the trial in an awkward position.



4. Mr Malenya said that the application was an ambush, and was being made solely to ensure that the trial did not take off. He stated that when he was instructed to take up the matter, the accused had already been arrested, and his presence at the scene was on instructions, and that he had made it clear to the investigating officer that he was there in his capacity as an advocate. He said it was post the fact. He submitted that *Maina Njenga v Republic* [2017] eKLR (Ngenye-Macharia J) was distinguishable, as his presence at the scene was different from that of the advocate in that case, who was at the scene of the arrest of the accused, and he was asked by the police to record a statement, with intent that he be called as a prosecution witness. Mr Malenya said that he was not required to record a statement by the police.
5. An inventory is defined in the *Concise Oxford English Dictionary*, Oxford University Press, Twelfth Edition, 2011, Oxford, 747, as “a list of what is found.” The purpose of an inventory was stated, in *Stephen Kimani Robe and Others v Republic* [2013] eKLR (Muchemi J), to be the keeping a record of exhibits recovered during an investigation. It was said, in *Jacob Kinyua Njeru & another v Republic* [2017] eKLR (T. Matheka J), that an inventory of whatever is found on the suspect is made and signed as a way of authenticating the said recovery; and in *Hassan Jilo Bwanamaka & another v Republic* [2015] eKLR (Muya J), that signing an inventory does not necessarily mean that the items in question belong to the signatory, but that they have been recovered in his presence.
6. Does the signing an inventory by an advocate for the defence amount to a conflict of interest? The *Code of Standards of Professional Practice and Ethical Conduct* (Gazette Notice 5212 of 26th May, 2017) for the Law Society of Kenya provides as follows on conflict of interest:

“The advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflict of interest, unless he/she makes adequate disclosures to the client(s) and obtains the client’s consent...

A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interest or by the Advocate’s duties to another current client, former client or a third person.”
7. It has been established that persons who sign an inventory confirm or authenticate that the items listed therein were recovered or taken from the suspect. Such an inventory could be put in evidence by the prosecution as an exhibit to support its case against the accused. There is, therefore, likelihood of the signatories to the inventory being examined on its contents or the manner of its procurement, either by the prosecution who would be relying on it, or the defence, who would be questioning the authenticity of the inventory. This may require the signatories to testify on its substance and the process of its making.
8. Would that create a conflict of interest for Mr Malenya? It would. The inventory is an investigation instrument or tool for the police, part of evidence gathering, and it is material that may be put in evidence by the prosecution as part of its case against the accused person. By signing or appending his signature to a document, which is part of material that the prosecution may rely on, Mr Malenya unwittingly put himself in a position of a potential prosecution witness, by literally offering himself to be a prosecution witness, which conflicts with his role as advocate for the accused person in the defence. It created, on the part of Mr Malenya, something of duty to the prosecution, which is adverse to his obligations to the defence. He authenticated a document that could potentially be used in evidence adversely against his client. To put it bluntly, in a sense, he aided the police in gathering evidence against his client. His position, with regard to that inventory, is adverse to the interests of the accused person.



9. An advocate being a witness in a matter is addressed in rule 8 of the Advocates (Practice) Rules, 1966, made under the Advocates Act, cap 16, Laws of Kenya, which provides that: -

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

10. Rule 8 of the Advocates (Practice) Rules envisages two scenarios. One, where the advocate has reason to believe that he may be required to give evidence as a witness. This would apply to a situation where the advocate has not yet been required to give evidence, but there is a possibility of his being required to do so. Two, it would apply where it becomes apparent that he will be required as a witness, from the goings on in the matter in which he is acting. The instant matter falls under the first scenario, that there is possibility of being called as a witness. Mr Malenya signed the inventory, and by so doing he put himself in a position where there is a possibility that he could be called as a witness by either side. Put differently, by appending his signature to the inventory, he created the possibility of his being called as a witness.
11. It was said, in *Gobel Himatsingh Lakhaji vs Patel Motilal Garbardas And Ors. [1965] 6 GLR 531* (Mehta J), that a person, who is appearing as counsel, should not give evidence as a witness, and that, if, in the course of the proceedings, it is discovered that he is in a position to give evidence, and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity.
12. I find merit in the application by Ms Kagai. Mr Malenya is a potential witness in the matter, either for the prosecution or the defence. Whether the prosecution will, in fact, call him, as such, is neither here nor there. Whether the defence calls him, as such, will depend on how the case for the prosecution pans out, with regard to what it does with the inventory, and if it does not call him as its witness. It puts him in a conflicting position, between his duty to the prosecution and his role as an advocate for the defence. He has not chosen to recuse himself from the matter, after the issue was raised, and, in the circumstances, I shall have to make the decision, that he should not, and shall not, continue to represent the accused person or act as an Advocate for the defence in this matter, which I hereby do.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JULY, 2022

WM MUSYOKA

JUDGE

Mr Erick Zalo, court assistant.

Ms Kagai, instructed by the Director of Public Prosecutions, for the republic.

Mr Kituyi and Mr Malenya, advocates for the accused person.

Dr Malala and Ms Mburu, advocates watching brief for the family of the victims.

