



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Nzavi (Criminal Case E008 of 2020)
[2022] KEHC 15764 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE E008 OF 2020
MW MUIGAI, J
NOVEMBER 22, 2022**

BETWEEN

REPUBLIC STATE

AND

RICHARD KIOKO NZAVI ACCUSED

RULING

1. The Accused person herein Richard Kioko Nzavi is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars being that the Accused person on the October 20, 2020 at Kilelu village, Kiundwani Sub-location, Kibauni Location, Mwala sub-County within Machakos County at around 1100 hours jointly with another not before Court murdered Johness Nthiwa Kamula.
2. The Mental Assessment Report dated November 25, 2020 and filed in Court on November 25, 2020 found the accused person fit to plead. The Accused person herein took plea on December 14, 2020 whereof after the charges were read out to him in a language that he understood he pleaded not guilty. A plea of not guilty was entered on his behalf.
3. The Accused person was represented by Mr Langalanga Advocate while the State was represented by Mr Mwangera who presented the defense with written statements and list of documents on December 14, 2020.
4. The hearing commenced on May 17, 2022.

Evidence

5. PW1 Anthony Musyoki Kasyoki testified that the deceased herein (Johness Nthiwa Kamula) was his brother. On October 20, 2020 he was at his home at Mwala when the deceased came to his place and later left to go to their mother's place. He later went to the shamba and after 30 minutes their mother



Syovisi Kamula came to the shamba to collect firewood. He was busy digging holes for planting trees when he heard noises and his wife Rosemary came and asked him to go home. On their way he met a neighbour who informed him that his brother Johness Nthiwa Kamula was injured and his wife was giving him first aid. Upon arrival at his brother's place he found his brother on the lying on the ground. He was not talking and was bleeding from the head and the wife was wiping off the blood. His wife, his mother and another brother also came to the scene and they took the deceased to the Kilelu Health Centre.

6. The doctor told him to go and report the incident to Kilelu Police Post. The doctor examined the deceased and asked for the ambulance as the deceased was in a serious condition but he succumbed due to the injuries sustained. They reported the matter to the police. The accused person is a son to one of their brother's named Alex Nzavi. The deceased and Alex Nzavi had problems about the shamba and cattle. That the accused person had taken one (1) cow/cattle from their mother.
7. PW2 Hellen Ndunge testified that the deceased herein was her late husband. On April 15, 2020 around 11.00 am she heard noises from the neighbouring shamba. Her husband was cultivating the shamba on the other side. The neighbour is called Lilian and she is married to Alex Nzavi father the accused person. Lilian (mother of accused) went to where the deceased was and told him that "hakuna kitu nimembakisha kwa hii dunia isipokuwa nikuweke kwa mchanga." And then left off walking towards her house.
8. Her husband informed the Area Chief, the elder brother, their mother and Lilian to deliberate the matter. The administration informed them that they will resolve the issue of threats after corona was over. On October 21, 2020 at lunch time when she went home, her daughter named Mbinya informed her that the deceased is no more. The daughter informed her that their father was killed at the shamba by Timothy and Richard (the accused person). On October 23, 2020 she went to Machakos Funeral Home with other relatives and identified the body. Alex Nzau the accused person is a son of Alex Nzau, brother to the deceased herein. The family did not relate well.

Proceeding with evidence of witness after statement given out shortly before witness testifies.

9. On July 26, 2022 the ODPP called witness No 3 Syovisi Kamula to testify. Mr LangaLanga Counsel for the accused told the Court that the statement of the said witness was supplied that morning, it was not dated and not typed like other witness statements. Counsel for the accused person stated that, proceeding with the witness at that stage would therefore be prejudicial to the rights of the accused person.
10. Mr Mwonjera ODPP/Prosecutor in response stated that the statement of the witness who was placed in the dock is the mother of the deceased and it is due to her old age but not to prejudice the accused person's right that the Witness statement was availed later.
11. No 107248 Cpl Everlyne Naomi Naini of DCI Mwala told the Court that during the time they recorded the other statements they were not able to record the statement of Syovisi Kamula as the witness is old and could not speak in English or Kiswahili and she spoke in Kikamba. They wanted to get a relative from the family to assist them to translate and the said statement was recorded on November 16, 2020 by Cpl David Kibet who is currently retired.
12. Mr Langalanga for the Accused stated he heard the statement of the Investigation Officer and stated that Mwala is in Machakos County and the Police did not need a relative to translate the statement. The police could have obtained a photocopy of the witness statement. He said that he did not know the reason why the copy with the police is dated while the copy with the ODPP is undated hence the



defense felt that the statement/evidence of the witness will not be fair and just to proceed as it will be prejudicial to the accused person herein.

13. After this Court considered the sentiments of the parties it was directed that each party to research on the legal position of the issue and each party to file and serve skeletal written submissions. The hearing with regard to the witness whose statements was questioned was adjourned. Each party was given 21 days to file skeletal written submissions and the witness in the dock stood down.

Evidence continues

14. PW3 Winfred Mwendu testified that on October 20, 2020 at around 10 a.m. she was at her home in Mwala when she heard noises from the neighbour's house by the name Lilian. She saw Lilian sons, Kioko and his brother Timothy at the shamba. Another neighbour by the name Regina Mbithi came to her house and told her that they should go and check what was happening at their neighbour's house. They went to the neighbour's shamba and found Richard and Timothy working and Kamula (deceased) was lying on the ground. The said Kamula (deceased) managed to stand but could not talk and he walked home whereby they followed him. He was injured. They called his brother, Nzioki to take him to hospital. Later on they were told he passed on.
15. PW4 Regina Nduku Musyimi testified that on the material date at around 10.00 a.m, she was at her home in Mwala when she heard loud noises. She saw the deceased on the ground. She and PW3 went to check what had happened. They saw the deceased trying to stand. He was bleeding from the head. They asked him what happened but he walked to his house. They found that he was seriously injured. They sent for his relatives to take him to hospital. On that day she saw Richard the accused person and his brother working at the shamba.
16. On July 27, 2022 this matter came up for mention to confirm filing of written submissions on the issue of admissibility of the statement obtained later.
17. On October 13, 2022 parties confirmed that they have complied with the order of filing the written submission and a Ruling dated fixed.

Written Submissions

State submissions dated September 27, 2022.

18. On whether the prosecution can supply the defense with documentary evidence during trial;
Article 50(2) of the Constitution provides that every accused person has 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.

The meaning to Article 50(2)(j) does not restrict disclosure but rather it directs full disclosure of all the evidence relevant to the trial.

19. The Court of Appeal adopted the dicta in the case of *R v Ward [1993] 2 ALL ER 557* where the Court of Appeal in England was unanimous that;

“The prosecution’s duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them



to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.” [Emphasis added].

20. Also in the cases of [*Juma & Others v Attorney General \[2003\] 2 EA 461*](#), [*Dennis Edmond APAA & 2 others v Ethics and Anticorruption Commission & Anor \[2012\] eKLR*](#), [*Thuita Mwangi & 2 others v Ethic and Anti-Corruption & 3 others \[2013\]*](#).

21. In the case of [*Joseph Ndungu Kagiri v Republic \[2016\] eKLR*](#) the Court stated that;

“This means the duty is cast on the prosecution to disclose all the evidence, material 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 or her defence. 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.”

Accused’s Submissions

20. It was submitted that plea in this matter was taken on July 7, 2021 and pre-trial directions taken whereby the prosecution supplied the defense with witness statements for 6 witnesses.

21. That on July 26, 2021 when the matter came up for hearing the prosecution without leave of Court served the defense counsel with a photo copy of undated hand written witness statement of one Syovisi Kamula.

Article 50(2) of the [*Constitution*](#) provides that every accused person has 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.

20. In the case of [*Joseph Ndungu Kagiri v Republic \[2016\] eKLR*](#) it was held;

“That the failure to provide the Appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2) (j) violated their constitutional rights to fair trial and vitiated the entire trial and it is material that they were ultimately acquitted. The Court went ahead to state that the failure to provide the accused person with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial.”

20. The failure by the prosecution to supply the said witness statement is a violation of the accused’s right to fair trial as enshrined under Article 50(2) (j) of the [*Constitution*](#) and this Court need not permit the said witness to testify.

21. The fact that supply of documents and witness statement by the prosecution is continuous but the same is not subject to abuse by the prosecution.



22. In the case of *Sospeter Odek Ojaamong & 8 others [2019] eKLR* the Court held that;

“That does not mean that the prosecution shall have an open ended cheque to introduce new evidence as they wish at any stage of the proceedings without leave of the court which shall then weigh the application and the implication of necessity of the evidence sought to be introduced against the interest of justice.”

Determination

20. The Court considered submissions on the production of the witness statement of Syovisi Kamula and whether it was prejudicial for the witness Statement to be produced and served to the Defence on the same day and at the time have the witness placed in the dock to testify.

21. The jurisprudence on the legal requirement that the ODPP/Prosecution ought at every trial provide witness statements and list of documents that contain all evidence to be relied on during trial to the Defense; the Accused person(s) and/or the Accused person(s)'s Counsel before trial is settled.

20. In *George Ngothe Juma & 2 Others v The Attorney General Misc Appl 345 of 2001(2003) EA 46*, the Court on fair hearing and service of witness statements & exhibits stated as follows;

“That is what the *Constitution* of Kenya requires, in mandatory terms, the court to do in every case. The accused must be given and afforded those opportunities and means, so that the prosecution does not gain an underserved or unfair advantage over the accused; and so that the accused is not impeded in any manner and suffer unfair disadvantage and prejudice in preparing his defence, confronting his accusers, and arming himself in his defence; and so that no miscarriage of justice is occasioned.

Therefore, in our considered judgment, the provisions of the *Constitution* of Kenya under consideration can have life and practical meaning only if accused persons are provided with copies of statements made to the police by persons who will or may be called to testify as witnesses for the prosecution, as well as copies of exhibits which are to be offered in evidence for the prosecution. This, is not a novel idea.”

20. *Thomas Patrick Gilbert Cholmondeley v Republic[2008] eKLR*, the Court of Appeal observed;

“The question that we shall attempt to answer in this appeal was posed by Mbogholi-Msagha and Kuloba, JJ way back in 2003 in the case of *George Ngodhe Juma & Two Others v The Attorney General*, Miscellaneous Criminal Application No 345 of 2001 (unreported). There, the High Court was asked to rule that the right to a fair trial with regard to criminal matters, guaranteed in article 77 of the Kenya *Constitution* which is the supreme law of the country, of necessity, involved the duty on the part of the prosecution to supply an accused person with all the relevant material in its possession, and to do so in advance of the beginning of the trial so that the party to be tried is made aware of the case to be advanced against him and to accordingly prepare his answer to that case.

The two learned Judges had no difficulty at all in giving a positive answer to the question posed before them, though of course they made certain exceptions and circumstances in which the duty of the prosecution to give an advanced disclosure to an accused person may be excused, such as where the state is claiming public interest immunity. The state did not as far as we are aware, appeal against the decision of the learned Judges of the High Court and in the case of *Thomas Patrick Gilbert Cholmondeley v Republic*, which is the subject of



the appeal before us, the Republic, at the beginning of the trial before Muga Apondi, J, duly supplied the defence with the relevant evidence which it (i.e. the Republic) intended to bring before the High Court in support of its charge of murder against Cholmondeley (hereinafter “the appellant”). We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under article 77 of our *Constitution*, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the 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. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”

20. From the above land mark cases it is mandatory that the State/ODPP/Prosecution should/shall provide Witness statements & list of exhibits before trial. If and when for explained/sufficient and reasonable grounds witness statement(s) are availed during trial then the Defense is legally entitled upon service of the Witness statement to have sufficient time to prepare for the defense and thereafter proceed with trial.
21. In the instant trial, the statement of one Syovisi Kamula was produced and served to the Defense on the morning of July 26, 2022. The ODPP accepted the fact and called in the Investigation Officer to explain the anomaly. The Investigation Officer explained that the statement was prepared on November 16, 2020 by one Cpl David Kibet who is now retired. The statement of the witness who is old and aged, they waited for a relative of the witness to aid in translation of the statement.
22. The defense through Mr Langalanga reiterated that the Witness statement in Kikamba ought to have been photocopied and served to the Defense and/or obtained translation from anyone else. Secondly, the statement served on the Defense was not dated but the ODPP’s statement was dated.
23. To the production and service of the witness statement on the date of hearing of the same witness, it was /is contrary to tenets of fair hearing under Article 50 (2) c & j *Constitution*. Therefore, this Court stood down the witness to avail the Defense sufficient time to prepare for the accused person’s defense.
24. To the issue raised of 2 witness statements one, in Kikamba and the other translated version, this Court cannot and will not preempt the service of both Witness Statements to the Defense and allow the ODPP/Prosecution to call the Witness to testify. This is because, the statements were not and ought not to be presented and read by the Court before trial and evidence adduced in Court as it would prejudice the accused person’s rights to fair hearing.
25. Secondly, once the witness takes the stand and testifies the Defense shall have ample opportunity to cross-examine the witness on the evidence adduced and in the process credibility of the witness and veracity of the evidence to safeguard the Accused person’s legal rights.

Disposition

1. The Accused person’s rights to fair trial are enforced by the Court through ensuring the Defense sufficient/adequate time and facilities to prepare for the Defense is upheld.
2. The witness statement of Syovisi Kamula served by the State/ODPP/Prosecution on July 26, 2022 the Court adjourned hearing the witness in compliance with the law that the Defense shall have sufficient time to prepare for the Defense, the ODPP shall have Syovisi Kamula testify in the trial.



**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M W MUIGAI

JUDGE

IN THE PRESENCE OF:

Richard Kioko Nzavi - Accused Person

Langalanga - For The Accused Person

Mwongera - For The Prosecution

Geoffrey/patrick - Court Assistant(s)

