



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NUMBER 89 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT KIILU WAMBUA.....ACCUSED

RULING

1. This matter came up for further hearing of the Prosecution's case on 23rd July, 2018 when the prosecution called **Agnes Mutinda Wambua**, the mother of the accused herein as PW9.

2. In the course of the examination in chief, **Miss Mogoi**, Learned Counsel for the Prosecution applied that the said witness be treated as a hostile witness and be subjected to cross-examination by the prosecution.

3. According to **Miss Mogoi**, the said witness was diverting from her statement which she recorded with the police on 29th December, 2010. It was Learned Counsel's view that being the mother of the accused, the witness may have formed a different view after the commencement of the case.

4. The application was however opposed by **Mr Muthama**, Learned Counsel for the accused, who submitted that from the evidence of the witness it is clear that she does not come from the village which was mentioned in the statement. In his view, the prosecution was engaging in a fishing expedition in order to force the witness to give a version that she did not record.

5. I have considered the submissions of Learned Counsel. Section 161 of the **Evidence Act**, Cap 80 Laws of Kenya provides that:

The court may, in its discretion, permit the person who calls

a witness to put any questions to him which might be put in cross-examination by the adverse party.

6. It is such a witness who is being sought to be cross-examined by the party calling him that is termed in legal parlance as a hostile witness. In other words, he is hostile to the position favourable to the person calling him contrary to the position which he had made the party calling him to believe was the position. In other words a hostile witness is not just a person whose evidence is merely unfavourable to the party calling him, but a witness who appears to be biased or unwilling to tell the truth. In such cases the Court has the discretion to permit the party calling the witness to put any questions to him which might be put in cross-examination by the adverse party. See **Evidence in East Africa** by **H. F Morris** page 206.

7. As was held by **Sir J.P. Wilde** in **Coles vs. Coles, (1866) L.R. 1P. &D. 70, 71**:

"A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court."

8. In **Alowo vs. Republic [1972] EA** at page 324 the East African Court of Appeal said:-

"The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible."

9. Similarly in **Batala vs. Uganda [1974] E.A. 402** the said court at page 405 said:

"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party

calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.”

10. I take it that what the Court meant was that such evidence cannot be relied upon by the party calling that witness since as stated in **Abel Monari Nyanamba & 4 Others vs. Republic [1996] eKLR** and **Maghanda vs Republic [1986] KLR 255**, it may well be relied upon by the other party though its weight is minimal.

11. Therefore the decision whether or not to permit a party calling a witness to subject him to cross-examination is not a right but an exercise of discretion based on the circumstances of the case. Being an exercise of discretion, a basis must be laid in order for the Court to make a decision thereon.

12. In this case, PW9 is the mother of the accused. That alone however does not render her a hostile witness. However from the questions put to her in examination in chief, the impression created by Learned Counsel for the Prosecution is that PW9's evidence in Court contradicts the statement which she purportedly made to the police which the witness seems to disown. The only objection made by Learned Counsel for the accused is that the intention is to make PW9 give a version that she did not record.

13. I have on my part considered the application and I find it merited. The accused does not stand to be prejudiced since as was held by the Court of Appeal in **Maghanda vs. Republic [1986] KLR 255 at page 257**:

“The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court.”

14. As was appreciated by Lesiit, J in **Abel Monari Nyanamba & 4 Others vs. Republic [1996] eKLR**:

“The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.”

15. In the premises in the exercise of my discretion in the circumstances of this case, I allow the application by the prosecution and permit the prosecution to put any questions to PW9 which might be put in cross-examination by the defence.

16. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 25th day of July, 2018.

G V ODUNGA

JUDGE

In the presence of:

Miss Gichuki for Mr Muthama for the accused person

Miss Mogoi for the State

CA Geoffrey