



REPUBLIC OF KENYA



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**Republic v Ndinda & 2 others (Criminal Case 8 of 2018)
[2022] KEHC 10949 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 10949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 8 OF 2018
MW MUIGAI, J
AUGUST 3, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

MARTIN MUTUNGA NDINDA 1ST ACCUSED

JOSEPH WAMBUA MANYOLE 2ND ACCUSED

JAMES NZAU KITAVI ALIAS KITOKO 3RD ACCUSED

RULING

Court Record

1. The Accused persons herein Martin Mutunga Ndinda, Joseph Wambua Manyole and James Nzau Kitavi alias Kitoko are charged jointly with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. In the Information, the particulars of the offence are that on the 12th/13th day of February, 2018 at Kituluni Trading Centre in Matungulu sub-County within Machakos County, they murdered Nicholas Mwendwa Muteti.
3. Plea was taken on 29/01/2019 after mental assessment report of 14/5/2018 confirmed that the Accused persons were fit to plead. The offence and particulars of the offence was read to all the three Accused persons denied the charges. Plea of Not Guilty was entered for the three Accused persons on the charges.
4. Mrs Kingoo Advocate represented the 2nd Accused Person while Mr. Mukula Advocate represented the 1st and 3rd Accused persons.



5. The hearing commenced before Hon. D. Kemei J on 22/3/2018 and heard 2 witnesses, PW1 & PW2. Under Section 200-201CPC the Accused persons sought that the trial proceeded from where it stopped. On 5/5/2022, the Court heard the evidence of PW3 and adjourned to 13/7/2022.

Proceedings

6. On 13/07/2022 this matter was coming for further hearing. The Proceedings were as follows in part; Mr. Mutinda holding brief for Mr. Mukula for the 1st and 3rd accused – present in Court: Mr. Mukula has not received the Government Analyst's Report.
- Mr. Mwangera ODPP/Prosecutor: We have the Government Analyst in Court and are ready to proceed. Mrs Kingoo for the 2nd accused is aware and is around. We are going to supply the copy of the Government Analyst before the hearing and directions shall be taken thereafter.

Court: Further mention at 11.00 a.m.

7. Later: Mr. Mukulu for the 1st and 3rd Accused person:
- I have been supplied with the Government Analyst Report. We are opposed to the same being introduced at this stage and relied upon by the Prosecution at this stage for the following reasons:-
- a. The Report is being introduced after 3 Prosecution Witnesses have testified.
 - b. When we took Pre-Trial directions on 9/07/2020 the Prosecution indicated that they were relying on investigating Officer Statements and Post Mortem Report only and that is what was supplied to me then.
- Court: The record of 9/07/2020 shows a different position. Court reads out the proceedings of 9/07/2020 is a mention only.
- c. The Statement of the Investigation officer does not refer to the Government Analyst Report but only states that they took exhibits and kept them in the safe custody. They never took anything to the Government Chemist.
 - d. Finally, it is the Accused person's right to be supplied with Prosecution evidence within reasonable time and for purposes of preparing the Defense and that position has a Constitution backing in Article 50(2) CoK 2010.
8. Mrs Kingoo for the 2nd accused:
- The Report was given to us about 10 minutes after the Court took a break. There are various exhibits. When we received the Report we spoke to ODPP and reminded him the exhibits were not identified by witnesses who testified and there are only 2 more remaining witnesses who are Police Officers. It is my view that the Report should be read, understood and consultation made in relation to the Accused person(s) who is affected by the Report for his/their views be taken before the witness testifies. The Report should be compared with what has been supplied with/by the Prosecution. In the event the Court allows the production of the Report, personally I will need to cross check the Analyst Report with the statements/reports produced and be able to adequately represent the Accused in the case. Litigation should be about ensuring at the end of the day every party in the proceeding and each party including one who is not represented by Counsel to go home feeling that they have been heard and given adequate time to prepare.
9. ODPP/Prosecutor – Mr. Mwangera:



With regard to Government Analyst Report dated 30/09/2019; it was indeed supplied to Defense Counsel during the break before the Court resumed. The duty of Prosecution is to ensure all Statements and Documents are supplied to the Defense. It is a continuous duty and not timebound. Any evidence to be relied on provided the evidence is supplied in time the evidence can be used in Court as long as sufficient time is given. My previous colleague who had led the matter conducted Pre-trial on 29/01/2019 and 10/04/2019. Going by Court Record the Trial Court granted bond vide Ruling of 30/09/2019 by Hon. D. K. Kemei – J. The Accused persons were granted bond on 9/12/2019 and hearing was set on 28/04/2020. Before the hearing date was granted, the elephant in the room is whether the Court will grant the Defense room to scrutinize the Report and then proceed with the matter after time is granted. The evidence is still admissible. We are willing to adjourn and allow the Defense adequate time and obtain another hearing date. No prejudice is suffered. The key issue is to ensure that justice is served to all.

10. Mr. Mukulu:

The supply of Prosecution evidence is not a continuous process nor should it be done in instalments. It is our submission that supply is a one-off event and the same should be done before commencement of the Prosecution case. Lastly introducing evidence in between the prosecution case is tantamount to an ambush.

11. Mrs Kingoo:

I associate with submissions of my colleague. The cross examination is done so far and we will not have opportunity to cross-examine again. We relied on the evidence on record and we formed an opinion of our case and its determination or approach of our case. There will be colossal damage. In view of that and the Prosecution has had the Report and no reasons was given why the Report was not supplied the Report should be disallowed. The Analyst Report will seriously prejudice our case and client's rights.

12. Court:

This is an issue that requires the Court to peruse the Court file and familiarize itself with what transpired as this Court has taken over the conduct of the matter from the previous Trial Judge.

13. The submissions raised by Defense of the Government Analyst- Report require the Court to address the issue exhaustively. At this point the Government Analyst is released and will not testify today. Ruling on the matter will be on 28/07/2022.

Determination

14. The issue for determination is whether the Government Analyst's Report may be admitted as evidence and/or the Government Analyst should testify and produce the exhibits and his expert opinion to the Court.

15. The burden of proof and standard of proof are established by Section 107-111 of the *Evidence Act*. The burden of proof remains with the Prosecution throughout the Criminal Trial to prove its case beyond reasonable doubt. The Defense has the burden of proof only to the extent of evidence within the Accused person(s) knowledge but not incriminating evidence.

16. The Prosecution is therefore at liberty to produce in Court evidence in support of the charges preferred against the Accused person(s) but in accordance with *the Constitution* 2010 and subsidiary legislation as interpreted by Case-law.

17. In the instant proceedings, the question raised by the Defense is that the Government Analyst was called by the Prosecution to testify and produce the Government Analyst Report on the same day



on 13/7/2022 when the said Report was produced and copies availed to the Defense Counsel for the Accused persons and the Public Defender was ready to proceed.

18. The Defense raised a combined Preliminary issue that the Government Analyst Report was not mentioned before commencement of Trial and after the Court heard 3 witnesses the issue was raised for the 1st time on the said day and the Proceedings were underway to take evidence of the Government Analyst.
19. This Court confirmed from the record that the hearing commenced and 2 witnesses testified and this Court heard PW3 and the Prosecution has not yet closed its case.
20. The Defense claims that they were ambushed by production of the Government Analyst Report, the Government Analyst as witness to testify all on the same day and time without advance notice or information. This fact is borne out by the Court record /Court proceedings.
21. The Court Record confirms that before trial the Trial Court granted provision of Witness Statements and relevant documents for Trial and the Defense confirmed that they received the Witness Statements and Post Mortem Report. It can only mean that the Government Analyst Report was not in the Police File.
22. The Defense oppose the production and reliance of the Government Analyst Report and the Government Analyst testimony as it would prejudice their client's cases due to the apparent ambush. The Defense takes the view that they had already prepared for the case and have cross examined 3 witnesses and at no time were they notified of the impending Government Analyst Report.

Legal Basis/requirement

23. In the case of *George Ngodbe Juma & Two Others vs. The Attorney General*, Miscellaneous Criminal Application No. 345 of 2001 (unreported) 2003 eKLR; Hon. Msagha- Mbogholi & R.Kuloba JJ (as they then were) delved into the question of right to a fair trial guaranteed under Section 77 of the repealed Constitution and if it included the prosecution's supply of relevant material in its possession to the Defense in advance at the beginning of the trial. The court found that the party to be tried is made aware of the case to be advanced against him by supply of relevant [statements and documents] by the Prosecution and accordingly prepare his answer to that case.

“It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare at which he is permitted to have the assistance of a lawyer of his choice, a he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgement, a right to argue that a decision be made in accordance with the law and evidence.”



24. In the case of *Thomas Patrick Gilbert Cholmondeley vs Republic* Criminal Appeal 116 of 2007, [2008] eKLR; Hon M. Apondi J (as he then was) held that;

“the Prosecution is now under a duty to provide an accused person with, and to do so in advance of trial, 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...”

25. Article 50 2 (c) & (j) *CoK 2010* provides;

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

(c) to have adequate time and facilities to prepare a defence;

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

26. In the case of *Hussein Khalid & 16 others –vs- Attorney General & 2 Others* [2019] eKLR, the Supreme Court of Kenya stated that;

“... Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defense and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court’s duty to ensure the documents are supplied before commencement of the trial.”

27. Hon J. Ngugi J, in the case of *Republic vs. Francis Muniu Kariuki* [2017] eKLR), stated that:

“Our case law has now established without a doubt that it is the Prosecution’s duty to provide the witness statements to an Accused Person and the Trial Court’s duty to ensure compliance with the constitutional requirement. Article 50(2) (c) and (j) are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one’s defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness’ statements and copies of any documents which will be relied on at the trial.” (Emphasis mine)”

28. In the case of *Joseph Ndungu Kagiri v Republic* Criminal Appeal 69 of 2012 Nyeri High Court [2016] eKLR Hon. J. Mativo stated Pg 6-7;-

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defense and challenge the prosecution’s evidence at the opportune time both in cross-examination and in his defense. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.....

“The case of R v Ward[17] is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, 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 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 the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, “to have adequate facilities to prepare a defense.”

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defense 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 or her defense. This position had also been stated in R v Stinchcombe[18] where the Supreme Court of Canada observed, “The obligation to disclose was a continuing one and was to be updated when additional information was received.”

28. In *Republic vs 241569 PC Keah Nyundo* High Court NBI Criminal Case No E010 of 2021 [2022] eKLR Hon.L.Mutende held that Article 50(2) (j) of *CoK 2010* limits the duty of the prosecution to supply the Defense with what is relevant and what the Prosecution intends to rely on and the Prosecution cannot be compelled to furnish what is not in its possession [at the time of providing statements and documentary exhibits].
29. From the above legal excerpts, it emerges that the law prescribes that the Accused person’s constitutional right to a fair hearing is guaranteed throughout the criminal proceedings. This right includes the right of Accused person(s) to be informed in advance of the evidence to be relied on and to have reasonable access and sufficient time to adequately prepare for the Defense during the Criminal Trial.
30. The Prosecution has a legal duty to disclose evidence to be relied on during the Trial and preferably to be discharged during the Pre-Trial Conference so as to facilitate the Defense to prepare adequately for the Defense during Trial.
31. As elucidated in Joseph Ndungu Kagiri v Republic supra Republic vs 241569 PC Keah Nyundo supra; provision of Witness Statements and documentary evidence being provided by the Prosecution does not mean that ALL witness statements & documents should be availed before Trial commences but if ALL are available ideally then the Prosecution should provide all Witness Statements and Documentary Evidence in their possession during Pre-Trial. On the other hand if ALL Witness Statements and Documentary Exhibits are not available then when they are available the Defense ought to be informed and provided with the said Statement(s) and/or Exhibit(s) expeditiously and sufficient time provided to the defense to enable adequate preparation for the Defense.
32. To the instant case, it is confirmed that the Prosecution provided the Witness Statements and Post Mortem Report at the onset of the Criminal proceedings. The Government Analyst Report and Witness were sprang on the Defense on the Hearing of the Government Analyst testimony and production of the Report.
33. Clearly, the position was/is untenable under the law, the Government Analyst Report ought to have been supplied to the Defense at the earliest opportunity when the Prosecution came into possession of the same and thereafter sought directions on the sufficient time required by the Defense to read understand and consult and prepare adequately on the Defense.
34. The Defense raised the issue of the fact that provision of statements and documentary exhibits being a one-off proceeding during Pre – Trial and therefore disclosure was/is timebound. This Court with



respect differs with the position; as the law provides for disclosure and availability of evidence to be relied on to be in advance before trial, that means that the ideal situation is to have all evidence to be relied on presented in advance. However, the fact of legal duty of law enforcement agencies ought to be factored in; the Police initiate investigations and at completion compiles the Police File and to transmits to the Public Defender/ODPP for perusal and processing to lodge the matter in Court. It is normal and possible to have some reports and/or statements availed later for explained reasons. In such circumstances, the Prosecution cannot provide what is not available or in their possession at the time. Suffice is that observance of the law is paramount, to provide relevant witness statements and documentary exhibits to the Defense in advance.

35. The Defense indicated that production of the Government Analyst Report at this stage would be prejudicial to the Defense.
36. The Court finds that the compliance of Article 50 2 (c) & (j) CoK 2010 shall be upheld; after provision of the Government Analyst Report to the Defense the criminal proceedings are halted to allow and enable the Defense sufficient time to prepare adequately for Defense.
37. The Court also notes that any/all evidence adduced shall be in open Court and in the presence of the Accused persons and such evidence shall be subjected to cross examination to determine veracity of the evidence and credibility of the witness. Section 146 (4) of the [Evidence Act](#) provides for recall of witness (s) and the witnesses who testified and did not identify exhibits may be recalled to do so. All these measures are to ensure a fair trial to the Accused persons and mitigate any prejudice.

Disposition

1. The Government Analyst Report shall be provided to the Defense before the next hearing date.
2. The Defense shall inform the Court what sufficient time/period is required to read understand and consult the clients with a view to prepare the Defense.
3. If the Defense find that recall of witnesses who have testified before production of the Government Analyst Report will reduce /remove prejudice, the Defense application of recall of witnesses shall be considered.
4. Further Mention for Directions on hearing of the matter shall be on 28/9/2022 after the Court recess/vacation.

**DELIVERED DATED & SIGNED OPEN COURT IN MACHAKOS ON 3RD AUGUST 2022.
(VIRTUAL CONFERENCE)**

M.W. MUIGAI

JUDGE

