



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIVASHA**  
**(CORAM: R MWONGO, J)**

**MISCELLANEOUS CRIMINAL APPLICATION NO E083 OF 2021**

ELIZABETH ABENYU .....1<sup>ST</sup> APPLICANT  
JOSEPHAT KIMELI SITONIK.....2<sup>ND</sup> APPLICANT  
PAUL MUNDIA.....3<sup>RD</sup> APPLICANT  
VERONICA ACHUA .....4<sup>TH</sup> APPLICANT  
GRACE WANJIRU.....5<sup>TH</sup> APPLICANT  
HANNAH WANGARI.....6<sup>TH</sup> APPLICANT

VERSUS

PERRY MANSUKH KANSAGARA.....1<sup>ST</sup> RESPONDENT  
VINOJI JAYA KUMAR.....2<sup>ND</sup> RESPONDENT  
WINNIE MUTHONI MUTISYA.....3<sup>RD</sup> RESPONDENT  
TOMKIN ODO ODHIAMBO.....4<sup>TH</sup> RESPONDENT  
JACINTA WERE.....5<sup>TH</sup> RESPONDENT  
WILLIEC OMONDI WERE.....6<sup>TH</sup> RESPONDENT  
LYNNETE JEPCHIRCHIR CHERUIYOT.....7<sup>TH</sup> RESPONDENT  
JOHNSON KAMAU NJUGUNA.....8<sup>TH</sup> RESPONDENT  
LUKA KIPYEGEN.....9<sup>TH</sup> RESPONDENT

**JUDGMENT**

**Background & Application**

1. This is yet another application to the High Court in the ongoing criminal case of the “Solai Dam Tragedy” in which 48 persons were killed and hundreds others injured or rendered homeless due to the collapse and bursting of the Solai Dam on the night on 9<sup>th</sup> May, 2018. The state is presently prosecuting the alleged perpetrators of the crime for, inter alia, manslaughter in Naivasha Chief Magistrates’ Court Criminal Case No 977 of 2018.

2. The applicants' application dated 26<sup>th</sup> August, 2019 had sought leave:

**“ for the firm of Messrs Ronald K Onyango Advocates, LLP to come on record as watching brief for the Interested Parties” viz. the Victims.**

In his supporting affidavit, Ronald Onyango states inter alia, that:

*-He was instructed by the plaintiffs to institute a separate civil claim (HC Pet No 13 of 2018) and watch brief for the Victims in the Solai Dam Tragedy;*

*-That he caused the victims to sign retainer agreements giving consent to pursue the matter as their legal representatives;*

*-That an oral application was made in court seeking to bar them from continued participation in the case on account of not representing victims corresponding to the Charge Sheet;*

*-That they refined the list of victims submitted to court to include only complainants representing victims who perished in during the Solai Dam tragedy;*

*-That continued participation of RKO Advocates in watching brief would not occasion injustice to the accused person.*

3. The application annexes several supporting documents key of which are: a list of six victims corresponding to the charges in the Charge Sheet; a document entitled “Solai Dam Victims’ (SDV) Questionnaire with the name of an interviewer and each claimant; a sheet entitled “4. Affirmation” with a signature at the bottom; and an Agreement between each of the victims and the law firm.

4. The application was strenuously opposed by all respondents in the lower court, but the state opted not to take sides. At the end of the hearing on it, the application was declined and set aside by the Ruling of Hon L Sarapai dated 22.3.2021.

5. The trial court nevertheless enjoined the Kenya Human Rights Commission as a party – for reasons of its prior involvement in the events concerning victims generally since the onset of the Solai Dam tragedy – and in order to prevent likely proliferation of litigation. This the court did following the cases of **Timothy Isaac Bryant & 3 Others v Inspector General of Police [2013]eKLR** and **Meme v Republic [2004]**. In so doing the trial court, “*in the best interests of the victims*” also appointed three counsel of renown to act pro bono as victim representatives.

6. Pursuant to the present application dated 9<sup>th</sup> April 2021, the criminal case has been stayed pending this determination. In their application, the applicants have asked this court to:

**“issue revisionary orders to revise and set aside the orders of the learned honourable trial magistrate ”**

and to:

**“substitute it with an order allowing the said victims to participate in the proceedings”;**

as envisaged under the Victim Protection Act No 17 of 2014 (VPA).

7. The applicants invoke the provisions of Articles 47, 48, 159 and 165 of the Constitution, and substantively the revision provisions of Sections 362 and 364(1) of the Criminal Procedure Code and Sections 2 and 9 of the Victim Protection Act.

8. Their application is premised on the grounds that:

**a) The trial court failed to consider several weighty legal grounds and key facts advanced by the Applicants under the Victims Protection Act in dismissing the applicants' application dated 26<sup>th</sup> August 2019.**

**b) The learned Magistrate erred in fact and law in failing to allow the victims to be represented by the Applicants, their representatives of choice, notwithstanding the fact that she had found, as a fact, that “both the applicants and respondents ably demonstrated that recognize (sic) and have a sound appreciation of the law and robust jurisprudence affirming that victims have a right to participate in court proceedings**

**c) The learned Magistrate erred in fact and law in basing that her decision on the credentials of the three persons whom she appointed as victim representatives without making an inquiry as to whether the Applicants themselves had acceptable credentials to represent the victims.**

**d) The learned magistrate erred in law and fact in appointing representatives other than those designated by the victims themselves, notwithstanding the fact that no enquiry and /or finding was made into the question whether the applicants were or were not acting in the best interests of the victim as envisaged by Section 2 of the Victim Protection Act....**

**e) The learned magistrate erred in law and fact in appointing the said three persons to represent the victims pro bono in**

*circumstances which unlawfully negated the advocate client relationship...*

*f) The learned magistrate erred in law and fact in finding that the Applicants did not qualify for admission into the criminal proceedings as victims or as victim representatives as the case may be*

*g) The learned magistrate erred in law and fact in establishing a high threshold of evidence of loss injury and damage (such as birth certificates, identity cards, marriage certificates, burial permits, etc) to be presented by an applicant at the point of applying to participate in proceedings...*

*h) The learned magistrate erred in law and fact in failing to appreciate that ‘a person distressed from watching the news of the Solai Dam Tragedy from Canberra Australia’ could be admitted to participate in the proceedings as a victim if they had a necessary nexus to a person who had suffered loss or who was a dependent of a person who suffered loss, or was a resident of the area affected by inundation of land by flood water etc.*

*i) The learned magistrate erred in law and fact in applying a rigid prescription to issue of victim participation when local and international law state otherwise*

*j) The learned magistrate erred in fact and in law in finding that there were two categories of victims namely “living victims and deceased victims” against the letter and spirit of the Victim Protection Act which clearly contemplates a victim to be natural person*

*k) That the learned magistrate erred in law and fact in failing to appreciate the fact that a victim’s right to participate in the proceedings could not be ousted by the mere fact that the general class of victims could run into a large number of people.*

*l) That the learned magistrate erred in law and fact in holding that it was quite late in the day to encourage victims to seek an organized body to seek admission to participate in the proceedings on their behalf, notwithstanding the fact the criminal proceedings were still at the pre-trial stage”*

9. The respondents all strenuously opposed the application, and the DPP, again, opted to take a neutral stance toward the application. Parties filed their responses and grounds of opposition supported, where necessary, by further affidavits. Further the parties filed written submissions to dispose of the application, and this court has carefully considered the pleadings and representations of the parties.

#### **Parties Cases: the pleadings**

10. Parties’ pleadings were filed and are summarized as follows. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Grounds of Opposition asserting that the applicants ought to have appealed rather than seek revision; that the appointment of Kenya Human Rights Commission and the advocates at Paragraph 52 of the impugned ruling protects the participation and interests of victims in the criminal trial; That the said ruling does not have incorrect, illegal, or improper findings or any irregularity or error to warrant revision.

11. The 5<sup>th</sup> Respondent tendered Grounds of Opposition dated 16<sup>th</sup> April, 2021, which in essence assert that the application is defective, and that the applicant, if dissatisfied with the ruling, ought to have filed an appeal.

12. In his grounds of opposition, the 6<sup>th</sup> Respondent urged that the application is defective, bad in law, and ought to be struck out; That it is misconceived, scandalous frivolous and vexatious; and that it offends the procedure and provisions of review in criminal cases.

13. The 7<sup>th</sup> Respondent filed brief grounds of opposition stating that the Application is not brought in good faith; is unnecessary and an abuse of the court process and that the Applicants ought to have appealed rather than sought redress via revision.

14. The 8<sup>th</sup> and 9<sup>th</sup> Respondent filed a replying affidavit citing thirty-eight (38) grounds. The main gist of it is that the firm of R K Onyango LLP is not legally appointed as the representatives of the applicants. They contend that the firm McKevron Law Chambers metamorphosed into Ronald K. Onyango LLP (RKO LLP) having been denied by the court from watching brief on 25<sup>th</sup> July 2019; that this is an attempt to insert itself into the proceedings despite the court’s decision. In essence, they state that there is no valid cause for the High Court to revise the decision of the trial court; that RKO LLP and its proxy applicants are curtailing the expeditious disposal of the criminal trial; and that the said advocates are infringing on the right to a speedy trial of the respondents on account of the applicants’ repetitive applications.

15. The Applicants filed a Further Affidavit in response to the 1<sup>st</sup> 2<sup>nd</sup> 5<sup>th</sup> 7<sup>th</sup> respondents’ grounds of opposition and in answer to the 5<sup>th</sup> 8<sup>th</sup> and 9<sup>th</sup> Respondents’ Replying affidavits. In it, the applicants contend that they have the locus to bring the application; have elucidated errors in the trial court’s ruling of 22<sup>nd</sup> March 2021; that revision as the applicants 1<sup>st</sup> recourse of legal redress is proper; that RKO Advocates LLP changed its name from McKevron Law simply in compliance with the law on identification of partnership entities; that they are duly instructed by the applicants/clients in Criminal case 977 of 2018; that the application has been brought in the interests of the victims of the Solai Dam Tragedy; That the ruling by Hon. Bidali was set aside by the High Court and an order was made for the case to be reopened hence trial has not commenced, and has wrongly been referred to by the 7<sup>th</sup> and 8<sup>th</sup> Respondents; that the court should consider the interests of justice and rights of the victims in their choice of representation.

#### **Parties Cases: submissions**

16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed written submissions on 4<sup>th</sup> May 2021 citing thirteen (13) points condensed as follows: That the parties

are delaying the court process through a series of attempts – tallied at four (4) times since commencement of CMCC 977 of 2018. They cited the first two occasions as the applications to have the matter transferred to Nairobi in Misc Criminal Application 23 of 2018 and Misc Criminal Application 28 of 2018 which were declined on 2<sup>nd</sup> October 2018 and 14<sup>th</sup> March 2019 respectively; The third time was in HC Criminal revision no. 4 of 2020 by the ODPP which was granted in a judgment setting aside the acquittal of the then trial court and that court, at paragraphs 200(6) and (7) of its ruling, directed the expeditious disposal of the case. Yet over 12 months later the pre-trial has not been undertaken and the present revision may further stall the proceedings in CMCC 977 of 2018 in breach of the accused’s rights to expeditious disposal.

17. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit, that the only avenue available for relief to the Applicants is via an appeal and not a review as presented by them; That the court via the Sections 362 and 364 of the Criminal procedure code and Articles 165(6) and (7) of the Constitution of Kenya in its exercise of supervisory and revisional jurisdiction to ensure the administration of justice should direct that the firm of RKO LLP or any advocate or advocates associated with it must first seek leave of the court to act in the matter as they opine that the said advocates are delaying the expeditious trial of the matter in the instant case; That, citing the case of **Parliamentary Service Commission vs Martin Nyaga Wambora** to permit a party to participate in matter is matter of judicial discretion; That there lies no nexus between the Applicants and the deceased persons as was held by the lower court and therefore no victims of the Solai Dam tragedy; That the decision to undertake the revision by the Applicants rather than an appeal is a professional mistake that ought to be borne by the advocates Messer’s RKO Advocates LLP; that an appeal would have been the first port of call after the impugned ruling; that the cost of this professional mistake ought to be visited upon the applicants by the said advocates; That this costs has set back the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by KShs 1 Million (1,000,000/--) and which sum should be paid by the firm of RKO Advocates LLP .

18. The 5<sup>th</sup> Respondent put in her written submissions on 7<sup>th</sup> May 2021 contend that with the ruling by Hon Sarapai in the lower court dismissing the Application by the Applicants, the only recourse available to the Applicants is appeal which they did not pursue; The discretion as to revision ought to be conducted sparingly and the decision to interfere with the lower court’s determination ought to be based on the understanding of the law; that perceived misinterpretation of the law cannot automatically in all situations be held to be an error calling for revision but a ground for appeal as held in **Njuguna Mwangi v Republic 2019 eKLR**;

19. Further, the 5<sup>th</sup> Respondent cites this Court’s decision in criminal revision No.44 of 2020 **DPP v Perry Mansukh Kasangara & 8 others [2020] eKLR** paragraph 151 holding that High court ought not to micro manage the lower court; and that the supervisory jurisdiction of the High Court should not be used as a short cut for an appeal where circumstances clearly pertain and more appropriate.

20. The 6<sup>th</sup> Respondent filed its written submissions on 7<sup>th</sup> May 2021 stating that the Application has been filed by strangers to CMCC 977 of 2018 and therefore they are not eligible to be part of the process; That it is the ODDP that is going to prosecute the matter and not the Applicants thus the Applicants have no locus in the application; That there lies no nexus between the Applicants and the deceased persons as was held by the lower court and are therefore not victims of the Solai Dam tragedy; That no legal basis for review has been elucidated by the applicants to warrant the said revision process by the High court; That the rights of the accused are being infringed by the applicants who are delaying the speedy trial of the CMCC 977 of 2018; That the Applicants have not shown the prejudice they stand to suffer whereas the Accused persons are being inconvenienced by the conduct of the Applicants.

21. The 7<sup>th</sup> Respondent filed her written submissions on 7<sup>th</sup> May 2021 citing nineteen moot points condensed as follows: That with continued applications by the Applicant, the proceedings in CMCC no. 977 of 2018 shall be further stalled to await the outcome of the revision if granted; that the delay has occasioned a situation where the 7<sup>th</sup> respondent is on half pay as she is an employee of the National Environment and Management Authority; that Revision is not the proper redress available to the Applicant as the ruling is well within the law; that Having not appealed the ruling the failure to do so is fatal to the applicant; That leave ought not be granted by the court to the firm of RKO to transact in any capacity as relates to the instant case and any off shoot thereof; That the delay in prosecuting CMCC 977 of 2018 is directly attributable to the firm of RKO Advocates LLP and by extension the Applicants and violates the 7<sup>th</sup> Respondents right to an expeditious trial;

22. In addition, they point out that to permit the participation of a victim or a victim’s representative is matter of judicial discretion; That the Applicants have failed to show how the lower court misdirected itself or failed to take into account any relevant factor that would warrant a revision by the High court; That there lies no nexus between the Applicants and the deceased persons as was held by the lower court and therefore they are not victims of the Solai Dam tragedy; That the decision to undertake the revision by the Applicants rather than an appeal is a professional mistake that ought to be borne by the advocates Messer’s RKO Advocates LLP as an appeal would have been the first port of call after the impugned ruling .

23. Following an application dated 10/5/2021 by the Kenya Human Rights Commission – which body had been enjoined pursuant to the impugned ruling – this court allowed them to file representations. They placed on the record a letter, written by Chimei & Co advocates dated 5<sup>th</sup> May 2021, in which the KHRC demonstrate that they had instructions to act for the following applicants – also allegedly represented by the applicants RKO Advocates LLP. They annexed instruction notes signed by:

- Josephat Kimeli Sitonik ID No xxxx, dated 23/1/2019
- Grace Wanjiru & Lucy Nyambura of ID nos. xxxx & xxxx, dated 17/04/2019
- Elizabeth Abenyu of ID no. xxxx, dated 24/02/2019

These three are also named applicants in the present application.

24. Further, the KHRC exhibited an Index of Documents and Authority to Appear and Act filed on 7<sup>th</sup> July, 2020 in **Nakuru Civil Suit No 29 of 2020 Stephen Kuria Kagwi & 245 Others v Perry Mansukh Kasangra, Patel Coffee Estates Ltd, Kensalt Plantations Ltd & The**

**AG.** The said Authority to Appear and Act indicates Paul Mundia, Josephat Kimeli Sitonik and Elizabeth Abenyu as the 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> plaintiffs respectively in the said suit. The submissions of KHRC confirm this position.

25. On 13<sup>th</sup> May 2021 RKO Advocates filed a further affidavit citing twenty-one (21) grounds having read the affidavit sworn by Eliza Abenyu; Paul Mundia; Josephat Kimeli Sitonik and the various issues raised by Kenya Human Rights Commission (KHRC) concerning the clients' identities and choice of legal representation. RKO Advocates through Joy Temba, Advocate, assert that: Three applicants stated in the 9<sup>th</sup> April 2021 application instructed RKO advocates LLP to act on their behalf; That the firms of RKO (formerly known as McKevron Law Chambers and JK Bosek advocates were given joint instructions to represent Eliza Abenyu, Paul Mundia and Josephat Sitonik on 15/08/2018. The purported instructions to act by KHRC dated 24/01/2019 has never been served on RKO Advocates LLP or a formal withdrawal by the Applicants aforementioned. That they have instructions from Grace Wanjiru Muiruri who lost her sister Jane Muthoni Munene, and the KHRC have confused this individual with a Grace Wanjiru Muchiri who is the 11<sup>th</sup> Plaintiff in the civil suit No.29 of 2020.

26. Further, they assert that RKO Advocates LLP act for Veronica Echua (who lost her brother in law Julius Namoit) and HW (who lost her son-LC). That there have been discussions on duplicity of clients between RKO Advocates LLP and KHRC which discussions have stalled attributable to the inaction by KHRC. That RKO has representative authority for One hundred and Ninety-Four other victims of the Solai Dam case premised on a formal understanding/client instructions to act on their behalf. That Victims have a right of representation under Article 50 of the Constitution and the KHRC is liable for professional misconduct due to the fact there has been no formal withdrawal by the clients. That the KHRC through its advocates are in breach of the LSK code of standards of professional practice and ethical conduct at paragraph 61 which provides that **“Before accepting engagement the successor Advocate should be satisfied that the former Advocate approves or has withdrawn or been discharged by the client...”**

27. The applicants also assert that following the impugned ruling, RKO Advocates have not received any formal communications from the Advocates appointed by the court to act for the victims pro bono and raises uncertainty, confusion and leaves certain victims unrepresented. That the 194 victims are aware of KHRC visitations in the site of the tragedy but have informed RKO Advocates LLP to represent them and have not given KHRC formal instructions to represent them.

28. Grace Wanjiru Muiruri (who lost her blood sister) signed an affidavit dated 17<sup>th</sup> May 2021 instructing RKO Advocates LLP to act on her behalf in Naivasha Criminal case 977 of 2018, Petition No. E009 of 2021 and attached a retainer agreement dated 24<sup>th</sup> March, 2019. That she is aware of the collapsed negotiations between RKO advocates LLP and KHRC. That is in doubt of the KHRC genuineness in the matter and its seemingly cooperation with the Patel family. That she is being harassed by Chief Kiragu Solai Location as she states that he is in cahoots with the Perry Mansukh Kasangra and that she is happy to be represented by RKO advocates LLP

29. There are also on file – but filed without leave of the court – three affidavits by three of the applicants, Josephat Sitonik, Eliza Abenyu and Paul Mundia, dated 2021 in which they each depose as follows :

*“2. I... have not issued instructions for the present review to be filed...”*

*3. I also confirm that I approached KHRC to represent me in any case involving the Solai tragedy.....*

*...6. it has been more than three years since the tragedy occurred and I view this application as one which will further delay this matter...”*

30. In response to this new situation, the applicants filed an affidavit on 19<sup>th</sup> May, 2021 – also without leave of this Court – in which Grace Wanjiru reiterates her appointment of the applicants as her representative as a victim of the Solai tragedy.

31. As all these affidavits were filed without this Court's leave and were not present before the trial court, they cannot be taken into account either to impugn the trial court's decision or as having affected its said decision. They will be treated as such.

32. In this regard, however, the Court notes that the applicants during the oral highlights of submissions by Mr Onyango on 20<sup>th</sup> May, 2021 said that KHRC represents 246 victims according to the annex filed by KHRC, and that they (RKO Advocates) represent 193 victims separately. However, whilst the KHRC document evidencing that fact is on file, there was no formal pleading by RKO of the 193 victims they represent. Further, Mr Onyango stated that :

***“One of the victims, Grace Wanjiru, in the KHRC list, is our client. These clients are instructing RKO; No one has withdrawn instructions from us.....”***

***.....The KHRC and us exchanged lists....”***

33. It appears from the above information that of the six applicants in the applicant's present application, it is doubtful that four of them, viz., Elizabeth Abenyu, Josephat Kimeli Sitonik, Paul Mundia and Grace Wanjiru, can emphatically be said to be solely represented by RKO Advocates as they appear in both the lists produced in respect of this application by both of RKO and KHRC. That leaves Hannah Wangari and Veronica Achua as the only ones solely on the list of RKO Advocates.

34. It is also to be noted that the Applicants' application filed on 26<sup>th</sup> Aug 2019 was in fact directed to be heard in the lower court pursuant to this Court's Judgment in exercise of its supervisory jurisdiction in **DPP v Perry Mansukh Kansgara & 8 Others v DPP [2020] eKLR** (see paragraphs 160-164 and 200). The court set aside the lower court's decision acquitting the accused persons for the reason, inter alia, that the trial court's decision had been made without taking into account the fact that there were pending victim applications.

## Issues for Determination

35. In my view the substantive points in issue which this court has to determine are whether the applicant has demonstrated that it qualifies as a victim under statute and entitled to be enjoined in the criminal proceedings; whether the trial court's decision was incorrect, illegal or lacking in propriety so that this court has to revise it and set it aside, or whether it is more apt as a subject of appeal; and whether the trial court was entitled to appoint KHRC as a victims' representative. The issues are worded as follows:

1. *Whether the High court can entertain the present revision application or whether it is more amenable for appeal; and if so, what needs revision in the ruling of the trial court?*
2. *Do the Applicants satisfy the criteria for recognition as victims of the Solai Dam Tragedy under the law and as presented in the Application dated 26<sup>th</sup> August, 2019?*
3. *Whether RKO Advocates LLP have locus and authority from victims to represent them in the instant suit as victims representatives?*
4. *Does the Kenya Human Rights Commission have locus and authority to represent victims in the instant suit?*

## Analysis and Determination

**Whether the High Court should entertain the present revision application or whether it is more amenable for appeal; and if so, what needs revision in the ruling of the trial court?**

36. It is trite that the High Court's revisionary jurisdiction in respect of criminal matters is founded in **section 362** of the *Criminal Procedure Code* which provides as follows:

***“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”***

37. This provision can only be invoked for the purpose of the High Court satisfying itself that the lower court's decision which is sought to be revised meets the three-fold criterion of *correctness*, *legality* and *propriety* in respect of the court's findings or orders. The provision can also be invoked to enable the High Court satisfy itself as to the *regularity* of the lower court's proceedings. Black's Law Dictionary and the Concise Oxford Dictionary help in clarifying the meanings of those operative words.

38. In essence, “Correctness” concerns whether the trial court's orders or findings are right, free from error, or true, and conform to the accepted standards. “Legality” concerns the quality or state of the orders or findings being allowed by law, or are in strict adherence to law and its formal requirements and obligations. “Propriety” is concerned with appropriateness, correctness or rightness vis a vis the proper standards.

39. This provision has been the subject of numerous pronouncements by courts. The court may not entertain a request for revision of a finding, sentence, or order if the requesting party did not appeal even though he or she was able to do so ([s. 364\(5\), CPC](#) (See **R v Mohamed Rage Shide Criminal Revision No. 9 of 2016** Garissa High Court; **Wahome v R [1981] KLR 497**).

40. In **R v James Kiarie Mutungei [2017] eKLR** in which the court set out the scope of the revision jurisdiction to include situations of gross error, it was stated:

***“The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous...”***

41. In **Republic v John Wambua Munyao & 3 others [2018] eKLR** Odunga, J, persuasively stated as follows:

***“Therefore it is my view that that jurisdiction should not be invoked so as to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion...”***

42. The learned Judge in the **John Wambua Munyao** case, referring to the court of Appeal's decision in **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR** went on to say that:

***“... Where an issue arises as to whether the decision of the Court below is correct in its merits either as a result of wrong exercise of discretion or otherwise, but which decision does not call into question, its legality, correctness or propriety, the right approach is to appeal against the same preferably at the conclusion of the proceedings or in limited instances before then. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR, held that:***

*“In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant’s fundamental rights guaranteed by section 77 of the Constitution. Whether that order was made pursuant to section 60 (1) of the Constitution, and we have found it could not have been made under that section, or whether it was made pursuant to the exercise of inherent jurisdiction as the learned Judge said he was doing, the effect of the order was to violate the appellant’s rights under section 77. The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial. Secondly, he had the option to appeal under section 84 (1) of the Constitution.”*

*In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person.”*

*As was stated by the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:*

*“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”. (Emphasis added).*

43. In light of the clear legal provisions and judicial pronouncements requiring that for a revision to lie, it must be shown that something in the decision is grossly erroneous, I now consider what the trial court decision determined; and whether gross error has been shown. To the extent that this is an exercise of determining what the alleged errors were, it is also an exercise of revision.

44. To that extent only, I accept that this court has powers to engage in revision in this case.

**Do the Applicants satisfy the criteria for recognition as victims of the Solai Dam Tragedy under law and as presented in their Application dated 26<sup>th</sup> August, 2019?**

45. I have carefully perused the lower court’s proceedings and the ruling. The trial court considered the application of 26<sup>th</sup> August, 2019 at some depth in light of the law and relevant jurisprudence.

46. The trial court adopted a two-pronged approach in its decision on the said application by answering the following two questions: Firstly, whether the applicants qualify for admission into the proceedings as victims; and secondly, whether they qualify for admission as victims’ representatives.

47. On the question as to Whether the Applicants qualify for admission into the criminal proceedings as *Victims*, the trial court denied the applicants’ application in paragraph 33 of its ruling on the following grounds:

*“33. Applying the criteria discussed in paragraphs 13- 27 above, this application fails for not addressing the legal elements of “victimhood”:*

a)

*The applicant, Messrs. Ronald K. Onyango Advocates LLP, has not supplied the court cogent evidence that they themselves (prayer 2), or that the deponent of the supporting affidavit, one Ronald Ochieng Onyango or that the six persons named in annexure 3 thereto, suffered any iniury, loss or damage affecting their personal interests in order to qualify for victim status before the court. The applicants neither establish that they are living or deceased victims envisaged in paragraphs 18 and 20 above.*

*b) The court has considered annexure 3 to the affidavit of Ronald Ochieng Onyango and finds that it also fails to substantively conform to Section 7 of the VPA on victim details. That annexure is a half a page of a table of 4 columns by 7 rows, containing names of 6 persons who claim to be victims in relation to the deceased persons named in counts 7,8,9,10, 11, 14, 23 and 25 of the charge herein. Accompanying the said annexure 3 are further annexures to the same affidavit, numbered 4, 5 6 7 8 9 and 10 where the six are demonstrated to have executed some standard form documents (titled “Joint Instruction “Milmet (SOLAI) DAM VICTIMS’ “SDV” Questionnaire) with two predecessor law firms and an NGO that Messrs. Ronald K. Onyango Advocates LLP took over from. In their submissions, counsel for the applicant drew the court attention to the second page of the latter batch of annexures (4-10), urging the court to find that they are affirmation pages (as they are titled) of victims instructing the said firms. In those annexures (4-10), the named persons simply declare themselves to be victims that suffered in some way or other following the Solai Dam tragedy. Apart from the half a page that is annexure 3, no evidence is attached to establish their connection to the deceased persons named in counts 7,8,9,10, 11, 14, 23 and 25.*

c) *In addition to not clearly establishing the qualifications of the persons named therein as victims within the meaning of the VPA as discussed above, the application also fails for strange drafting; it flippantly talks of both victims and "interested parties", regarding which, the court has considered that both the VPA and the Criminal Procedure Code, do not provide for the ambiguity of "interested parties". In any case, the said interested parties were not disclosed, nor connected to the alleged victims discussed in (b) above.*

d) *Accordingly, the court finds that the applicants, in the first application do not qualify to be admitted into the proceeding and be allowed to participate as victims in the present case."*

48. On the question as to "Whether the applicants qualify for admission into the (criminal) proceedings herein as *Victims' representatives*" the trial court came to the following conclusions:

*"35. The applicant, Messrs. Ronald K. Onyango Advocates LLP, has not supplied the court cogent evidence that they themselves, or that the deponent of the supporting affidavit, one Ronald Ochieng Onyango or that the six persons named in annexure 3 thereto, suffered any Injury, loss or damage affecting their personal interests in order to qualify for the status of victim representative before the court.*

a) *The applicants not established that living or deceased victims envisaged in paragraphs 13 - 27 above, instructed them.*

b) *The court has considered annexure 3 to the affidavit of Ronald Ochieng Onyango and finds that it also fails to substantively conform to the requirement that a victim representative is one either designated by the accused person or by the court. Again, that annexure is a half a page of a table of 4 columns by 7 rows, containing names of 6 persons who claim to be victims in relation to the deceased persons named in counts 7,8,9,10, 11, 14, 23 and 25 of the charge herein. Accompanying the said annexure 3 are further annexures to the same affidavit, numbered 4, 5 6 7 8 9 and 10 where the six are demonstrated to have executed some standard form documents (titled "Joint Instruction "Mill-net (SOLAI) DAM VICTIMS' "SDV" Questionnaire) with two predecessor law firms and an NGO that Messrs. Ronald K. Onyango Advocates LLP took over from. In their submissions, counsel for the applicant drew the courts attention to the second page of the latter batch of annexures (4-10), urging the court to find that they are affirmation pages (as they are titled) of victims instructing the said firms. In those annexures (4-10), the named persons attach signatures and in some cases thumbprints as evidence of the said instructions.*

c) *Further, the court has noted that the law firm Messrs. Ronald K. Onyango Advocates LLP, changed its name from McKevRon Law Chambers LLP, being the firm that, from the face of the annexures, appears to have been jointly instructed, together with JKBosek & Company Advocates by alleged victims; it is not evident from the application, or annexures in support, that those apparently joint instructions were thereafter extended only to only the firm of Ronald K. Onyango Advocates LLP. This is an important detail given that under the VPA, the designation of a victim representative is exercised either by the victim or the court.*

d) *In addition to not clearly establishing their qualifications for admission as victim representative within the meaning of the VPA as discussed before in this ruling, the application also fails for strange drafting; noting the level detail required in this case, this kind of drafting from an applicant professing legal qualifications, is prima facie problematic and not likely to be helpful to the justice of the case.*

e) *In any event, having found in the first limb that the names in the application and attachments have not qualified for victim status, it is also moot whether the alleged designation of the applicants by them would confer representative status of the applicant*

f) *Accordingly, the court finds that the applicants, in the first application do not qualify to be admitted into the proceedings herein and be allowed to participate as victim representatives in the present case.*

e) *In the upshot, the application dated 26.08.2019 is dismissed with no order as to costs."*

49. In the ruling, the trial court first made clarifications on the various applicable definitions both statutory and as expounded by judicial precedent, then applied the definitions to the applicants as presented in their application. In essence, the trial court declined the applicant's application on the basis that: the applicant Ronald K Onyango had not supplied evidence that either they or the persons for whom they acted had suffered any injury loss or damage or established that they were living or deceased victims; the annexure to the affidavit of Ronald K Onyango did not substantively conform to Section 7 of the VPA.

50. The Applicant contends that the trial court erred in law and fact by disallowing the victims to be represented by the applicants. They also contend that the applicants are victim representatives as defined in the **Victim Protection Act at Section 2** which defines victim and victim representative as follows:

*"victim" is any natural person who suffers injury, loss or damage as a consequence of an offence;*

and

*"victim representative" means an individual designated by a victim or appointed by the Court to act in the best interests of the victim"*

51. They urge that in denying the Applicants the right to participate in the proceedings as victims this amounted to a glaring act or omission by the Lower court. In addition, they assert that substantial justice has not been done and will not be seen to be done in setting parameters for victim participation that bare too rigid; and thus that the order made by the lower court should be interfered with in the interest of justice in denying or admitting the said applicants even as victim representatives

52. The applicant's application dated 9<sup>th</sup> April 2021 is supported by an affidavit sworn by one Joy Temba, an advocate of the firm of RKO Advocates LLP. The 'Applicants' decry the fact that the trial court did not appreciate them as victims and appointed over them victim representatives. The main gist of the application is that the application has locked out the alleged victims from participating in the proceedings.

53. The problem with this application and affidavit, as with the application of 26<sup>th</sup> August 2019 which was before the trial court, is that the advocate places him or herself in the shoes and position of the alleged victims for whom they act. The victims themselves have not been given voice in the applications. They are merely alleged by the deposing advocate to be victims. None of the alleged actual victims have made any averment or deposition concerning or explaining their victimhood. At the end of the day, the only thing available by which to ascertain their status as victims is an agreement they are alleged to have signed with the advocates.

54. In this regard, it was persuasively and correctly stated by the trial court that:

***“16. In determining whether an applicant who seeks leave of the court to participate as a victim qualifies, the court is duty bound to ascertain that the applicant has a personal interest in the proceedings by reference to the key elements of “victimhood” as highlighted in paragraph 14 above. In this task, the court is further guided by the (sic) relying on the persuasive authority of Leonard Maina Mwangi v Director of Public Prosecutions & 2 others (para 81) where the High Court pronounced itself as follows:***

***“...Under the VPA all the court has to satisfy itself is that the person presenting themselves as victim must as a prerequisite prove their personal interest in the proceedings to the court before he/she can be allowed to communicate to the court, or to participate at the trial.***

***17. The language of the court in the cited case is emphatic that such ascertainment: (i) precedes the envisaged participation (ii) is a matter of evidence (iii) is to focus on an ‘individual’ stake in the proceedings”***

55. In other words, the person who can say to the court ‘I am a victim of the Solai Dam tragedy and I should not be locked out’ is the one who ought to swear the affidavit in the application that seeks his admission into the proceedings as a victim, or he ought to show that he has duly authorized someone to do so on his behalf. In this application before the court, without an affidavit of any victim, there is no personal statement asserting victimhood by a person presenting themselves as a victim.

56. I thus see nothing wrong in the learned magistrate's finding that the application of 26/08/2019 fails in that the deponent of the supporting affidavit, one Ronald Ochieng Onyango or the six persons stated in the annexures have not shown evidence of having suffered personal injury loss or damage or having thereby been affected in their personal interests in order to qualify as victims. At paragraph 33 of the ruling the learned magistrate states that a mere table with names that fit half a page is a far cry from cogent evidence as victims. The application has not appended evidence of victim and neither can the deponent, the Advocate, adduce evidence as if he were a victim.

57. The applicants also complain that the trial court put a high bar on the definition of victim and on the evidence necessary to enable a victim to be enjoined. It may bear repeating just who a “victim of an offence” is described in Article 50 of the constitution and statute.

58. As already stated Section 2 of the VPA defines “victim” in the following terms:

***“ ‘victim’ means any natural person who suffers injury, loss or damage as a consequence of an offence”***

That person could be a “dependant” as defined in the same section or part of the “immediate family” as also defined in that section.

59. Beyond that, a “victim” is also defined in **section 329A** of the **Criminal Procedure Code** as follows:

***“ ‘victim’ means a primary victim or a family victim”*** and

***“family victim”, in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim’s immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence:***

***“member of the primary victim’s immediate family” means—***

***(a) the victim’s spouse; (b) the victim’s de facto spouse, being a person who has cohabited with the victim for at least 2 years;***

***(c) a parent, guardian or step-parent of the victim;***

***(d) a child or step-child of the victim or some other child for whom the victim is the guardian; or***

***(e) a brother, sister, step-brother or step-sister of the victim;***

***“personal harm” means actual physical bodily harm, mental illness or nervous shock;***

**“primary victim”, in relation to an offence, means—**

**(a) a person against whom the offence was committed;**

**(b) a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence;**

60. When one takes into account the broadness of the definition of a victim under the VPA and CPC, it is clear that they show, indeed they demand, that a person who approaches the court as a victim has some explaining to do. It is that explanation to the court that must satisfy the court into what category he fits in order to be considered for the status of, and then deemed as, a victim.

61. It is insufficient generally, but more particularly in a case where there are numerous victims such as in this case, for a person to come to court, and merely blurt out:

*“I am a victim, I suffered loss and injury as a result of the offence”*

Nor is it sufficient to come to court, as the applicant did in this case, and say:

*“my client was a victim. He suffered loss and injury as a result of the offence”*

In such a case the court will be unable to ascertain the bona fides of the subject, and will be unable to place and categorise the alleged victim for purposes of his participation in the criminal proceedings.

62. In my view, unless it can be shown that a person presenting themselves as a victim is unable to swear an affidavit to demonstrate that he or she is indeed a victim, such person should ordinarily approach the court through an affidavit. Failure to that, particularly in cases where there are several victims as a result of an act that results in mass victimization, that person ought not be granted access to the criminal proceedings where they enjoy all the rights and obligations under the VPA of a person holding the high status of a victim.

63. For all the foregoing reasons, I am unable to agree with the applicants that the application of 26<sup>th</sup> August 2019 set out a proper case for them to be placed on record as the victim, nor did they manage to place the actual victims into a position where the trial court could take cognizance of them as victims under the VPA or under the CPC.

64. Ultimately, the trial court’s discretionary decision on this point was proper and cannot thus be impugned.

**Whether RKO Advocates LLP have locus and authority from victims to represent them in the instant suit as victims’ representatives?**

65. As already stated above, the trial court dismissed the applicant’s application to act as the victims’ representative for the reasons set out in paragraph 35 of her ruling.

66. The trial magistrate analysed the affidavit of RKO and pointed out, inter alia, that:

- The applicant had not established the living or deceased victims
- The alleged instructions to RKO or, (more correctly), to its predecessor firm were issued jointly with Bosek & Co Advocates and it was unclear if the said instructions were extended to RKO solely since the VPA requires the designation of victim representative to be given by either the victim himself or the court;
- The applicants having not qualified for victim status, there could be no designation of them as victim representatives

67. In **Joseph Lendrix Waswa v Republic [2020] eKLR** the Supreme Court stated:

***71. Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim’s views and concerns, their impact on the accused person’s right to a fair trial, and subsequently, in the judge’s discretion, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.***

68. Where it is a legal representative making the application, that application must clearly and in accordance with the legal provisions, contain sufficient credible material to enable the court to identify the person sought to be represented as a victim. It is the duty of the trial court to evaluate the matter before it to enable it reach a proper perspective and determination on the matter. That determination, though no discretionary must be founded on judicious and rational grounds.

69. In the present case, the trial court having found that the applicant was not a victim, and that the alleged victims for whom the applicant sought to act were unascertained because they had not disclosed the particulars of their personal suffering, loss or damage through a verifiable document such as an affidavit, they were incapable of appointing a representative. The trial court then made its discretionary

determination, as to which the Supreme Court in **Lendrix** also stated:

***“72. Discretionary pronouncements of a Court, as we have stated in several decisions, form an integral part of a Court’s jurisdiction and should not be interfered with unless an Appellate Court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a Court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice. In the instant case, we see no need to interfere with the trial judge’s discretionary pronouncements. (Emphasis added)***

70. Section 2 of the **Victims Protection Act** has the following definition of victim representative:

***“ ‘victim representative’ means an individual designated by a victim or appointed by the Court to act in the best interests of the victim”***

To designate means simply to appoint or to install into an office.

71. Thus, clearly, the first step is that the person who has suffered injury, loss or damage as the consequence of an offence has to provide material that demonstrates that he is recognised as such. That done, he is thereafter able to take the step of designating or appointing a person as his representative. Here, there was no indication by any alleged victim that they had designated the applicant law firm as victim representative within the intendment of the VPA.

72. Even if it were confirmed that the applicant law firm was in fact acting for the proposed victims in the other civil suits where they were claimants, there is nothing in law that precludes the subsistence of criminal proceedings and civil proceedings parallel to each other (**Timothy Issa Bryant & 3 Ors v IG Police & Others [2013] eKLR; and Meme v R (2004) EA124**). That is to say, there is no requirement that a claimant in a civil proceeding be enjoined as a victim in criminal proceedings. Similarly, there is nothing to preempt a claimant from proving his case in civil proceedings with or without being enjoined as a victim in criminal proceedings.

73. The application of 9<sup>th</sup> April, 2021, decries that the learned magistrate declined to recognize RKO Advocates as the legal representatives of the victims, thus denying them representation of their choice. In the Supreme Court case of **Lendrix**, relied on by the trial court, the following guiding principles were established to assist courts in considering an application by a victim or his legal representative to participate in a trial:

***“77...Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the Supreme Court Act as the Court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:***

***a. The applicant must be a direct victim or such victim’s legal representative in the case being tried by the Court;***

***b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;***

***c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;***

***d. The victim’s presentation should be strictly limited to “the views and concerns” of the victim in the matter granted participation;***

***e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;***

***f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor;***

***g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;***

***h. The trial Court should ensure that the victim or the victim’s legal representative understands that prosecutorial duties remain solely with the DPP;***

***i. While the victim’s views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;***

***j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim;***

***k. While the Court has a duty to consider the victim’s views and concerns, the Court has no obligation to follow the victim’s preference of punishment...” (Emphasis added).***

74. In the present case, not only did the actual victims not apply or approach the court themselves by affidavit, the applicant is shown to be

Advocate Ronald Onyango who has nowhere stated that he is himself a victim.

75. As earlier noted, the situation has been complicated by the fact that during submission of the pleadings in the present application of 9<sup>th</sup> April, 2021, and the parties' submissions thereon, it emerged that some of the alleged victims for whom the applicant was acting, are also being represented by the KHRC. This duplicitous representation was openly admitted in the applicants' submissions.

76. I think it would be untenable for a court to proceed on the basis of duplicitous representation of victims for various reasons. Key among them are: That the views of victims of such double representation could result in different positions or perspectives being taken by the different representatives as to the victims' trauma, victim impact, vulnerability, needs for support services, and the like; That there could be disparities in the information and evidence availed by them; That there would be serious challenges when it comes to the question of the nature and type of restitution and restorative justice to which the victim might be entitled. If any of these played out to their logical end, the consequences would be disastrous for the victims and for the proceedings in general. This list is of course, in-exhaustive, but discloses the tip of the iceberg concerning the difficulties that would be faced by the court later on if the issue of proper identification of the victim and his representative is not resolved right at the outset.

77. Where there are numerous victims in a criminal proceeding, it seems to me that there is a great potential for:

- duplication of instructions by disparate and desperate individuals who may be living victims whether or not family members, dependents or others unconnected;
- long delays in getting the criminal proceedings off the ground whilst victims seek to streamline issues of representation, inevitabilities of differences and preferences between victims and their advisers or representatives, between victims inter se; and between victims and other interested persons who may be claimants but not interested to be recognized as victims in the criminal case;
- dissonance between victims on aspects of potential civil compensation and criminal restitution measures;
- internal capacities and capabilities of victims and representatives to gather information relative to the scope and consequences of their victimization.

78. On account of this potential in cases with many victims and the negative effects it may lead to in respect of the expeditious disposal of the criminal proceedings, it is prudent for a trial court faced with such victim applications to seek creative and innovative ways to ensure that the focus on the criminal trial is not distracted from expedition so that the accused persons are not prejudiced.

79. To that end, it is appropriate for the trial court in exercise of its discretion, and in the attempt to balance the three-fold interests of the accused, the public, and the victims, to identify victim representatives at an early stage who have the capabilities, expertise and capacity to quickly and effectively organize the various issues victims will need to grapple with in terms of their effective representation. If it does this, I think a trial court would be properly exercising its discretion in the best interests of the victims as envisaged in **section 6(4)** of the **VPA**.

80. That appears to me a pragmatic way forward until the Cabinet Secretary responsible for matters relating to justice makes regulations under Section 34 of the VPA and the Chief Justice makes rules of court in respect to victims under sections 329F of the CPC.

81. In the end, I do not find any reason to interfere with the trial court's decision in respect of this issue.

#### **Whether the Kenya Human Rights Commission have locus and authority to represent victims in the instant suit?**

82. This issue arises out of the necessity to ascertain whether the trial court's decision appointing them as victim representatives had a proper basis. The trial court, when dealing with the KHRC application which is not the subject of this revision, appointed it as a victim representative.

83. In determining the KHRC application dated 28/11/2019, the trial court said:

***"34.This application succeeds in part and fails in part on this limb;***

***a) It succeeds to the extent that it establishes that the deponent of the two supporting affidavits, one IKC, together with a child he has asserted to be his son, are victims of the Solai Dam tragedy;***

***IKC has been illustrated to be a living victim of the Solai Dam Tragedy at paragraph 1 of annexure "IKC— 1 " to the affidavit of IKC sworn on 28.11.2019, being; in the first part, a copy of his national identity card No. xxxx bearing the name IKC, issued on 04.08.2009 at Nakuru and generally disclosing his both natal, residential particulars as Arutani Sub-location, Solai Location, Bahati Division in what was formerly known as the District of Nakuru. The court finds this level of detail proximally sufficient, and persuasive towards establishing a nexus between the said IKC, and the Solai Dam Tragedy within Nakuru County.***

***Simultaneously, it succeeds for establishing in the second part of "IKC— 1 " in the preceding paragraph, being a copy of Death Certificate Serial number xxxx, issued for one LCK, a minor aged 2 years at the time, died from "asphyxia immersion in fast Moving Water Mass Drowning, on 10.05.2018 at Solai Energy Village, is a deceased victim of the Solai Dam tragedy.***

***There was a contention from the respondents that the name in count VII of the charge is RC and not LC in contention to his***

*assertion that he is the father to the deceased minor. The court has considered that contention and finds that it has no bearing on the elements established by the two victims. In any event, the same may turn out to be a typographical error that the prosecution may*

***b) It fails however to the extent that it does not clearly establish whether part of all of the 189 persons named in prayer No. 2 of their application are victims of the Solai?***

84. It is clear that the existence of an affidavit by a person who clearly and concisely deposed to the injury, he personally suffered loss and damage, namely IKC, was the issue that secured the appointment of KHRC as a victim representative. The arguments concerning the importance of such an affidavit have already been made and need not be repeated here.

85. The trial court, having satisfied itself that there was a demonstrated victim, it then invoked **Section 2** of the **Victims Protection Act** on victim representative, and made the appointment. There is nothing to show that the exercise of its discretion was improper, and the appointment shall remain undisturbed.

### **Disposition**

86. The Court's summary and conclusion on the issues raised herein is as follows:

a) **Whether the High Court should entertain the present revision application or whether it is more amenable for appeal; and if so, what needs revision in the ruling of the trial court?** The court could, and did, entertain the revision, but found there was nothing to revise.

b) **Do the Applicants satisfy the criteria for recognition as victims of the Solai Dam Tragedy under law and as presented in their Application dated 26<sup>th</sup> August, 2019?** The Court agreed with the trial court that the Applicants did not satisfy the criteria for recognition as victims.

c) **Whether RKO Advocates LLP have locus and authority from victims to represent them in the instant suit as victims' representatives?** The Court found they did not.

d) **Whether the Kenya Human Rights Commission have locus and authority to represent victims in the instant suit?** The Court confirms the trial court's appointment of KHRC as victims' representative.

87. Accordingly, the application for revision is hereby dismissed, and the stay granted is hereby discharged.

88. In light of the long delay in commencing the lower court proceedings, the trial court is directed to proceed with the hearing expeditiously within the next 21 days.

### **Administrative directions**

89. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

90. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

91. Orders accordingly

**Dated and Delivered in Naivasha by teleconference this 3<sup>rd</sup> Day of August, 2021**

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**RICHARD MWONGO**

**JUDGE**

Attendance list at teleconference:

1. Opar Onyango Okoro for the Applicants
2. Mr. Muteti for the DPP
3. Naeku for Bowry with Masinde for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents
4. Mr. Owuor for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents

5. Ms Awandu holding brief for Were for the 6<sup>th</sup> Respondent
6. No Representation for the 7<sup>th</sup> Respondent
7. Masinde for Kahiga Waitindi for the 8<sup>th</sup> and 9<sup>th</sup> Respondents
8. Malenya for the KHRC appointed as Victim Representative
9. Court Clerk – Quinter Ogutu