



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 189 OF 2013

MAINA NJENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the ruling in the Chief Magistrate's Court at Milimani Cr. Case No 552 of 2012
Delivered by Hon. D.A.Okundi,Ag. CM on 25th September, 2013).*

JUDGMENT

Background.

This is an appeal against the ruling/order in Milimani Criminal Case No. 552 of 2012, herein the case, dated 25th September, 2013. Maina Njenga, the Appellant herein filed a memorandum of appeal dated 9th October, 2013 in which he set out grounds why he was dissatisfied with the ruling in question. These were, *inter alia*, that the trial magistrate erred in disqualifying Snr. Counsel Mr. Paul Muite from representing the Appellant as there existed a conflict of interest, and in so doing misinterpreted the Constitution with regard to the Appellant's right to an advocate of his choice. Further, that in so doing the learned magistrate contravened the Appellant's fundamental rights as enshrined under Article 50 of the Constitution and tilted her discretion towards the prosecution to the Appellant's detriment.

The order appealed against arose after an application by Mrs. Obuo, learned State Counsel for the prosecution in which she submitted that Mr. Muite, SC had recorded a statement with the police on 29th May, 2012 making him a prosecution witness in which case he could not act for the appellant as there was a conflict of interest. She submitted that his evidence was crucial particularly with regard to the charge against the Appellant of confinement which constituted Count III. Mr. Muite in reply submitted that he was in court on 24th April, 2012 and applied for the accused persons to be granted bond. He submitted that there were no protestations to his representation of the Appellant. He submitted that he recorded his witness statement on 29th May, 2015 setting out the circumstances of his involvement in the affairs forming the bedrock of the charges in this case. Mr. Ondieki, his fellow defense counsel, echoed his sentiments. The trial magistrate made a ruling dated 25th September, 2013 in which she found that in the circumstances of the case the prosecution had laid down a proper basis for the disqualification of Mr. Muite, SC as a defence counsel and proceeded to do so.

In view of the foregoing, this court has been asked to make the following orders namely; that it sets aside

the Honorable magistrate's order mentioned above, a declaration that the order goes against the express provisions of the Constitution and is a denial of the Appellant's fundamental rights, termination and/or discontinuation of the case as its existence amounted to harassment of the Appellant by the State, a declaration that Rule 8 of the Advocates Practice Rules is inconsistent with the Constitution and finally that the Court makes any other relief it deems fit to grant.

Respondent's Submissions.

Ms. Nyauncho filed written submissions on their behalf dated 27th February 2017. In them she submitted that the lower court disqualified Paul Muite, SC from representing the Appellant on account of the fact that he was a prosecution witness leading to the appeal at hand. She submitted that they opposed this appeal given that the disqualification was in compliance with Rule 8 of the Advocates(Practice) Rules. She submitted that once Mr. Muite, SC recorded a statement he became a prosecution witness and would be required to testify which led to conflict of interest if he were to continue representing the Appellant.

She submitted that Mr. Muite, SC was a crucial prosecution witness and could therefore not continue representing the Appellant as this would seriously test the right to be represented by one's advocate of choice if he was to also appear as a witness. 'She concluded by submitting that the disqualification did not prejudice the Appellant as he has other lawyers, of his choice, as part of his defence team.

She also gave oral submissions at the hearing which were a reiteration of the written submissions with the addition that Mr. Muite SC had voluntarily given his statement to the police and that by the time he gave the statement in question he was yet to appear in court as the defence counsel. She also submitted the case of **Thuita Mwangi & 2 other v. EACC & 3 other[2013] eKLR** to show that under Article 157(6)(7) the office of the director of public prosecutions has the right to exercise his powers in electing to rely on Paul Muite, SC as one of its witnesses in which case he could not also act as the defence counsel.

She therefore urged the court to dismiss the appeal.

Appellant's submissions.

The Appellant filed written submissions dated 21st February 2017. He was accorded an opportunity to orally highlight them in court. Learned counsel for the Appellant, Mr. Ondieki submitted that the rights of the appellant under Article 10, 25(c), 27(1)(2)(3) and (5) and 50 (1) and(2) (a) – (g) were violated; that summoning of the appellant's counsel to make a statement and become a prosecution witness while he was acting for the appellant compromised the appellant's right to a fair trial. This also violated the appellant's right under Article 27(1) to (5) to equal protection before the law read together with Article 2, the result of which was to render the trial invalid. The case of **Albanus Mwasia Mutua v Rep(2008) e KLR** was cited to emphasize the duty of the court to protect the Constitution. Furthermore, the right to a fair trial cannot be limited by virtue of Article 21(1).

Counsel also submitted that the Appellant's rights under Article 19(1) and (3) were also violated. Article 2 and 7 of the Banjul Charter and the case of **Thuita Mwangi & 2 Others v EACC & 3 Others** were cited to buttress this submission.

It was the counsel's submission that the respondent acted in bad faith since at the point the application was made, the trial had just begun by which time Senior Counsel, Mr. Paul Muite was aware of the appellant's defence and the prosecution could turn this defence into the prosecution case in violation of the right to a fair hearing. In rejoinder, counsel maintained that Mr. Muite was part of the defence team from the beginning, adding that under the proviso to Rule 8 of the Advocates (Practice) Rules, counsel is allowed to testify if already on record for a party. Further, under Article 24(1)(e), the State should have advanced their purpose by getting another witness. The case for the appellant was that the defence case was already compromised by turning SC Mr. Muite into a prosecution witness. That under Article 157 (11), the DPP, in prosecuting cases, must be guided by good administration and prevent abuse of legal process. This tenet had not been observed by the surprise turn of events.

Counsel further submitted that by disqualifying the counsel, the lawyer-client confidentiality was undermined and the appellant's right to choose a lawyer would be violated. It was also argued that the accused person's presumption of innocence should prevail. This could not be upheld when a defence counsel had been turned into a prosecution counsel. Furthermore, there had been inordinate delay in trying the appellant and the appellant could no longer have a fair trial given that due to the time lapse, the defence evidence had been destroyed and memories faded. As a consequence, this court was urged to declare the proceedings in the lower court null and void.

Respondent's submissions.

The respondent was represented by learned State Counsel, Miss Nyauncho who filed written submissions on 27th February, 2017. She also was accorded an opportunity to orally highlight them in court. The prosecution maintained that the disqualification of SC Mr. Muite from representing the appellant at the trial was in line with Rule 8 of the Advocates (Practice) Rules. In any case, SC recorded the statement voluntarily knowing he would be required to testify in court. Therefore, any further representation of the appellant would raise a conflict of interest. More so, by the time of recording the statement, counsel had not appeared in court as a defence counsel. He ultimately ought not to have taken up the brief as defence counsel. Counsel's statement was that he witnessed the confinement of the complainant in count III. According to the Respondent the appellant's right to legal representation was not violated as he has four other counsel who can ably continue to represent him. As held in the *Thuita Mwangi* case (supra), under Article 157(6) and (7), the DPP has powers to commence prosecution under no direction or power of any person. Thus in electing counsel to be a prosecution witness he had acted within his constitutional mandate.

Determination

The main issue for determination is whether the appellant's right to a fair trial was violated by the decision of the court disqualifying Senior Counsel Muite from acting for the appellant and thereby allowing him to be a prosecution witness as sought by the respondent. The questions which arise from this issue are as follows:

- a) Whether the right of an accused person to legal representation by an advocate of his choice is limited.
- b) If the answer to the above is in the affirmative, is it justifiable in the circumstances of this case to uphold the decision of the lower court disqualifying the counsel from representing the appellant.
- c) whether disqualification of SC Muite and consequent approval for his participation as a prosecution counsel would be prejudicial to the appellant

Is the right to representation by counsel of choice absolute?

The issues above stem from the right of an accused person to legal representation which is couched in the following terms under **Article 50 (2)** of the Constitution:

(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;..'

The right to legal represented is universally accepted as one of the fundamental human rights and freedoms. It is recognised 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.

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.’

The ICCPR is more elaborate on the rights to a fair hearing under Article 14. Article 14(3)(d) narrows down the right to legal representation thus: :

‘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;..’

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.’

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”).

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.

It was 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...’

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 an accused person without subverting a fair trial.

An illustration is hereby necessary. For instance, where an accused person insists that he needs to be represented by counsel of his choice but the said counsel is not available to appear in court at scheduled dates, would the court be held ransom on the ground that an accused’s right to legal representation of his choice must by all means be upheld? In my candid view the answer is no. In other instances, an accused counsel of choice may be found to be unqualified to continue to represent an accused in the first place. In other instances as demonstrated, the counsel himself is an impediment to an expeditious trial. In that case, the court would not compromise legal process on account of upholding the right of an accused to be represented by a counsel of his choice.

That said, where a limitation is to be placed on the counsel of choice, it ought to meet the constitutional threshold. It must not compromise an accused person’s right to a fair trial. The Supreme Court of Appeal of South Africa was confronted with a similar question in the case of *Halgryn v S* [2002] 4 ALL SA 157, where the court considered the provisions of **section 35(3)(f)** of the South African Constitution which is couched in similar terms with Kenya’s Constitution. The court stated as follows:

‘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)).’

An accused is therefore free to exercise this right, by choosing counsel who rightly has audience before the court and is ready and capable of facilitating the smooth running of the court business.

Whether disqualification was justifiable in this case.

The reason that the prosecution sought to have Senior Counsel Muite disqualified was that the counsel was supposed to be a prosecution witness. From the evidence before me, it is not disputed that the senior counsel was present at the scene and up to the point when the appellant was arrested. The appellant explained that he had called for his advocate in his capacity as his legal representative. Later on, Mr. Muite was called to record a statement with the police and it was on this account that the prosecution sought for his disqualification so that he could be called as a prosecution witness. The prosecution relied on Rule 9 of the Advocates (Practice) Rules to argue that counsel was already conflicted. Let me make a clarification that it is rule 9 and not 8, as submitted by counsel for the Appellant, that deals with situations of a conflict of interest in a case of an advocate in a case where he may be required as a witness.

The issue of disqualification of a person's advocate has arisen in some cases. In ***William Audi Odode & Another-vs- John Yier & Another*** Court of Appeal Civil Application No. NAI 360 of 2004 (unreported), the court held in part as follows:

I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.

The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters [section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.]

In the case of ***Wheat v. United States***, [486 U. S. 153](#) (1988), the US Supreme Court considered whether it was wrong for the trial court to decline an advocate to be substituted and join the petitioner's case. The said advocate had represented two other accused persons who had been charged alongside the petitioner. The application for substitution was opposed on the ground that a conflict of interest would arise. It was further argued that the petitioner who was privy to one of the co-accused involvement in the offences alleged, would likely be called as a witness for the State. Therefore, counsel would not effectively provide the legal representation owing to the potential conflict. The petitioner maintained that all the three co-accused had agreed to waive any future claims of conflict of interest. The Court of Appeal affirmed the District Court's decision, finding that the court had properly balanced the (a) qualified right to be represented by counsel of one's choice and (b) the right to a defense conducted by an attorney who is free from conflicts of interest.

The Supreme Court considering this issue reasoned thus:

Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective Advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. (See *Morris v Slappy* 461 U.S. 1...)

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government. The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.]

The court added that, ***'courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'***

In the case of ***Delphis Bank Ltd v. Chatt & 6 Others [2005] 1 KLR*** it was held that a litigant's right to legal representation by an advocate of his choice is not absolute. In that case, the Court of Appeal held as follows:-

'1. The right to a legal representative or advocate of his choice is a most valued constitutional right to a litigant. In some cases, however particularly civil cases, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness.

2. There is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human possibility result.'

The High Court in the case of ***Republic v Silas Mutuma Marimi & 2 others [2016] eKLR*** reasoned that:

The court proceeded to set out the principles upon which an advocate may be disqualified from acting for a litigant. This right may be limited in two instances. Firstly where there is a possibility that the advocate may be called as a witness in the case and secondly where there exists a conflict of interest between two clients out of a previous advocate/client fiduciary relationship with the opposing client.

I do agree with 'Mr. Ogola' that the likelihood that he will be called as a witness in this murder trial is remote. He had not recorded any statement with the police nor have the prosecution given any indication that they intend to summon him as a witness during the trial. As such rule 9 of the Advocates Practice rules would not be applicable.

The court went ahead to bar counsel to represent the accused in the murder case. The prosecution had opposed representation by counsel for the three accused on the reason that the firm where counsel was a partner had been previously engaged by the family of the deceased to hold a watching brief for them.

In the instant case, SC Muite was called to the scene of the offence. Thereafter, counsel recorded a statement with the police. An examination of this statement confirms that counsel was indeed present at the scene. Furthermore, a detailed account is given since his arrival at the scene and the information he had received from his client on what had happened. The statement also gives an account of happenings leading to the arrest of the appellant and his co-accused. It is on this basis that the prosecution seeks to have counsel become a witness for the State. **Rule 9** of the Advocates (Practice) Rules which was relied on provides :

'9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears'.

This court was urged to determine that this provision is unconstitutional as it undermines the right for an accused to be represented by counsel of his choice. This position lacks support particularly, in view of my

earlier observation that the right to choose one's counsel is not absolute. By being present at the scene, SC Muite became privy to some facts which may prove relevant to the criminal proceedings, thus, becoming a possible witness to the prosecution case. I now delve into the next question; ***Whether the lawyer-client privilege is undermined by disqualifying SC Muite.***

The advocate-client privilege is protected under **Section 134** of the Evidence Act in the following terms:

134. (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) shall continue after the employment of the advocate has ceased.

This provision protects communication between an advocate and his client made for purposes of obtaining legal advice. Consideration of this privilege is relevant to the appeal at hand to answer the third question of;

whether disqualification of SC Muite and consequent approval for his participation as a prosecution counsel would be prejudicial to the appellant.

Regarding the rule of privilege, it was held in the English case of ***Conlons vs Conlons (1952) 2 ALL ER 462*** as follows:

'The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication be so made to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enable properly to conduct his litigation.'

The Court of Appeal also stated in the case of ***Mohammed Salim Balala & another v Tor Allan Safaris Limited Civil Appeal No. 28 of 2014 (2015) eKLR*** that:

Of particular importance is that the advocate client privilege is only there for the sake of the client not the advocate. It is for the client to choose whether or not to lift the privilege. All that the advocate can do is plead privilege if sued. (see. Halsbury's Laws of England 4th edition vol 44 at page 52). This does not mean that an Advocate cannot be sued on the basis of his relationship with his client. It only means that he cannot be compelled to disclose information thus obtained unless his client chooses to lift or pierce the privilege. Again this can only be

resolved at trial.

The uncontroverted position was that Mr. Muite appeared at the scene and witnessed incidences relevant and material to the criminal charges against the appellant and his co-accused. By virtue of this fact, he becomes a potential prosecution witness, which in line with Rule 9 cited above would render it unethical for him to continue appearing for the appellant. Mr. Muite did not, in the terms of the Rule consider that he should recuse himself. On the other hand, the appellant maintains that counsel appeared at the scene in his capacity as his legal representative. Mr. Muite continued to appear in court together with other counsel on behalf of the appellant. There is thus, a possibility that, since the parties to the case were ready to proceed, Mr. Muite was already intricately privy to the defence theory that the appellant may have intended to adopt in his defence against the charges leveled against him.

This scenario places senior counsel in conflicting sides of both the defence and the prosecution. There is an obvious conflict between the counsel's duty to his client and his duty to the court. Should any of these duties prevail over the other, the duty to his client over the duty to the court or vice versa? Another impending question is whether it is, in the circumstances of this case, practically possible to uphold one duty of the counsel over the other, without prejudicing the other duty and subjugating the interests of justice. And if the answer to this is in the negative, does the court have the power to disqualify a potential prosecution witness?

Answering these seemingly dialectical positions requires an articulation of the lawyer's duties. In some jurisdictions, the duty to the court has been upheld as being paramount to all other duties, including loyalty to his client. In Australia for instance, this duty is spelt out in the **Professional Conduct Rules**. In the **Barristers Conduct Rules of the Bar Association of Queensland**, this duty is couched in the following terms:

A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.

In *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, it was observed as follows:

It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. [The barrister] is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with ... fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.

The Rules of Practice and Code of Conduct applicable to the members of the Law Society of Kenya are not as explicit in those terms. In the case of **Francis Mugo & 22 others v James Bress Muthee & 3 Others** [2005] Civil Suit No. 122 of 2005 eKLR, Musinga, J. (as he then was) had this to say:

While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an advocate he has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in "THE ART OF THE ADVOCATE." As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth.'

Counsel for the respondent invited this court to observe that in exercising his powers to commence prosecution under **Article 157**, the Director of Public Prosecutions has powers to act under no direction or power of any person. This power, it was suggested, extends in the Director's determination as to who should be called as a prosecution witness.

Article 157 (10) of the Constitution provides that:

‘The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.’

However, that authority is not unfettered since under Article 157(11), the Director is required to ***‘have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.’*** The power of the DPP is also reiterated by Section 6 of the Office of the Director of Public Prosecutions Act. In the case of *Thuita Mwangi & 2 Others v Ethics and Anti-Corruption Commission* (supra), the court had this to say concerning exercise of prosecutorial authority:

‘42.The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in section 4 of the Office of the Director of Public Prosecutions Act. These objects are as follows; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism.

43 The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process. As the Kuloba J., observed in Vincent Kibiego Saina v Attorney General, High Court Misc Civil Appl. No. 839 of 1999 (Unreported) at pages 20, 21, “If a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court the court will unhesitatingly step in to stop it.”

It is the duty of the court to measure actions of the respondent, to promote the public interest, the interests of the administration of justice and prevent and avoid abuse of the legal process. Nothing has been put before this court to show that the prosecution in asking for Senior Counsel Muite disqualified to represent the appellant was in any way malicious, or would amount to an abuse of the court process. But at the back of this court’s mind is the fact that, since the commencement of the trial, the Respondent knew that SC had recorded a statement; and so, I think it ought to have made the application of disqualifying him at the earliest opportunity. Accordingly, even if no bad faith motive is discernible, and bearing in mind his (SC) great involvement in the entire case, the question I ask is whether his disqualification as a prosecution witness meets the interests of justice?

The prosecution, in seeking to have Mr. Muite appear as their witness, submitted that his statement was that he witnessed the confinement of the complainant in count III. While it is clear from this statement that counsel witnessed some of the unfolding events at the scene, it can also not be ruled out that he had been consulted by the appellant. His engagement by the appellant continued, since then counsel consistently appeared in court for the appellant. This alone, imputes that being counsel on record for the appellant, he was privy to the defence that the appellant was likely to advance. Therefore, it would be difficult to draw a clear line where counsel would actively play the role of a prosecution witness without compromising the defence by the appellant. As Lord Brougham said in the **Trial of Queen Caroline(1821) J. Nightingale, Vol II, The Defence, Part 1:**

“[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.”

Before arriving at its conclusion in this matter this court is aware that, “[t]he proper role of the trial court in enforcing the ethical standards of the legal profession is problematic. While a trial court has the inherent as well as statutory power to control lawyers before it “in furtherance of justice,” such control must respect the independence of the bar, the function of the advocate, and the rights of the client.” (Patricia B. Fellner in Comden v. Superior Court: Disqualification of the Testifying Attorney, 67 Cal, L. Rev. 824(1979))

It follows that there lies the possibility that SC may betray the counsel/client privilege if he testified for the prosecution. The facts I deduce from the trial court proceedings that in disqualifying SC Muite from representing the appellant in the trial, the trial court unfortunately failed to look at the larger picture of his involvement in both sides of the case. Yes, he is intricately involved with the prosecution case with the same weight he was involved with the defence case. If he remained to provide evidence as a prosecution witness, there is a likelihood of betraying, or selling out, strictly so to speak, the defence of the appellant to the benefit of the prosecution. I say so because, although his statement speaks for itself, the questions that will be put forward to him in cross examination are not foreseeable at this stage. They may turn out to totally destroy the defence case. The net effect of his involvement either way is the contamination nature of evidence. It is gainsaid then that in the interest of justice and in observance of the spirit and letter of Article 157(11) of the Constitution, learned SC Muite cannot independently stand for either party. I hold that he shall neither testify for the prosecution nor represent the appellant.

This now drives me to make the final disposition, whether in view of my findings, the trial should be declared null and void. We must remind ourselves that in a criminal case instituted by the DPP, the complainant is the State. Witnesses who testify for the prosecution do so on behalf of the State. The rationale is basic; that criminal proceedings are instituted for purposes of maintaining public order and must therefore be heard and concluded in public interest. In addition, the complainant is also eager to see the outcome of the court verdict. Again, there is no time limitation within which a criminal trial should be instituted and heard. The delay in the expeditious disposal of the subject trial has been occasioned by the current appeal. The DPP cannot therefore be deemed to have in any prejudiced the appellant by the trial not having taken off. This court would then not have any justification of finding that he (DPP) would violate the appellant’s right to a fair trial if the trial continued.

Against this backdrop and in relation to the instant case, the contentious charge is in Count III in which SC Muite would be a prosecution witness. The appellant is not only charged in this Count but there are other charges leveled against him and his co- accused which, in the interest of justice must be heard to their logical conclusion. Further, although this court is not versed with the evidence the prosecution will tender, the exclusion of SC Muite calls on them to go to the drawing board; hopefully other witnesses may testify in support of Count III or altogether the charge be withdrawn. This court leaves the prosecution to make their wise and informed decision in that respect.

The result of my observation is that I decline to declare the trial null and void. The same will proceed before the Chief Magistrate’s Court at Milimani save that SC Muite shall neither testify for the prosecution nor represent the appellant as defence counsel. The trial court file shall be remitted back to the said court for mention before the Chief magistrate on 30th March, 2017 for purposes of taking a hearing date. Taking into account the age of the file, i order that the trial be heard on a priority and if possible on a day to day basis. It is so ordered.

Dated and Delivered At Nairobi This 23rd Day of March, 2017.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Mr. Ondieki for the Appellant.

2. M/s Nyauncho for the Respondent.