



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Isabwa & 6 others (Criminal Case 29 of 2015)
[2022] KEHC 17201 (KLR) (Crim) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 29 OF 2015**

JM BWONWONG'A, J

DECEMBER 21, 2022

BETWEEN

REPUBLIC PROSECUTOR

AND

ERIC MUNYERA ISABWA 1ST ACCUSED

RAPHAEL KIMANI GACHII 2ND ACCUSED

MUSTAFA KIMANI ANYONI 3RD ACCUSED

STEPHEN ASTIVA LIPOPO 4TH ACCUSED

JANE WANJIRU KAMAU 5TH ACCUSED

MARGARET NJERI WACHURI 6TH ACCUSED

SIMON WAMBUGU GICHAMBA 7TH ACCUSED

RULING

The issues before me for determination as follows;

1. Whether the prosecution have disclosed (supplied) the telephone call data of the accused persons to the defence.
2. Whether this case should initially have been commenced as inquest as opposed to filing and prosecuting it as a charge of murder in this court.
3. Whether the prosecution should first call and present in court the star/key witnesses in this court.
4. Whether the court should review its order that denied bail/bond to the accused.



Issue 1

- 5 The prosecution is under a constitutional obligation to disclose in advance the evidence they intend to rely upon: See article 50(2) (c) of the 2010 Constitution of Kenya.
- 6 In this regard, I find that the prosecution have not complied with the order of Wakiaga, J, who on 29/5/2019 ordered the prosecution to produce the telephone call data of the accused, which translates to a period of over three years to date. The reason advanced by the prosecution for not complying with the order is that the current prosecutor (Ms Maina) was not aware of this order. Even when it was brought to her attention, her response was that she was preparing a schedule of the telephone call data to be disclosed.
- 7 I find that this is laxity that cannot be tolerated. I further find that as a result of non-compliance with the court order, the defence may not be able to conduct an effective cross examination. Additionally, it may also adversely affect their overall defence strategy.
- 8 It is for this reason that I ordered Sgt. Francis Singila (Pw 16) to be stood down until the telephone call data had been supplied to the defence.
- 9 I therefore find that the prosecution has not discharged their mandate of disclosing the telephone call data.

Issue 2

- 10 The defence have submitted that this case should initially have been filed and conducted as a public inquest.
- 11 In other words, the prosecution of the accused is unwarranted in their view. This issue challenges the prosecutorial independence of the Director of Public Prosecutions (DPP) in making a decision to charge and prosecute those, who have in his view committed offences that warrant a prosecution in court in terms of article 157 (6 and (10) of the 2010 Constitution of Kenya; which provides that:

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- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).



- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
- 12 If the defence are dissatisfied with the filing and prosecution of the murder charge against the accused, they ought not to invoke the jurisdiction of this court in its trial capacity. This court is sitting in its trial capacity. Its terms of reference are as clear as broad day light.
- 13 Furthermore, this court has no jurisdiction to advise the parties or their counsel on how to go about it.
- 14 This problem has arisen due to the fact that the trial of those charged with murder in this country is done summarily following the abolition of both the preliminaries and later the committal proceedings. The consequences of the abolition of both the preliminary inquiries and committal proceedings were discussed by this court (J.M. Bwonwong’a, J) in Nairobi High Court Misc Application NO. E348 of 2021 Bryson Mangla Agot v Moshe Noiman & 14 Others. There is no agency that reviews the DPP’s decision to prosecute suspects as to whether the evidence warrants a trial or not. I recommend that permission ought to be sought from the High Court to allow a summary trial to take place. I am aware that this procedure was followed in the Kingdom of Eswatini (formerly known as the Kingdom of Swaziland).
- 15 The suspects who can afford to hire an advocate may challenge the DPP’s decision to charge and prosecute and them through the procedure of judicial review under Order 53 of the Civil Procedure Rules. See *Stanley Munga Githunguri v Republic* (1986) KLR 1. The majority of the Kenya suspects may not afford to hire advocates.

Issue 3

- 16 Closely related to the DPP’s decision to file and prosecute suspects in court, is the presentation of evidence in court.
- 17 Mr. Ongaro submitted that the prosecution should first call as witnesses the key or star witnesses to prove their case. In this regard, he was supported by Mr. Mutitu for the 4th accused. This court is being invited to direct the prosecution on how and in what order witnesses should be called to testify. The prosecution has a right to present their evidence in court in the manner they deem fit.
- 18 However, the foregoing is subject to the rules of court, in which the prosecution files in court and serves the defence on a schedule of witnesses, who are to testify on a particular day. This is done as a matter of case management which involves the holding of pre-trial conferences.
- 19 Furthermore, Mr Ongaro submitted that the prosecution should produce the cell phones of the accused. He also submitted that the prosecution is producing photo shop, which he said is manufactured evidence in the form of photographs. He also submitted that the evidence of Nyangares (PW 4), the newspaper vendor is contradicted by that of a potential witness, Andrea Juma. Ms Maina for the prosecution submitted that Mr. Ongaro was giving evidence from the bar. I find that these are issues that ought to be raised during trial in cross examination by the defence. They may also raise them in their submissions. At this stage of the trial, they are irrelevant.
- 20 Mr. Ongaro also submitted that the prosecution should re-assess their evidence against the accused. This is an issue for the Director of Public Prosecutions to address and not this court. Furthermore, it is not for this court to determine the amount of fees payable to advocates in these pro bono briefs; as was being suggested by Mr. Mutitu for the 4th accused.



21 In this regard, Mr. Mutitu submitted that even the meagre sum of money payable as fess is subject to tax. This is equally a matter for another governmental agency and not for this court.

Issue 4

22 The real issue is whether I should review my order denying bail/bond. This depends on whether there has been a change in the circumstances of the case. The defence have submitted that the accused have been in pre-trial remand custody for over seven (7) years now.

23 Counsel for the victims, Dr. Khaminwa (S.C), urged the court to release the accused on bail/bond.

24 According to him the real killers of Hon. Muchai have not been arrested. He urged court to order for a re-investigation of this case, so that the real culprit can be arrested and brought to book.

25 Furthermore, I find as unacceptable in principle for the prosecution not to comply with a court order that was handed down on 29/5/2019. That order required the prosecution to disclose to the defence the telephone call data to the defence.

26 The prosecution cannot rely on their failure to comply with a court order to oppose the informal application for review of the order denying bail to the accused.

27 For now, over three years the prosecution has not complied with the court order.

28 This non-compliance by the prosecution is prejudicial to the fair trial rights of the accused. It has the effect of delaying the hearing and determination of this trial.

29 Furthermore, I decline the invitation of counsel for the victims to order for a re-investigation of this case; since this court lacks jurisdiction to do so.

30 I find that this in itself is a sufficient ground to grant bail/bond to the accused.

31 I hereby proceed to grant bail/bond to the accused. Each accused is hereby granted a bond of shillings seven hundred thousand (Kshs. 700,000/=) with two sureties, each of a similar amount to be approved by the Deputy Registrar of this court.

32 In the alternative, each accused may be released on a cash bail of five hundred thousand shillings (Kshs. 500,000/=).

33 Additionally, each accused is to report once in every calendar month to the DCIO, Central Division in Nairobi until the case is heard and determined.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI ON THIS 21ST DAY OF DECEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Ms. Maina for the State

Mr. Ongaro holding brief for Mr. Wachira for the 1st accused

Mr. Ongaro holding brief for Mr. Olando for the 2nd accused

Mr. Ongaro for the 3rd accused



Mr. Ongaro holding brief for Mr. Mutitu for the 4th accused

Ms Nyamongo for the 5th and 7th accused

Mr. Mabachi for the 6th accused.

