



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. E012 OF 2021

KENNETH NJIRU NJAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

LINEAL COMPANY LIMITED1ST APPLICANT

GIBSON KIMANI MAINA2ND APPLICANT

RULING

1. The appellant, *Kenneth Njiru Njagi* was charged and convicted in four counts with the offence of obtaining money by false pretences contrary to *section 313* of the *Penal Code*. In each count, he was *jointly* charged with a company in which he was a director namely, *Kensville Motors Limited*.

2. In Count I and count 2, it was alleged that on the 19th and 21st October 2016, at Equity Bank, Westland's Branch, jointly with others not before the court, with intent to defraud, the appellant and his co-accused obtained KShs.125,000 and KShs.4,291,750 respectively from *Line Company Limited* by falsely pretending that they were in a position to import a motor vehicle make BMW Model X3 from the United Kingdom, a fact they knew to be false.

3. In Counts 3 and 4, the particulars alleged that on the 16th and 22nd December 2016, at Equity Bank, Westland's Branch, jointly with others not before the court, with intent to defraud, the appellant and his co-accused obtained KShs.1,100,000 and KShs.2,000,000 respectively from *Gibson Kimani Maina* by falsely pretending that they were in a position to import a motor vehicle make Lexus SUV RX 450 from the United Kingdom, a fact they knew to be false.

4. After a full trial, the appellant was convicted and sentenced as follows;

- i. Count 1 - to serve six months' imprisonment;
- ii. Count 2 - to serve eighteen months' imprisonment;
- iii. Count 3 - to serve twelve months' imprisonment;
- iv. Count 4 - to serve eighteen months' imprisonment.

The sentences were ordered to run concurrently.

5. Aggrieved by his conviction and sentence, the appellant proffered an appeal to this court challenging both his conviction and sentence.

On 2nd March 2021, through his advocates *Kangahi & Associates*, he filed an application seeking to be admitted to bond/bail pending hearing and disposal of the appeal.

6. On the date the application was scheduled for hearing, *Mr. Wachira*, learned counsel who held a watching brief for the victims during the trial made an oral application seeking court's leave to participate in the hearing of the application on behalf of the victims. On 15th April 2021 when I was to give directions on the matter, prompted by my enquiry, *Mr. Wachira* clarified that his application was for leave to have

the victims participate in the entire appeal process not only in the application for bond pending appeal. I then directed counsel to file a formal application specifying the manner and extent of the victim's intended participation in the appeal.

7. Pursuant to the above directions, the firm of *Waruiru, Karuku & Mwangale Advocates* filed a Notice of Motion dated 21st April 2021 seeking the following substantive orders:

i. *That the honourable court be pleased to enjoin the applicants/victims in these proceedings and permit them to present their views and concerns throughout the appeal.*

ii. *That the applicants/victims be given an opportunity to actively participate in the appeal process to enable them address their personal interests.*

iii. *That costs of this application be provided for.*

8. In the grounds premising the motion and in the supporting affidavit sworn by the 2nd applicant on his own behalf and on behalf of the 1st applicant, the applicants contended that they had both constitutional and statutory rights to actively participate in the appeal since they were direct victims of the offences which gave rise to conviction and sentence subject of the appeal; that they actively participated in the trial and they should be allowed to present their views, concerns and interests during hearing of the appeal on stages determined appropriate by the court; that they lost a colossal sum of money totaling KShs.7,516,750 due to the appellant's fraudulent misrepresentation that he was in a position to import motor vehicles on their behalf which was false.

9. In addition, the applicants contended that it was in the interest of justice and fairness that every victim is given an opportunity to be heard before any decision affecting them is taken; that their involvement and participation in the appeal will not be prejudicial to or inconsistent with the rights of the appellant as they are equally entitled to a bundle of rights and fundamental freedoms.

10. The appellant through his learned counsel *Mr. Kangahi* did not in principle oppose the application. Counsel chose not to file any affidavit or submissions and relied on the written submissions filed by the respondent but emphasized that the court had discretion to determine the level of the victim's participation at the different stages of the appeal process.

11. It is noteworthy that though learned prosecuting counsel *Ms Akunja* had indicated in her initial response to the application that the respondent was not opposed to participation of the victims in the appeal, in her written submissions, she appears to have changed that position and urged the court to find that victims of crime did not have any role to play in an appeal; that their role ended at the sentence stage when the trial was concluded. She further submitted that in the event that the court was inclined to allow the application, the applicant's participation should be limited to the appeal against sentence only. For this proposition, she relied on the Court of Appeal's decision in ***IP Veronica Gitahi & Another V Republic, [2016] eKLR***.

12. I have carefully considered the application and the responses made on behalf of the appellant and the respondent. I note with concern that the applicant's learned counsel did not specify in his application the extent and manner of the victim's intended participation in the appeal contrary to the directions given by the court on 15th April, 2021.

Be that as it may, it is clear that the applicant's prayer is to be granted leave to actively participate in all stages of hearing of the appeal.

13. Given the respondent's submission that victims of crime have no role to play in the hearing of an appeal and after considering the material placed before me, I find that the key issue which emerges for my determination is whether victims of crime have a right to participate in an appeal lodged by the person(s) convicted of an offence which affects their personal interest and if so, what ought to be the scope and mode of their participation?

14. Unlike the right of victims to participate in the trial process which has been recognized as both a constitutional and statutory right by jurisprudence emanating from the superior courts including the recent pronouncement by the Supreme Court in ***Joseph Lendrix Waswa V Republic, [2020] eKLR***, the right of victims to participate in the appeal process in the manner sought by the applicants has not been sufficiently adjudicated upon by our courts. In fact, apart from the decision of the Court of Appeal in ***I.P. Veronica Gitahi & P.C. Issa Mzee V Republic, [Supra]*** which dealt with the issue of victim's participation in an appeal, all other decisions I have come across concern the rights of victims in the trial process: See - ***Republic V Paul Mwangi Macharia, [2011] eKLR***; ***Gideon Mwitii Irea V DPP & Others, [2015] eKLR***; ***Richard Ouma Arondo V Republic, [2017] eKLR*** and ***Joseph Lendrix Waswa V Republic, [2019] eKLR*** in which the Court of Appeal affirmed the decision of the High Court in Bungoma (*Ali Aroni J*) in which counsel for victims of the crime of murder were permitted to participate in the trial of the appellant on specified terms. Aggrieved by the Court of Appeal's decision, the appellant appealed to the Supreme Court which led to the decision of the Supreme Court referenced earlier.

15. Turning now to the issue whether victims of crime should be allowed to actively participate in the appeal process, the starting point is the law that governs participation of victims in criminal proceedings.

16. Before the promulgation of the Constitution of Kenya 2010, Victims or their families could only participate in criminal trials either as prosecution witnesses or through an advocate who was a passive observer in the proceedings as he or she had no audience and could only communicate with the court through the prosecutor. This was the practice in most common law jurisdictions whose legal system is adversarial in nature unlike the system in civil law jurisdictions which is inquisitorial and allows active victim's participation right from the investigation stage to the trial process.

17. Prior to enactment of the 2010 Constitution, participation of victims in criminal trials was only allowed during plea bargain negotiations and at the sentencing stage through production of a victim impact statement: See- *Section 137D* and *Section 329* of the *Criminal*

18. The Constitution of Kenya 2010 brought with it a paradigm shift by entrenching and widening victims participatory rights in criminal proceedings by *inter alia* guaranteeing to every person the right to a fair trial which *Article 25* declares to be one of the constitutional rights which cannot be limited. The right to a fair trial is enshrined under *Article 50* of the Constitution.

19. *Article 50 (1)* states that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

20. *Article 50 (2)* sets out the rights accorded to an accused person during the trial process which are an embodiment of the tenets of a fair trial. Of particular importance is *Article 50 (7)* which gives the court power to allow an intermediary to assist a complainant or an accused person to communicate with the court.

21. Lastly, *Article 50 (9)* specifically recognizes victims of crime and provides that:

“Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

Pursuant to *Article 50 (9)*, Parliament in 2014 enacted the *Victim Protection Act (VPA)*. Under *Section 2* thereof, rights of victims are defined as:

“... any rights to which a victim is entitled under the Constitution, this Act or any other written law.”

22. *Section 3* provides that one of the objectives of the VPA is to recognize and give effect to the rights of victims of crime. *Section 4* proceeds to set out the general principles that should guide the court, administrative body or a person performing any function under the Act shall respect and uphold the value and principles in the constitution and shall in particular be guided by the provisions of *Articles 10, 27 (4), 47, 48 and 49* of the constitution.

23. *Section 4 (2) (b)* thereof requires that bodies implementing the Act including courts shall ensure that:

“every victim should as far as possible be given an opportunity to be heard and to respond before any decision affecting him or her is taken.”

24. *Section 9 (1)* provides for the rights of victims during the trial including the right to be present during the trial either in person or through an appointed representative and the right to have the trial concluded without unreasonable delay. The victims also have a right to be informed in advance of the charge facing the offender with sufficient details as well as the evidence the prosecution and the defence intends to rely on and to have reasonable access to that evidence.

Section 9 (2) further stipulates 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.”

25. In addition, by virtue of *Section 13*, a victim who is a complainant in a criminal case has a right either in person or through an advocate to adduce evidence which has been left out and to give oral evidence or give written submission while *Section 20* bestows on victims the right to submit information for consideration by a court during plea bargaining, bail hearing and sentencing.

26. From the above constitutional and statutory provisions, it is clear that the common law concept of “watching brief” in criminal proceedings where the victims or their advocate was just a mere observer who could only communicate with the court through the prosecutor is now dead and buried. The Constitution and the VPA now gives victims of crime the right to directly participate and to be heard either in person or through an advocate in stages of the trial determined by the court in its discretion taking into account the nature of the offence, the evidence and rules of procedure. The extent of victims’ participation is therefore a matter that should be decided on a case to case basis depending on the peculiar facts and circumstances of each case.

27. The rights accorded to victims under the VPA which as noted earlier have constitutional underpinning just like the rights protected under the Bill of Rights must be purposefully and liberally construed in order to breathe life into them by protecting and promoting their enjoyment to the greatest extent consistent with the nature of those rights as dictated by *Article 20* of the Constitution.

28. The right to a fair trial accorded to all persons including victims of crime is an absolute right and must in my opinion be read together with the right to access justice enshrined in *Article 48* and the right to equal benefit and protection of the law protected under *Article 27 (1)* of the Constitution.

29. Flowing from the foregoing and considering that appeals emanate from decisions which are products of the trial process, I am satisfied and I so hold that victim participatory rights start in the trial and extend to the appeal process subject to determination by the presiding judge of the scope and manner of participation. I am fortified in this finding by the decision of the Court of Appeal in *L.P. Veronica Gitahi & P.C. Issa Mzee V Republic, [Supra]* where the court allowed participation of counsel representing victims of crime in an appeal and the pronouncement of the same court differently constituted in *Joseph Lendrix Waswa V Republic, [2019] eKLR* where the court stated as follows:

“..... The Constitution and the VPA now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process.”

30. That said, in determining whether to allow an applicant participation in a trial or in an appeal either in person or through an advocate, the court must be satisfied that the applicant is indeed a victim within the meaning of *Section 2* of the VPA. The court must also balance the statutory rights of the victim against the constitutional rights of the appellant to ensure that the victim’s participation will not prejudice the appellant’s rights to a fair trial. In addition, the court must weigh the views and concerns expressed to be the subject of the victim’s intended participation to establish whether participation is necessary and whether allowing the application will serve the ends of justice.

31. Applying the above principles to the instant case, it is my finding that though the 1st applicant suffered financial loss in the transaction that resulted in the prosecution and conviction of the appellant, being a corporate entity, the 1st applicant does not fit the description assigned to a victim in *Section 2* of the Act which defines a victim as a natural person who suffers loss, injury or damage as a result of an offence. For this reason, I find that the 1st applicant does not qualify to be a victim and is not entitled to participate in the hearing of the appeal.

32. The 2nd applicant being a natural person who was one of the complainants in the trial qualifies to be a victim and has a right to participate in the appeal.

33. Having found as I have above, the next question that I must now address is the scope of the 2nd applicant’s participation in the appeal. As held by the Supreme Court in *Joseph Lendrix Waswa V Republic, [supra]*, the victim’s participation during the trial and by analogy during an appeal should be limited to presentations regarding the “views and concerns” of the victim in the matter under consideration. The extent of participation should be set bearing in mind that the hearing of a criminal appeal usually has two stages, namely, the stage of bond/bail pending appeal if such an application is made and hearing of the main appeal.

34. In this case, the appellant has appealed against the trial court’s decision on both conviction and sentence. He has also filed an application for bond/bail pending appeal. As noted earlier, the applicants did not specify in their application the specific stages of the appeal they desired participation.

35. Starting with participation at the hearing of the application for bond pending appeal, the VPA expressly gives a victim the right to make presentations for consideration by the court during plea bargaining, bail hearing and sentencing. In this case, I note that the appellant was out on bond during the trial and though the circumstances have now changed since after conviction he no longer enjoys the presumption of innocence, it is not clear from the application why the 2nd applicant would want to be heard at this stage considering that the applicant was out on bond during the trial. Nevertheless, if the application is prosecuted, I will exercise my discretion and allow the 2nd applicant to participate in the hearing by filing an affidavit deponing to any concern or any new issue which may have arisen post conviction which would make the admission of the appellant to bond pending appeal prejudicial to the victim’s interests and safety or which may compromise the public interest.

36. With respect to the hearing of the main appeal, I wish to make reference to the case of *L.P. Veronica Gitahi & P.C. Issa Mzee V Republic, [2016] eKLR*, where *Mr. Ndubi*, learned counsel representing the victim of a crime of murder applied to be allowed to participate in an appeal in which the appellant had appealed to the Court of Appeal against both conviction and sentence. In allowing *Mr. Ndubi* to address it on the appeal against sentence, the Court of Appeal did not address its mind to the question of victims’ participation in the hearing of the appeal against conviction noting that *Mr. Ndubi* had requested for participation on the issue of sentence only.

37. In this case, the victim has sought to be allowed to actively participate in the appeal against conviction and sentence. He has however not explained how his participation will help the court reach a just decision. I say this because in an appeal, the appellate court only considers the evidence contained in the record of appeal and the applicable law in determining whether the grounds of appeal have merit or whether the impugned conviction was properly entered or was unsafe.

38. Unless in exceptional circumstances where the court grants leave allowing tendering of additional evidence, an appellate court does not consider any fresh issues or evidence which are not contained in the record of appeal. The 2nd applicant participated fully in the trial and whatever views and concerns he expressed during the trial must be part of the record of appeal which will guide the court in making its decision. I do not therefore see what value the applicant’s participation will add to the just determination of the appeal.

39. Secondly, the principal parties to an appeal are the appellant and the state represented by the Office of the Director of Public Prosecutions (ODPP). The ODPP has a constitutional mandate to independently control investigations, prosecution and punishment of crime in the interest of the public which includes vindication of the victim. If the victim was allowed to address the court on the soundness or otherwise of the conviction, this will be akin to allowing the victim to conduct a parallel prosecution which will obviously prejudice the

rights of the appellant to a fair and impartial trial.

40. Given the foregoing and considering that the VPA restricts victims' participation in criminal proceedings to a presentation of views and concerns revolving around personal interests, I have come to the inevitable conclusion that the only aspect of an appeal that victims of crime can safely participate without prejudicing the rights of an appellant to a fair trial is on the appeal against sentence if the appeal on conviction was upheld.

41. The above finding is premised on the fact that in deciding whether or not to interfere with the sentence of the trial court, an appellate court is enjoined to consider not only the applicable law but also whether the trial court properly exercised its discretion in sentencing. The victim is therefore entitled to inform the court how he was affected by the commission of the offence and whether the views he expressed in the presentence report were taken into account by the trial court when passing sentence. I will therefore allow the 2nd applicant to participate in the appeal by filing either written submissions on the question of sentence only or a victim impact statement.

42. The upshot is that the victim's application is allowed only to the extent specified above.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 30th day of June 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kangahi for the appellant

Ms Ndombi for the respondent

No Appearance for Mr. Wachira for the applicants

Ms Karwitha: Court Assistant