



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**CRIMINAL CASE No. 46 OF 2018**

**BETWEEN**

**ZACHARIA OKOTH OBADO.....1<sup>ST</sup> ACCUSED**

**MICHAEL JUMA OYAMO.....2<sup>ND</sup> ACCUSED**

**CASPER OJWANG' OBIERO.....3<sup>RD</sup> ACCUSED**

**AND**

**PROF. GEORGE LUCHIRI WAJACKOYAH.....RESPONDENT**

**RULING.**

1. **Zacharia Okoth Obado**, hereafter the Applicant, brought the present application dated 6<sup>th</sup> November, 2019 by way of a Notice of Motion, under the provisions of **Article 50(2) of the Constitution and Section 134(2) of the Evidence Act**, seeking an order for the disqualification of Prof. George Luchiri Wajackoyah, hereafter the Respondent, from acting for the victims. The application is supported by two affidavits sworn by the Applicant on 6<sup>th</sup> and 12<sup>th</sup> November, 2019 and an affidavit sworn by Roger Sagana, counsel on record for the Applicant, on 12<sup>th</sup> November 2019. The Respondent filed a Replying Affidavit on 11<sup>th</sup> November, 2019 through which he opposed the application. He further filed a Further Affidavit sworn on 19<sup>th</sup> November, 2019 and two affidavits sworn by Melida Auma Rangili, the mother of the deceased, also in opposition to the application.

2. The application was canvassed on 2<sup>nd</sup> December, 2019 with Ms. Mwaniki and Ms. Kimani acting for the Republic, Mr. Kilukumi, Mr. Sagana and Mr. Ochwa acting for the 1<sup>st</sup> Accused/Applicant, Mr. Fred Ngatia and Mr. Oonge acting for the 2<sup>nd</sup> Accused person, Mr. Oronga, Ms. Ang'awa and Mr. Muga acting for the 3<sup>rd</sup> Accused person, Mr. Okatch and Mr. Otieno acting for the Respondent and Ms. Awuor holding brief for Ms. Mwendu for the victims.

**SUBMISSIONS**

**Applicant's submissions**

3. The application was canvassed by way of oral submissions. Additionally, all parties filed lists/digests of authorities. Learned counsel, Mr. Kilukumi was the lead counsel for the Applicant and relied on a list of authorities filed on 27<sup>th</sup> November, 2019 by the law firm of Sagana, Biriq & Co. Advocates.

4. The principal ground on which the application is founded, according to Mr. Kilukumi, is that counsel Wajackoyah sought and obtained instructions from the Applicant, thus placing him in a position of conflict of interest as he was in possession of confidential information that was privileged and which could be used to the detriment and prejudice of the Applicant. He submitted that on 23<sup>rd</sup> September, 2018 while the Applicant was in police custody at Gigiri Police Station, counsel Wajackoyah met him at the station and sought and obtained instructions from him. That during the meeting, the Respondent shared correspondence between himself and the office of the Director of Public Prosecutions and further correspondence between himself and the Director of Criminal Investigations to convince the Applicant that he was undertaking consultancy with the two offices. He also informed the Applicant that the offices had cleared him to represent him, nevertheless at which point the Applicant offered him instructions. He submitted that the meeting in question had taken place from the afternoon to around 3.00 pm and ended at 9.00 pm. Further, that the Applicant supplied the Respondent with his counsel's, Mr. Sagana, telephone number so they could work as a team.

5. He submitted that the Respondent was thereafter in communication with Mr. Sagana on the date in question, 23<sup>rd</sup> September, 2018 and

thereafter. He urged the Court to note that the Respondent did not dispute being at the police station and meeting the Applicant. That the Respondent's assertion that he was there to meet another client is not buttressed by evidence which would be readily available from the occurrence book, anyway. He submitted that in the absence of this evidence the court should find that the Respondent was at the station to meet the Applicant.

6. Mr. Kilukumi submitted that on 24<sup>th</sup> September, 2018 when the Applicant was arraigned in court, the Respondent was present but when counsel were introduced his name was inadvertently not mentioned when Mr. Ombija introduced counsel for the Applicant. He submitted that the Applicant bitterly complained to the Respondent about the omission after the proceedings. That although the Respondent was not introduced as counsel for the Applicant, he surprisingly did not go on record for the Victims on this date. He however addressed the Court on off the cuff matters such as the code of dressing of the Applicant. According to Mr. Kilukumi, the coming on record later of the Respondent as counsel for the victims ultimately conflicted his position as it was tantamount to acting for two different parties, having received instructions from the Applicant. That indeed the same amounted to a professional misconduct.

7. Counsel added that the Applicant could not receive a fair trial where one of his legal representatives had jumped ship with confidential information. He was quick to state that the Applicant did not oppose to the victims being represented by a counsel of their choice but that their current counsel had to quit the proceedings as he was conflicted. He submitted that the victims would suffer no prejudice as they already have another counsel on record and are at liberty to engage more if they wished.

8. To buttress the submissions, counsel relied on the following authorities:

a) *Century Oil Trading Company Limited –vs- Kenya Shell Limited [2008] eKLR*

b) *Strathmore Research Centre and Consulting Centre –vss- Paul Maina Gacari [2012] eKLR*

c) *Republic v Silas Mutuma Marimi & 2 others [2016] eKLR*

d) *Pauline Tabutany Kiprop & 3 others –vs- Julius Kiprop [2008] eKLR*

e) *Yusuf Abdallah Abdi –vs- Ibrahim Noor Hillowly [2017] eKLR*

f) *Shalimar Limited & 2 others –vs- Sadrudin Kurji & Another [2015] eKLR*

#### 2<sup>nd</sup> Accused person's submissions

9. Mr. Ngatia for the 2<sup>nd</sup> Accused, in addition to the oral submissions relied on a list of authorities dated and filed on 25<sup>th</sup> November, 2019. He cited the following cases:

a) *Code of Standards of Professional Practice and Ethical Conduct, Gazette Notice No. 5212, Vol. CXIX-No. 69.*

b) *Republic v Silas Mutuma Marimi & 2 others [2016] eKLR*

c) *Israel Otieno Agina v The Attorney General [2011] eKLR*

d) *Director of Public Prosecutions v Perry Mansukh Kansagara & 8 others [2019] eKLR.*

10. He submitted that there was a meeting between the Applicant and the Respondent on 23<sup>rd</sup> September, 2018 from 3.00 pm to 9.00 pm and that this is not denied by the Respondent who simply states that they bumped into each other at the police station. However, the Respondent's assertion that he was there to meet another client could not be verified as this client remained nameless and faceless. He urged the Court to find that there was a meeting between the Applicant and Respondent where the Applicant's impending indictment was discussed. Whilst referring to the cases cited, he underscored that they espouse two principles, namely; that the tenets of a right to a fair trial and the fact that a right to a fair trial cannot be derogated.

11. In reference to the Code of Standards of Professional Practice and Ethical Conduct (supra) he emphasized that the same codifies the fact that an advocate shall not act for both sides in a dispute and that the court therefore, had no option but to find that the Respondent was conflicted and should not appear for the victims.

12. He submitted that there were also concerns raised with regards to the Respondent's consultancy work with the Office of the Director of Public Prosecutions and the Directorate of Criminal Investigations particularly when the police had not confirmed or denied whether a meeting had taken place between the parties or whether the Respondent carried out consultancy services for the two offices. For this reason, and in reference to the case of **Israel Otieno Agina v. Attorney General(supra)**, in the absence of a denial by the Respondent, counsel urged the court to find that the dispositions made by the Applicant are true.

13. On issue that of the Respondent's submission that there were no written instructions between the Applicant and the Respondent to demonstrate that the latter was given instructions by the former, Mr. Ngatia submitted that there was no requirement, legal or otherwise, that instructions ought to be in writing.

14. With regards to the lapse of time between the Respondent coming on record for the Victims and the filing of the present application, he

submitted that the lapse of time could not cure an irregularity especially one that is founded on Article 25 of the Constitution. He thus urged the Court to allow the application.

### **3<sup>rd</sup> Accused person's submissions**

15. Mr. Oronga, for the 3<sup>rd</sup> Accused, submitted on only one issue namely, the meeting at the police station. That it was difficult for the Respondent and the Applicant to bump into each other in a police station, more so when the Applicant was a suspect under arrest and in the cells. He urged the Court to make an inference that the meeting was because the Respondent had gone to the cells to take instructions from the Applicant.

16. He urged the court to apply the test set out in the case of **Pauline Tabutany Kiprop & 3 others v Julius Kiprop (2008)e KLR** (cited by counsel for the Respondent) namely; whether the advocate could be in possession of confidential information. He submitted that in the present case given that it is not disputed that there was a meeting between the parties there was a high chance that confidential information was shared.

### **Respondent's submissions**

17. Mr. Okatch for the Respondent relied on the affidavits sworn in by the Respondent and Ms. Merida Auma Rangili, mother to the deceased and a bundle of authorities he filed on 26<sup>th</sup> November, 2019. He submitted that there were no instructions solicited by, or given to, the Respondent. He submitted that the application was meant to achieve two things, namely; to re-victimize the victims and to scuttle the hearing of the case. He asserted that the application was a sideshow. He urged the Court to be guided by the decision in **Joseph Redrix Waswa v. Republic[2019] eKLR** where the role of victims in a trial was enunciated.

18. He submitted that Section 4 of the Victims Protection Act guards against the re-victimization and underpins the notion that justice should be balanced. Further, that under Section 9 of the Act, a victim should be represented by counsel of their choice. The Respondent was the victim's counsel of choice as per the affidavit sworn by the mother to the deceased and had no intention of changing him. He urged the Court to note that the victims in this matter were poor and could not afford a lawyer at a fee but that the Respondent was offering his services *pro bono*.

19. He urged the Court to consider whether real prejudice would be occasioned as was the test set out in **In Serve Love Africa (Sila) Trust v. Abraham Kiptarus Kiptoo & 2Others (2017)e KLR** . Further, that the court should be slow to interfere in such matters unless it was anticipated some mischief would be occasioned.

20. He submitted that although it was deponed that the Respondent would likely share information, there was no indication that he had shared any information to date. He urged the Court to note that the Applicant had not discharged the burden of demonstrating that the Respondent had been instructed by the Applicant. For this reason, the Court had no reason to order that he stops representing the victims. The case of **Zakhem Construction (K) Ltd. v. Mereka & Co. Advocates 2017 e KLR**, was cited to buttress the submission.

21. It was the counsel's view that an advocate could not be barred from representing a party on unsubstantiated grounds as was held in the case of **DPP v Perry Mansukh Kasangara & 3 Others (supra)**. That although there were depositions to the effect that the Respondent had showed the Applicant various documents in relation to his consultations for the DPP and DCI they had not produced any evidence of the same. Further, that it was deponed that the wife of the Applicant was present during the interaction in question but has not filed an affidavit to buttress the assertions made in the application.

22. He submitted that although the conduct of parties could imply that there were instructions, as per the decision in the **Ochieng Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited (2007) eKLR**, the Respondent in this case never appeared for the Applicant and was never introduced to the Court on three occasions. Further, that when he came on record for the Victims there was no objection by the parties. There was also no evidence to show any correspondence between the Applicant and Respondent leading to the Court to arrive at one decision, that is, that there were no instructions given and not a single fee was paid. He urged the court to administer justice and allow the Respondent to continue acting for the victims.

### **Victims' submissions**

23. Mr. Awuor for the Victims submitted that the victims were neither supporting nor opposing the application and they would therefore take a neutral position.

### **Republic's (DPP) submissions**

24. Ms. Mwaniki for the State also took a neutral position but submitted that it was the Office of the Director of Public Prosecution's role to jealously guard the victims of the crime. She submitted that the State had no preference on who appears for the victims although it was unfortunate that the application was brought after the parties had agreed to proceed and dates were allocated for the hearing of the protected witnesses. She submitted that no evidence had been tendered to support the application and she reaffirmed that the Respondent had not been given any consultancy by the ODPP.

### **Replies to submissions**

25. In reply, Mr. Kilukumi, submitted that the application was brought so as to safeguard a fair trial and was not intended to re-victimize the victims. He submitted that the Applicant had explained the nature of the communication with the Respondent and what he perceived to be the relationship formed. That the Respondent was in possession of confidential information that could be prejudicial to the Applicant. With

regards to the submission that the application was meant to scuttle the trial, he submitted that that was not true as the matter was still at the pre-trial phase. With regards to raising the objection to counsel Wajackoya at the earliest opportunity, he submitted that the Applicant noted that he had to draw the issue to the attention of the lawyers only after the issue of victim participation was flagged by Hon. Justice Lesiit. He submitted that the issue of laches or estoppel could not be argued in a criminal case as equity must follow the Constitution. Further, that under Section 134 of the Evidence Act any instructions to the Respondent would be the subject of legal objection. He urged the Court to be guided by decisions in criminal cases as the decisions were made having regard to the 2010 Constitution.

26. Mr. Ngatia and Mr. Oronga wholly concurred with the submission of Mr. Kilukumi.

#### **DETERMINATION:**

27. I have accordingly considered the respective rival submissions as well as the cases cited by the respective parties. I have come to the conclusion that the following issues arise for determination, namely;

- a. *Whether the Victims are entitled to an advocate of their choice and what the scope of right to representation by an advocate of own choice is.*
- b. *The Scope of conflict of interest and legal privilege.*
- c. *Whether the Respondent should be barred from acting for the victims in this matter.*

#### **Right of an advocate of one's choice and whether victims are entitled to it:**

28. I have dissected this issue for determination premised on the Respondent's submission that the orders sought are not warranted as Prof. Wajackoya was engaged as a counsel of choice by the victims which choice ought not to be fettered. The right of representation by an advocate of own choice has a constitutional underpinning under Article 50(2) (g) which provides that:

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

***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;..”***

29. In our jurisdiction the right extends to victims participating in criminal litigation *mutis mutandis* subject to conditions granted by a court. In particular **Section 4(2)(g) of the Victim Protection Act, 2014** provides that:

***“Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that-***

***Every victim is accorded legal and social services of his or her own choice and if the victim is a vulnerable victim within the meaning of this Act, then he or she shall be entitled to legal and social services at the State's expense.”***

30. The right to legal representation is universally accepted as one of the fundamental human rights and freedoms. It is recognized as one of the basic principles under the Universal Declaration on Human Rights, and has been codified in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter), which instruments now form part of the laws of Kenya by virtue of **Article 2(5)** of the Constitution.

31. The provisions on the right to a fair hearing have been evolving. **Article 10** of the Universal Declaration on Human Rights defined the right in general terms as follows:

***“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”***

32. The ICCPR is more elaborate on the rights to a fair hearing under **Article 14**. **Article 14(3)(d)** Provides that:

***“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:***

***(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;..”***

33. The Banjul Charter describes the right to a fair trial under **Article 7** in part as follows:

***“Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an***

*impartial court or tribunal.’*

34. The important place of the right to legal representation in the trial process was echoed by the Court of Appeal in the case of *David Njoroge Macharia v Republic Criminal Appeal No. 497 of 2007 [2011] eKLR* as follows:

*“The right to legal representation is universally acknowledged as a fundamental right. Trials in many jurisdictions are considered unfair and fatally irregular if the presiding judge or magistrate fails to inform the accused person his or her right to be assisted by a counsel; if he or she denies the accused his right to appoint a counsel of his or her choosing; if he or she fails to facilitate the effective and full participation of a counsel or if he or she does anything that would impede the counsel of the performance of his duty (see Vandki P. K. “Examining the Right to Legal Representation: a reflection on the case of the Inspector General v. Steven Harvey Perez and the Others).”*

35. **Article 50(2)** provides the minimum guarantees that constitute a fair hearing. The Human Rights Committee, which is a body of independent experts who monitor the implementation of the ICCPR, has elaborated on some of these fair trial guarantees. It states in its **General Comment No. 13 of 1984 on Article 14 (Administration of Justice)** as follows:

*(9) Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is “adequate time” depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.*

*(11) Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.”*

36. It can be argued that this right, being a fair trial right cannot be limited as it is protected under **Article 25** which reads:

*“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited–*

*(c) the right to a fair trial; and...”*

37. Yes, it is true that the right to a fair trial is not, in the terms of this provision, limited. The question therefore, is whether, by virtue of this provision, the right to representation by counsel of one’s choice is automatically unlimited. Determination of this question ultimately goes back to the question whether, representation by an advocate of one’s choice, would be in advancement or violation of the course of a fair hearing. If not, whether justifiable reasons would exist to disqualify an advocate from representing a party without subverting a fair trial. Simply stated, is the right to legal representation by an advocate of own choice impeachable?

38. This court was faced with a similar situation in the case of *Maina Njenga v. Republic*[2017] eKLR. It delivered itself thus:

*“Determination of this question ultimately goes back to the question whether, representation by an advocate of one’s choice would be in advancement or violation of the course of a fair hearing. If not, whether justifiable reasons would exist to disqualify an advocate from representing [Victims] without subverting a fair trial.”*

39. The court was guided by amongst other cases, the case of *Halgryn v S* [2002] 4 ALL SA 157, a decision of the Supreme Court of South Africa. The Court held that:

*“Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations (R v Speid (1983) 7 CRR 39 at 41). It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer and, furthermore, that the lawyer is readily available to perform the mandate, having due regard to the court’s organization and the prompt dispatch of the business of the court. An accused cannot, through the choice of any particular counsel, ignore all other considerations (D’Anos v Heylon Court (Pty) Ltd 1950 (1) SA 324 (C) 335 in fine, 1950 (2) SA 40 (C), Lombard en ‘n ander v Esterhuizen en ‘n ander 1993 (2) SACR 566 (W) at 571 I-572b), and the convenience of counsel is not overriding (cf Gentiruco AG v Firestone (SA) Ltd 1969 (3) SA 318 (T)).”*

40. There is no doubt therefore, that a counsel of a party in a trial can be impeached if he is an impediment to the process of a fair trial. The court must be convinced beyond imagination that the continued presence of such an advocate will violate, thus compromise, the right to a fair trial for another party in the trial, as was argued in the instant case. It must however meet the constitutional threshold. This then drives me to consider the next issue, which is, what the scope of legal professional privilege between an advocate and his client entails vis a vis what would constitute conflict of interest.

### **Legal Privilege and the Scope of conflict:**

41. The Applicant submitted that the Respondent is in possession of confidential information he received when they met at Gigiri Police Station. The test to be applied when considering whether to bar an advocate from acting due to their possession of confidential information in a criminal trial was enunciated by Odero J. in **Republic v. Silas Mutuma Marimi & 2 others**[2016] eKLR, that:

*“... , the test really is whether there exists a reasonable apprehension that such confidential information may be revealed even if by mistake, inadvertence or due to human error.”*

42. I am of the considered view that, the fact that it is not disputed that the Applicant and that Respondent met at Gigiri police station, raises a high possibility that confidential information was exchanged which is likely to be revealed. Of course there lies the argument by the Respondent that it was not demonstrated that any instructions were given, more so, written ones. But must instructions to an advocate be in writing?

43. As rightly argued by learned counsel, Mr. Ngatia, the instructions needed not be in writing. In **Ochieng Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited (2007)** eKLR, a decision of the High Court, it was held that:

*“It is not the law that an advocate must obtain a written authority from the client before he commences a matter. The participation ads authority of an advocate in a matter can be implied or discerned from the conduct of the client,”*

44. The conduct of an advocate too, of itself, is sufficient to deduce that an interaction between him (advocate) and the Applicant gave rise to instructions. I say so because it could not have been a coincidence that the counsel was at the police station for over five hours, stumbles on the Applicant and on the following makes an appearance when he (Respondent) is taking plea. Interestingly, on the date of the plea, the counsel opts to be non-participatory in the proceedings. He later comes on record for an opponent of the Applicant. That hardly be the case. The coincidence can only be concluded that he was with the Applicant to receive some instructions of a kind; he therefore is in possession of some confidential materials that would heavily prejudice the trial of the Applicant by his continued appearance in the trial.

45. After all, the Applicant on 23/9/2018 was in the cells when he met the Respondent. There was really no time that written instructions could have been given in that the Applicant on the following day was taken to court to take plea. It is the conduct of the Respondent that drives the court to conclude that he was indeed instructed by the Respondent. I then grapple with the question of, how then would this confidential information fetter a fair trial?

46. In the **Trial of Queen Caroline(1821), J. Nightgale, Vol II, The Defence, Part 1:**” it was observed that;

*“[A]n advocate, in the discharge of his duty, knows but one person in the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”*

47. What this implies is that an advocate who is possession of some confidential information of his client must not use that information to the torment of other parties in the trail. I cannot be going wrong by concluding that, even if that information is not disclosed to the court, it is likely to hurt the fair trial of the Applicant. The Respondent cannot definitely have his cake and eat. The likelihood of using the information he got from the Applicant to his detriment and so for the benefit of the victims is real. The court comes in handy and must stop him.

48. An advocate is also expected to conduct himself professionally. The Law Society of Kenya’s Code of Standards of Professional Practice and Ethical Conduct(Gazette Notice 5212 of 26<sup>th</sup> May, 2017) lays out Conflict of Interest and Advocate-client confidentiality as some of its Overriding Principles. At (SOPPEC) 6 it states:

*“The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflict of interest, unless he/she makes adequate disclosures to the client(s) and obtains the client’s consent.”*

SOPPEC 7 states:

*“Communication between the Advocate and client is protected by the rule of confidentiality of Advocate-client communication. The Advocate has a duty to keep confidential the information received from and advice given to a client. Unauthorized disclosure of client confidential information is professional misconduct. At the same time the Advocate has a duty to safeguard against abuse of Advocate-client confidentiality to perpetrate illegal activities.”*

49. The Code goes ahead to defines what amounts to a conflicting interest at paragraph 93, thus:

*“A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interest or by the Advocate’s duties to another current client, former client or a third person.”*

50. Having made the above observations, I am now only left with one question to determine, which is whether the Respondent should be barred from representing the victims.

### **Whether the Respondent should be barred:**

51. Having set out the governing law and rules relevant to the application, I shall now consider the factual basis of the conflict alleged in the matter. According to the Applicant, he met the Respondent on 23<sup>rd</sup> September, 2018 at the Gigiri Police Station where he instructed him to appear in Court the following day to represent him and introductions were also made to the Applicant's advocate, Mr. Sagana. The Respondent does not deny meeting the Applicant on the date in question but states that he was at the Police Station to meet another client when he bumped into the Applicant.

52. I want to sound clearly that I have concluded that the meeting between the Applicant and the Respondent from 3.00 pm to 9.00 pm was not a coincident as alluded, but crafted to discuss him(Applicant) as a possible suspect in a murder case in which he took plea the following day. No wonder he (Respondent) was in court on the latter date, notwithstanding his non-participation.

53. The duty of confidentiality owed by an advocate to a client and the duty to avoid conflict of interest by an advocate to a client cannot be overstated. I find that based on the factual matrix before me there is a preponderance of evidence suggesting that the Respondent was privy to confidential information by dint of the length of time he spent with the Applicant.

54. I thus find that the Respondent owes a duty of confidentiality to the Applicant. His continued acting for the victims would be antithetical to the process of a fair hearing of the Applicant as it would likely violate his right to a fair trial.

55. Let me emphasize that it is not the duty of the court to choose for a party the advocate to represent it. But where it is demonstrated that an advocate as in this case is conflicted, the best redress to give is that he discontinues to appear in the matter for the victims. The Respondent herein is privy to the case of the Applicant. He has now switched goals to be counsel for the victims. This clearly discloses a conflict of interest which fetters the Applicant's right to a fair trial. He cannot purport to represent two parties. The victims have other counsel and are at liberty to enroll services of other counsel. What is paramount is that justice be accorded to all parties and that the right to a fair trial be observed to the letter. It follows then that this application is meritorious and must succeed.

56. It is paramount that I mention that no evidence was adduced to demonstrate that counsel Wajackoya had been engaged by ODPP and ODCI for a consultancy. Hence, the orders arrived at are not at all premised in any way by the submission that he was involved with the two offices in whatever manner.

57. I accordingly order that advocate, Prof. Wajackoyah be and is hereby disqualified from acting for the victims in this matter.

**Dated and Delivered at Nairobi This 18<sup>th</sup> day of December, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. *Mr. Kilukumi, Sagana & Ochwa For the Applicant/1<sup>st</sup> Accused.*
2. *Mr. Oonge for the 2<sup>nd</sup> Accused.*
3. *Mr. Oronga for the 3<sup>rd</sup> Accused.*
4. *Mr. Okach & Otieno for the Respondent.*
5. *Miss Mwaniki & Ms. Gichuhi for the Republic.*
6. *Mr. Awuor h/b for Miss Mwende for the Victims.*