



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 57 OF 2016**

**LESIT, J.**

REPUBLIC .....PROSECUTOR

V E R S U S

FREDRICK OLE LEILMAN.....1<sup>ST</sup> ACCUSED  
STEPHEN CHEBURET MOROGO.....2<sup>ND</sup> ACCUSED  
SILVIA WANJIKU WANJOHI.....3<sup>RD</sup> ACCUSED  
LEONARD MAINA MWANGI.....4<sup>TH</sup> ACCUSED  
PETER NGUGI KAMAU.....5<sup>TH</sup> ACCUSED

IN THE MATTER OF AN APPLICATION SEEKING TO LIMIT THE ROLE OF VICTIMS  
DURING PROCEEDINGS

LEONARD MAINA MWANGI.....APPLICANT

V E R S U S

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT  
THE VICTIMS’ FAMILIES.....2<sup>ND</sup> RESPONDENT  
LAW SOCIETY OF KENYA.....3<sup>RD</sup> RESPONDENT

**RULING**

**BACKGROUND**

1. Before me is an application filed by way of Notice of Motion under a Certificate of Urgency dated 18<sup>th</sup> April 2017. The application is brought under **Articles 2(1), 3(1), 10, 2(a )(b), 50(7), 157(1), (4) & 11,**

**158(1), 160(1), 165, 3(a)(b), 25(c), and 23(1) of the Constitution, sections 85(1), 302, and 329C of the Criminal Procedure Code; sections 3, 4, (c)-(f), 1, 5, and 1(a),(b)(i)-(iii) of the Office of the Director of Public Prosecutions Act; section 35 of the National Police Service Act; section 7(b) of the Persons Deprived of Liberty Act and sections 4(2), 9, and 13 (a), (b) of the Victim Protection Act.**

2. The application seeks the following orders:

**a) That this matter be certified urgent.**

**b) That henceforth the advocate watching brief for and on behalf of victims be and is hereby barred from cross-examining any witnesses in these proceedings.**

**c) That cross-examination by advocates watching brief for and on behalf of the victims and or any evidence introduced on record pursuant to such cross-examination be and is hereby expunged.**

3. The application is supported by the Affidavit of Leonard Maina Mwangi, the 4<sup>th</sup> accused herein. The application is premised on the grounds that the Applicant is apprehensive that cross-examination of witnesses by the advocate watching brief for the victims was prejudicial to the accused and was not backed by any provision of the law and therefore, violates the principles of fair hearing. Further, that in criminal proceedings, advocates watching brief have no *locus standi* to cross-examine witnesses or at all, and that such cross-examination violates the mandate of the Director of Public Prosecution under **Article 157(4)**.

4. In response to the application, the victims' families filed the following Grounds of Opposition:

**a) That the prayers constitute and amount to denial or violation of the victims' fundamental right in that:**

- It is a denial or threatened denial of their access to justice contrary to Article 48**
- It is a limitation or threatened limitation of their right to a fair trial of the issues in the case contrary to Articles 25(c) and 50**
- It is an unreasonable, unjustified, and unjustifiable limitation to a fundamental right contrary to Article 24**
- It is a denial of the right of every person to equality before the law and equal protection and benefit of the law contrary to Article 27**
- It is a limitation or threatened limitation of the right of every person to enjoy the Bill of Rights to the greatest extent consistent with the nature of that right pursuant to Article 20.**

**b) That the application is misconceived, bad in law and should be dismissed *in limine* for various reasons that:**

- It is based on the erroneous premise that a victim's role is a passive one of watching brief**
- It fails to recognise the victim's right, subject to the accused' right, to actively access and participate in the criminal justice process including right to adduce evidence which has been left out**
- Victim's participation even if it may amount to assistance to the prosecution, does not constitute prejudice to the accused and such assistance does not replace or usurp the**

## **powers of the prosecution**

- **The application attempts to interfere with the DPP's powers under Article 157 which requires the DPP to among others consider public interest, the interest of the administration of justice and the need to avoid and prevent abuse of the legal process.**
  - **The application goes against Article 159 that justice must not be sacrificed to the strict adherence of the provisions of procedural law**
  - **The application is in contravention of Article 68(3) of the Rome Statute which allows the victim to participate in proceedings as deemed appropriate by the court.**
- c) That the application fails to disclose the alleged prejudice to the accused if the victims are allowed to participate in the criminal proceedings as hitherto done or any violation thereof;**
- d) That the application is an abuse of the legal process and should be dismissed.**

## **APPLICANT'S SUBMISSIONS**

5. Mr. Mochere submitting on behalf of the accused in his submissions relied on **Article 50** of the **Constitution**, advancing the argument that the rights of victims of crime had been expanded under this provision which under **Article 50 (7)**, recognizes that the court may, in the interest of justice, allow an intermediary to assist a complainant or an accused person to communicate with the court. Counsel urged that while the Constitution allows such assistance by an intermediary, it also required, under **Article 50(9)**, Parliament to enact an appropriate law to provide for the protection, rights and welfare of victims of offences, thus the **Victim Protection Act**, herein after **VPA**, which defines a victim to include, any natural person who suffers injury, loss or damage as a consequence of an offence.

6. Mr. Mochere referred to the two instances under **section 329** of the **Criminal Procedure Code** that allow the court to receive a victim impact statement from the victim after conviction but before sentencing or where the primary victim has died as a result of the offence, to receive such statement from a family victim.

7. Mr. Mochere observed that under **section 9(3)** of the **VPA**, the victims' representative could bring to the attention of the court instances where the interests of a victim of crime are or have been affected. However, this reference to rights and interests did not mean cross-examination of witnesses by the victims' advocate. He maintained that the communication envisaged was direct to court and not through cross-examination of witnesses, and which ought to be within the parameters set out by the **VPA**. Counsel cited the case of ***IP Veronica Mutai v Republic 2016 eKLR***, which highlighted stages at which interventions for victims can be made. He noted that the reason behind restriction on interventions for victim was to ensure compliance with the **Evidence Act** on admissibility and relevance.

8. Mr. Mochere further submitted that , there is no parallel right in the Constitution that gives victims of crime a right to challenge evidence, cross examine, check evidence and adduce evidence. He emphasized that this right is only granted to an adverse party in a criminal trial. Counsel also submitted that the order of cross-examination of witnesses as provided for under **section 302** of the **Criminal Procedure Code**, and **sections 145-146** of the **Evidence Act**, had not been addressed in the **VPA**. He also questioned the place of advocates watching brief in a criminal trial which only recognizes two parties.

9. Mr. Mochere urged that advocates watching brief were friends of the prosecution and therefore ought to channel their issues through the prosecutor who, under **Article 157** of the **Constitution**, is mandated to conduct prosecution. He challenged the victims' role arguing that they should not be allowed to be investigators and prosecutors since doing so would prejudice the accused since only the Director of Criminal Investigations was mandated to investigate cases under **section 35** of the **Police Service Act**. Counsel further urged that there was real danger posed if an advocate watching brief, while armed with information investigated or supplied to defence, would use it in cross-examination, an act that would

prejudice the accused. Counsel emphasized that under **Article 50** of the **Constitution**, only the accused were on trial and not the victim and are considered innocent until proven guilty.

10. Mr. Mochere relied on the case of *Republic v Joseph Lentrix 2016 eKLR* urging that the **VPA** provides for the procedure to be followed by the court, but which did not, however, amend the **Criminal Procedure Code** and the **Evidence Act**. He also cited the Indian case of *Sathyawani Ponrani v Samuel Raj CRL OP (MD)No.5474 of 2010* where the court opined that a victim could be allowed to cross examine witnesses, but urged the court to note that Aroni, J. in *Republic v Joseph Lentrix Waswa 2016 eKLR* distinguished the Indian case and found that the basis that the **VPA** gives the parameters for victims' participation. Counsel further submitted that in the Indian case, *Sathyawani Ponrani* (supra), the court noted that only where public prosecution failed could the victim's counsel be allowed to cross-examine witnesses. Mr. Mochere urged that there had been no indication in the instant case that the public prosecutor had failed in his duty.

11. Regarding pre-trial conference, counsel submitted that although parties were all in agreement on the victims' participation in the trial, such participation was subject to the specifications of procedural law, the **Constitution** and the **VPA**.

### **INTERESTED PARTY'S' SUBMISSIONS**

12. Mr. Ongaro appearing for the Law Society of Kenya relied on written submissions dated and filed on 25<sup>th</sup> April 2017 and highlighted on 26<sup>th</sup> April 2017 when parties argued the application. Counsel submitted that access to court by affected persons was recognized under **Article 22(2)(b)** of the **Constitution**. He advanced the view that cross-examination by the victims' advocates neither compromised the accused persons' right to a fair trial, nor hindered the prosecution's ability to conduct a focused prosecution of the matter. He maintained that it was within the victims' right to interrogate inconsistencies from the witnesses in question through cross-examination. Counsel relied on the provisions of **sections 4(2)** and **13(1)** of the **VPA** to further advance the view that victims had a right to be heard which would be violated if they were denied an opportunity to cross-examine witnesses on evidence that was not introduced during examination-in-chief. Accordingly, counsel argued, the overriding goal for allowing this participation was to ensure that justice was served throughout the trial process. Thus, failing to allow their participation would negate the spirit of **Article 50(9)** of the **Constitution** which participation enhanced the legitimacy of the justice delivery system.

13. Prof. Sihanya further submitted that failing to allow participation would violate the victims' rights under **Articles 22(2)(b); 27(1); 50(7)** and **259** of the **Constitution**, adding that the accused would suffer no prejudice by virtue of a victim exercising his rights pursuant to **section 13(1)** of the **VPA**. He also observed that the victims had previously cross-examined witnesses, noting that the victims' objective was truth and justice and that their role in court was no longer passive. Furthermore, access to court by affected persons was recognised under **Article 22(2) (b)** of the **Constitution**, and the accused person's rights were not superior to the victims'. Counsel submitted that victims' right to participation subsists throughout the court process, adding that the right to adduce evidence, which entails advancing evidence before the court, is best done during cross-examination and is limited to evidence which was not adduced during examination in-chief. Therefore, it would be prejudicial to deny the victim an opportunity to present evidence that he was aware had not been adduced. Counsel relied on the decisions of the court in *Republic v Joseph Lentrix Waswa Criminal* (supra) *Mary Kinya Rukwaru v Raghunathan Santosh & Another Misc. Criminal Application No. 169 of 2014*, *Hon. Gideon Mwiti Irea v the Director of Pubic Prosecutions & 7 Others Petition No. 151 of 2015*, *IP Veronica Gitahi & PC Issa v Republic Cr. Appeal No. 23 of 2016* and the Indian case of *Sathyawani Ponrani V Samuel RAJ* (supra).

14. Prof. Sihanya observed that the court had already recognised the rights of victims thus it would be mischievous to exclude them at this stage. Counsel added that the accused had neither demonstrated the violations of their rights nor had they shown inconsistencies with procedures stipulated under **sections 302** of the **Criminal Procedure Code**, **sections 146 - 156** of the **Evidence Act** or **sections 9** and **13** of the **VPA**. He expressed the view that the application had been motivated by recognition that police witnesses were not being candid.

## SUBMISSIONS BY VICTIMS' COUNSEL

15. Mr. Ojiambo for the victims' family submitted that the application had failed to observe the place of the victim in the criminal justice process which enjoys constitutional underpinning. He added that the accused had also failed to look at the various provisions of the law holistically, and had misconstrued the decision of the court in *IP Veronica Gitahi & PC Issa v Republic* (supra), adding that victims' participation entailed full participation which was not limited to **sections 4(2), 9 or 13** of the **VPA** as demonstrated in **section 14** and the Indian case of *Sathyawani Ponrani* (supra). Thus, counsel urged, participation was not simply limited to watching brief as advanced by the Applicant. Mr. Ojiambo submitted further that the court had authority to determine the question of victims' participation, as it did in this case, and could similarly stop anything that was objectionable at any stage of the proceedings but not *in limine* stop victim's' participation. Mr. Ojiambo observed that none of the authorities cited suggested limitations binding on the court.

16. Mr. Ojiambo urged the court to observe that fair trial rights were available to every person including the victim and the public, which right is non-derogable under **Article 25** of the **Constitution**. Thus, denying the victims to participate would be a travesty of justice. He urged the court to consider the public nature of the proceedings as well.

## SUBMISSIONS BY PROSECUTION

17. Mr. Mutuku, learned Prosecution Counsel in response to the application and submissions advanced by all parties submitted that although **section 302** of the **CPC** and **sections** of the **Evidence Act** dealing with admissibility and relevance among others had not been amended to reflect the provisions of the **VPA**, this was not to be construed to mean that victims or their representatives cannot participate in criminal proceedings. Counsel urged that the Act gave life to **Article 50(9)** and as such it takes precedence over the procedural laws. Counsel urged that **sections 9** and **13** of the **VPA** laid out provisions on how a complainant or victim can participate in criminal proceedings. Counsel urged that although the sections were not specific to the issue of cross examination of witnesses, it was upon the discretion of the judicial officer and the parties involved to interpret the law.

18. Mr. Mutuku urged that **section 13** of the **VPA** provided that a victim can adduce evidence if that evidence had been left out. He submitted that the questions that needed to be answered were how, where, when and in which manner such evidence was to be adduced. He stated that having a witness cross-examined by the victim was the best avenue that a victim would bring out the evidence that had been left out by the prosecution. Counsel urged that the day when a victim's advocate would sit passively in court were now long gone.

19. On the issue of the victims' participation usurping the powers of the D.P.P, learned Prosecution Counsel urged that the victims via their representatives were not calling and leading the witnesses in evidence in-chief. This, counsel urged was the preserve of the D.P.P and had not been shifted. Counsel further urged that under **section 13** of the **VPA**, the victim had a right to call a witness and lead in giving evidence provided that leave of the court was sought.

20. Learned Prosecution Counsel urged that the participation of the victims in criminal trial had been recognized as the best practice all over the world and that **Article 68(3)** of the **Rome Statute** was a good example. He further urged that the Constitution had accepted these best practices under **Article 2** and as such, the court should not shy away from adopting them.

21. Finally on the issue of the expungement of the victims participation already recorded in the court proceedings, counsel urged that the Applicant had to show what prejudice they had suffered. Mr. Mutuku urged that this burden could not be discharged by stating it in an application but the Applicant had to demonstrate the rights violated as provided under **Article 50**. Counsel further urged that the Applicant had to demonstrate that the interventions made by the victims were inconsistent with a fair and impartial hearing.

22. Mr. Mutuku urged that for the application to succeed the Applicant had to establish whether the conditions set in the provisions of **section 9** and **section 13** of the **VPA** had been complied with. These conditions were:

**(a) Whether the victim had sought permission from the court to be a participant in the proceeding; and,**

**(b) Whether in ensuring the rights of the victims were protected, was it in a manner that was prejudicial to the accused.**

23. Further, Mr. Mutuku observed, there had been consensus when the parties appeared before the court at the Pre-Trial stage, adding that once this was done, there was no need for the victims to always seek permission from the court.

24. Mr. Mutuku urged that all the parties in the case were alive to what had been happening during the interventions made by the victims' advocate when the prosecution had called their 26 witnesses. Counsel urged that the victims advocate had not sought to cross examine all the witnesses and that in the instances they sought to cross examine, the defence counsels were given an opportunity to further cross examine.

## **ANALYSIS AND DETERMINATION**

25. This application revolves around the question of the right of a victim to participate in criminal proceedings. The issues for determination are the following:

**a) Whether or not a victim of crime has a right to participate in criminal proceedings.**

**b) If the victim can participate at the trial, how does he participate and what is the scope of that participation.**

**c) Whether or not participation by a victim infringes on the accused persons' right and interferes with fair trial.**

## **WHETHER OR NOT A VICTIM OF CRIME HAS A RIGHT TO PARTICIPATE IN CRIMINAL PROCEEDINGS.**

25. In Kenya, the place and role of a victim in criminal proceedings has been evolving. Initially, victims were silent observers in court, and were only visible as witnesses and were represented by an advocate through watching brief. In watching brief, counsel lacked the right of audience and could only channel concerns through the prosecution, except in inquests or enquiries where the victims counsel was allowed to cross-examine witnesses.

26. That position has since changed. Developments in the law increased recognition of victims of crime in the trial process. This position was heralded by the **Sexual Offences Act** which formally recognised the victim in the definition of a complainant as follows:

**'Complainant' means the Republic or the alleged victim of a sexual offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse.'**

27. The Sexual Offences Act under **section 33** created an opportunity for consideration of statements of victims in determining the commission of an offence and for the determination of an appropriate sentence. Victim impact statements were eventually provided for in the **Sexual Offences Regulations**.

28. Later amendments to the **CPC** through **Act No. 5 of 2003** introduced victims in the criminal trial process. The Code was more elaborate in providing for an expanded definition of a victim, as well as the

place of Victim Impact Statements in the trial process, most notably to inform the court before granting bail and also before passing of sentence. This progression made its way in the law before the promulgation of the Constitution.

29. **Section 329A** of the **CPC** defines a victim in relation to an offence as:

**“329A Interpretation**

**In this Part—**

**“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;**

**“victim” means a primary victim or a family victim;”**

30. Regarding application of **Part IXA** of the **CPC** **section 329B** stipulates as follows:

**“329B. Application of Part**

**This Part applies in relation to an offence that is being dealt with by any court, where the offence results in the death of, or actual physical bodily harm to, any person.”**

31. **Part IXA** of the **CPC** deals with **Victim Impact Statements**. It limits the use of Victim Impact Statements only in cases where the primary victim has died or where the offence resulted in the physical bodily harm to any person.

32. The progression in the recognition of victims in the trial process did not end with the amendment of the **CPC**. A firm position was realized in the recognition of victims in the criminal trial process after the

promulgation of the Constitution, 2010. It received constitutional underpinning under **Article 50(9)** which required Parliament to enact legislation providing for the protection, rights and welfare of victims of offences. It was further given statutory underpinning under the enactment of the **VPA** in 2014. The enactment of the VPA was deliberately to give effect to **Article 50(9)** of the **Constitution**.

33. The **VPA** codifies the rights of victims in the justice system beyond the trial process. This is evident from a general reading of the preamble to the Act which states:

**“An Act of Parliament to give effect to Article 50(9) of the Constitution; to provide protection of victims to crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes”**

34. It is not in dispute that a victim has the right to participate in criminal proceedings. **Section 4** sets out the general principles that would guide the court in dealing with a question of the rights and welfare of a victim. **Section 4(2)(b)** in this regard enjoins the court to ensure that :

**‘every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken.’**

35. **Section 9(1)** elaborates the rights of a victim during the trial process as follows:

**‘(1) A victim has a right to —**

- (a) be present at their trial either in person or through a representative of their choice;**
- (b) have the trial begin and conclude without unreasonable delay;**
- (c) give their views in any plea bargaining;**
- (d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;**
- (e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;**
- (f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and**
- (g) be informed of the charge which the offender is facing in sufficient details.’**

36. This provision does not expressly elaborate on the right to actively participate in the sense of presenting or challenging evidence in court. That right is recognised in **section 9(2)** which also limits the participation to instances where the personal interests of a victim have been affected. The participation must also not prejudice the rights of an accused to a fair trial, and must not be inconsistent with a fair and impartial trial. It reads as follows:

**‘(2) Where the personal interests of a victim have been affected, the Court shall—**

- (a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and**
- (b) ensure that the victim's views and concerns are presented in a manner which is not**

**(i) prejudicial to the rights of the accused; or**

**(ii) inconsistent with a fair and impartial trial.**

**(3) The victim's view and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.'**

37. Further opportunity for participation of a victim is recognised under **section 13**. The participation is limited to an instance where a victim is a complainant. The victim in this case is allowed to adduce evidence that has been left out, and to make submissions. Adducing evidence is also subject to the **Evidence Act**. The section provides that:

**'Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to- subject to the provisions of the Evidence Act, (Cap. 80), adduce evidence that has been left out; give oral evidence or written submission.'**

38. The main contention in this application is that the victims should not be allowed to participate to the extent of cross-examination of witnesses. Under **section 10(1)** of the **VPA**, the court can consider the victims views and concerns in the proceedings where **'the personal interests of a victim have been affected'**. **Section 2** of the **VPA** defines a victim **'as any natural person who suffers injury, loss or damage as a consequence of an offence'**

39. An assessment of whether the personal interests of a victim have been affected must be viewed in the context of who a victim is as described above. The victims in this case were the deceased one who was an advocate, his client and a taxi driver. These are the subject matter of these proceedings. The victims are not limited to the three but include those who suffered loss and naturally include the wives and children of the deceased persons, their parents and other affected directly by these deaths like the LSK, Taxi Operators and BodaBoda Riders who were the colleagues of the three deceased persons in this case. Indeed these are the ones represented by Mr. Ojiambo, SC, Prof. Sihanya, Mr. Ongaro and Mr. Ahmed.

40. While considering whether to grant the accused bail in this caase I dealt with the issue of who are the victims in this case and held as follows:

**"63. Apart from accused rights and public interest issues, there are other categories of rights which the court is mandated not to lose sight of. These are the rights of the victims of the offence or crime. The Victim Protection Act gives a broad definition of who victims are. They include the families of the ones against whom the offence was committed. It also includes those directly or indirectly affected by the offence.**

**64. In this case we have all these categories of victims. They include the family members of the deceased persons; the Law Society of Kenya, IJM, Witness Protection and taxi owners' and boda boda fraternity. Others include a special category of Overseers, iPOA."**

41. In the case of **IP GITAHI & ANOTHER** (supra), the court of appeal held:

**"By section 2 (VPA) a victim is defined to include any natural person who suffers injury, loss or damage as a consequence of an offence, a definition wide enough to include the deceased's mother and uncle who are represented by Mr. Ndubi in this appeal...it would be unconscionable of us to deny him audience in this court when he was allowed, on specific terms to participate in the trial court."**

42. This case buttresses the courts finding that these category of persons before this court as victims qualify and meet the threshold of a victim as defined under **section 2** of the **VPA** which describes victim as **'any natural person who suffers injury, loss or damage as a consequence of an offence.'**

43. The victims thus qualify to participate in the criminal trial of the accused in the scope recognised by

the law, and also the VPA by having their views and concerns considered by the court. It is well within the law in this case for the victims to participate in terms of adducing evidence as contemplated under **section 9** and **13**, but only to the extent that such participation does not compromise the accused persons' right to fair trial and the fair trial. Adducing of evidence must also be within the rules of evidence as set out in the **Evidence Act**.

44. **Section 9** of the **VPA** gives the victim a right to:

“(1) ...

(a) **be present at their trial ...;**

(b) ...;

(c) ...;

(d) **have any dispute that can be resolved by the application of law decided in a fair hearing...;**

(e) **be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;**

(f) **have the assistance of an interpreter provided by the State; and**

(g) **be informed of the charge which the offender is facing in sufficient details.'**

‘(2) Where the personal interests of a victim have been affected, the Court shall—

(a) **permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and**

(b) **ensure that the victim's views and concerns are presented in a manner which is not**  
—

(i) **prejudicial to the rights of the accused; or**

(ii) **inconsistent with a fair and impartial trial.**

(3) **The victim's view and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.'**

45. There is no other purpose for supplying the victim with statements comprising the evidence the defence and the prosecution intend to rely on, allowing them to be present at the trial and to be represented by counsel and have their views presented to court just as a formality. The purpose is to have prior information about the case before it commences, and I believe the reason for this is to aid them to knowledgeably prepare for the trial. Gone are the days they sat pensively in court, helpless and voiceless. The latest developments in the law and the promulgation of the Constitution 2010 increased the space for victims to participate actively at the trial and to be fully informed about the case. The victim has to determine what nature their participation in a case will take. Where they decide to play an active role, then it is for the court, in its discretion to determine the scope and level of participation.

46. The participation of victims in criminal trial proceedings as now recognised in our laws is in accord with international developments that have embraced the place of victims in the trial process. The **United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** recognises the right of victims to access justice and fair treatment. It provides in part:

**‘6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:**

**(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;**

**(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.’**

47. The **Rome Statute** also recognises victims’ participation under **Article 68(3)**, which provides:

**“Where the personal interests of the Victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”**

48. The Rome Statute allows victims and their legal representatives to participate in proceedings at the **International Criminal Court (the ICC)** by calling and questioning witnesses, subject of course to applying to do so through the court.

**IF THE VICTIM CAN PARTICIPATE AT THE TRIAL, HOW DOES HE PARTICIPATE AND WHAT IS THE SCOPE OF THAT PARTICIPATION.**

49. The question that would arise therefore is the scope of victim’s participation and in particular how they should participate as envisaged by the law. It was submitted on behalf of the accused that the victims should not be allowed to cross-examine witnesses. Counsel for the accused expressed the view that the provision for representation of views and concerns did not extend to cross-examination of witnesses, and that such representation was limited to certain stages of the proceedings.

50. It is not in doubt from the provisions cited above that victims of crime have a right to participate in criminal proceedings. The **VPA** allows for presentation and recognition of victim's views and concerns to be presented and considered at stages of the proceedings as determined to be appropriate by the court. Furthermore, a victim is allowed to adduce evidence which has been left out. This participation must be realized within the confines of fair trial guarantees, and subject to the **Evidence Act**.

51. The **VPA** under **section 9(1)** also recognises one of the rights of a victim as including the right to-

***‘(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;...’***

52. The victim is placed in a unique position in that he has the right to access evidence; both the defence of the accused and the evidence of the prosecution. This has placed the victim in an exclusive position in law, since that right does not extend to the prosecution. The rationale behind this provision is, in my view, two-fold:

**Firstly, it seeks to actualize the right of a victim to participate in the proceedings, since there cannot be participation without access to the relevant information. The victim in this sense is being viewed as a person distinct from the prosecution.**

**Secondly, participation when actualized in the form the court finds appropriate should be realized within the limits of the evidence before the court in the form of the evidence intended to be relied on by the prosecution and the defence.**

53. The Applicant has challenged the manner in which the victims' were participating in these proceedings. Firstly, it must be pointed out that the question of victims' participation arose early on in these proceedings. During the Pre-trial Conference, advocates for the victims expressed their intention to participate by cross-examination of some witnesses as the need may be. This position was agreed to by all parties without any reservations at the time I took over this case at PW3. No issues arose until the time the court was in the process of taking the evidence of the 26<sup>th</sup> prosecution witness.

54. Regarding this agreement, the counsel for the accused argued that although parties had agreed on the modalities of their participation, the same was subject to the specifications of procedural law, the Constitution and the VPA. In effect the defence was acknowledging that there was a consideration of the participation of Victims in these proceedings very early at the beginning of the proceedings.

55. I do not wish to dwell on the issue of Pre-trial Conference except to add that it is in use through Active Case Management Guidelines which were gazetted by the Chief Justice (RTD) Dr. Mutunga, but was first rolled out in Pilot Court Stations. It will eventually be adopted in all court stations and in all case types.

56. That said, the concern raised in the application is that the accused was apprehensive that cross-examination of witnesses by the victims' advocates was prejudicial to him and was not backed by any law. The Applicant relied on the case of **IP Veronica Gitahi & Another v Republic** (supra). In that case the Court described and defined the parameters for intervention by victims' representatives under the VPA as follows:-

**'The Act further provides the parameters of the victim's representative's participation in the trial. The victim's views and concerns may be presented in court at any stage of the proceedings as may be determined to be appropriate by the court. Those views and concerns may be presented by the victim himself or herself or by a "legal representative" acting in the victim's behalf, at the stage of plea-bargaining, bail hearing and sentencing, as far as possible to be heard before any decision affecting him or her is taken; to be accorded legal and social services of his or her own choice, and if the victim is vulnerable, to be given these services at the State's expense, and to make a victim impact statement at the stage of sentencing. These rights must however not be prejudicial to the rights of the accused person or be inconsistent with a fair and impartial trial. See sections 20 and 21.'**

57. It is noteworthy that the appellate court did not disturb the High Court's direction which set the terms of the level of participation by the victim's counsel, but simply acknowledged the participation which was on the specific terms that the trial court had set. The learned judge of the High Court had in that case limited participation :

**" will allow interventions only on matters of law at appropriate stages of the proceedings where and if necessary.. I will allow submissions at the stage of a case to answer and final submissions if need be. The victim while granted reasonable access to the prosecution file is not allowed to add any point of fact or any evidence to the present case file or to question witnesses..."**

58. I note that my learned brother of the High Court actually allowed greater participation to the victims lawyer, not limited only to bail, plea bargaining and sentence. He clearly opened a wider window to them by setting the terms of participation to include interventions on points of law at various stages of the trial. The judge was clear that he would determine if the intervention will be allowed subject to where and if necessary. I noted that the Court of Appeal did not fault the learned judge for widening the space of participation to beyond the parameters they mentioned in their ruling being **"Those views and concerns may be presented by the victim himself or herself or by a "legal representative" acting in the victim's behalf, at the stage of plea-bargaining, bail hearing and sentencing"**

59. What I learn from this is that the trial court should exercise its discretion and determine the level of participation by the victims or their representatives subject to safeguarding the rights of the accused to

ensure that the exercise of rights by the victim is not prejudicial to the rights of the accused person or be inconsistent with a fair and impartial trial.

60. In the case of ***Republic v Joseph Lentrrix Waswa*** (supra), counsel for the victims made an oral application seeking to “actively participate” in the matter. The court considered the question *whether a counsel watching brief for the family of a deceased in a criminal matter can actively participate in the trial on behalf of a victim” and if so to what extent”*. The court observed that:

**‘From the cited Articles of the Constitution 2010, provisions of the VPA 2014 and cases cited from within and outside, the law has shifted the traditional parameters of a victim in a criminal case and therefore the arguments advanced by the defence are certainly out of place and would if adopted by court be contrary to the provision of the Constitution and the VPA, and by all means against progressive jurisprudence. The victims counsel can no longer be considered a passive observer.’**

61. That court went ahead to rule as follows:

**‘30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of Sathyavaniand as advocated by counsel for the family herein. The above Indian case in that regard is distinguishable as the VPA 2014 gives the parameters of involvement during trial to include; the victim’s views and concerns at various stages of the trial as the court may determine either directly by a victim or his/her representatives, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not throughout the trial and parallel to the prosecution.’**

62. The court in ***Waswa*** case, (supra) limited participation to include victim’s views and concerns at plea bargaining, sentencing or where a decision would likely affect the right of the victim. My learned sister in this case was also emphatic that the participation was not to be parallel to the prosecution and not throughout the trial. My learned sister expanded the space for the participation of the victim by stating that the victim’s views and concerns at various stages of the trial as the court may determine would be presented by the victim or counsel.

63. From these two decisions of my brethren in the High Court, and from the restrain on the part of the Court of Appeal to challenge the discretionary directions made by the High Court on the question of victim participation. I would say that this area is growing, it is not static. It has so far been very progressive. As more courts are faced with this issue, we shall definitely see more views, different interpretations and diverse dimensions of application.

64. For now, it is my view that under, Article 27 the victim **“is equal before the law and has a right to equal treatment and equal protection before the law.”** Article 50 (1) **“right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court..”**

65. The VPA has several operative words regarding the victims, including **“to be present at trial..to be represented by counsel..should be heard...have reasonable access to evidence relied upon...to raise concerns ...”** et al.

66. All these right are precursors to active participation by victim, subject to courts direction in court’s discretion, depending with the nature of the case. In the instant case, the court was assisted by all counsels to the parties in this case, at the Pre-trial Conference. The terms are on record. As stated the question of participation of the victims was raised and addressed during the Pre-trial Conference where parties agreed that victims would be allowed to ask questions to witnesses whenever they found it necessary. This was of course subject to court’s direction and intervention where necessary, which power the court exercises throughout the trial both in regard to examination of witnesses by the prosecution and the defence.

67. I am in agreement with the learned Judge’s reasoning in the ***Rep v Waswa*** case, (supra) to the extent

that the participation of the victim should not be a parallel prosecution. The victim should not appear to be in competition with the Prosecution. He should also not appear to be conducting a parallel prosecution to that of the prosecution. The victim should be allowed to participate at any stage of the proceedings, subject to the limits set in law as discussed above. The court should set the parameters of this participation in line with the VPA, the Constitution and any other relevant law including allowing cross examination of witnesses.

68. In regard to cross examination I must put a rider. The need for having a focused prosecution as opposed to a parallel or competitive one must be guarded jealously. It is important that whatever cross examination that takes place must be within what is contained in the evidence provided by the defence and prosecution as the one they intend to rely on. That was the accused persons will not be taken by surprise or ambushed. A failure to observe this rule would be highly prejudicial to the accused person and may compromise fair trial.

69. Adducing evidence through cross examination cannot therefore, be viewed outside the evidence before the court. Participation by a victim is premised on already existing evidence. The other prerequisite is that such evidence is subject to the dictates of the Evidence Act as to relevance and admissibility, the rights of an accused to a fair trial and requirements of a fair and impartial trial. Therefore, even where the victim has been allowed to cross-examine witnesses thereby adducing evidence, it is not an open cheque, it must be within the limits set out herein above, and even then there should be no compromise to the standards required of a fair trial.

70. In the case of **Sathyawani Ponrani** case (supra) the High Court of India considered the question of whether a victim should be entitled to participate in criminal proceedings. The judge in **Republic v Waswa** case (supra) distinguished the Indian case and observed:

**‘30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of Sathyavani and as advocated by counsel for the family herein The above Indian case in that regard is distinguishable as the VPA 2014 gives the parameters of involvement during trial to include; the victim’s views and concerns at various stages of the trial as the court may determine either directly by a victim or his/her representatives, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not thought out the trial and parallel to the prosecution.’**

71. The judge in the Indian case, above held in part:

**“The Code of Criminal Procedure (Amendment) Bill, seeks to achieve the above objective.**

**20.A perusal of the said objective and reasons would extremely exemplify that the said proviso has been introduced in order to help the victims to give a more active role in the dispensation of criminal justice. In other words, the purpose of the proviso is to have active participation of the victim in the criminal justice system. After all it is he who sets the criminal law in to motion and it is he who is the affected party. A reading of the said proviso under section 24 (8) of the Code of Criminal Procedure would clearly show that the court concerned can permit the victim to engage an advocate of his choice to assist the prosecution...**

**35. Section 301 Cr.P.C. speaks about the power of the Public Prosecutor to conduct the prosecution. A conjoint reading of Section 301 and 24(8) would make it clear that it is the Public Prosecutor who conducts the case but it does not mean that a lawyer engaged by a victim shall not be allowed to supplement the conducting of the case by the Prosecutor. A lawyer has to render his assistance in three different ways. He has to render assistance to the victim, to the prosecution and as an officer of the Court.**

**36.It is the sole prerogative of the public prosecutor to pick, choose and examine a prosecution witness. However if the public prosecutor fails in the above mentioned duty**

either accidentally or designly in the opinion of the Court, then in such a circumstance it can permit a victim's lawyer even to examine a witness. Such a power can also be exercised by the Court for the purpose of conducting a free and fair trial and in the interest of justice.

37. Therefore this Court is of the opinion that a combined of [Section 301](#) and proviso under [Section 24\(8\)](#) would make it clear that a lawyer can be engaged to argue and in an appropriate case with the permission of the Court to examine the witness.

38. Further a reading of the above said provisions would show that [Section 301](#) speaks about the instructing a pleader whereas [Section 24\(8\)](#) proviso speaks about engaging a lawyer. Therefore under [Section 301](#) a party can instruct whereas under [Section 24\(8\)](#) proviso a victim can engage a lawyer and conduct the case along with the Public Prosecutor.

39. Hence considering the same, this Court is of the opinion that the proviso under [Section 24\(8\)](#) will have to be given its full and actual meaning, considering the legislative intent for its introduction”

72. The practice in India is quite progressive. It is also clear, just as is evolving here at home, that the court has power to exercise its discretion and determine the nature, degree and scope of participation by the victim. Otherwise, the Indian process is different from ours, however the bottom line is that the victim is allowed participate in the proceeding, even in some instances to assist the prosecutor in the case.

73. The court in the case of [Gideon Mwiti Irea v Director of Public Prosecutions & 7 Others Petition No 151 of 2015; \[2015\] eKLR](#) where the court held that:

‘...under Section 13(1) of the VPA a complainant has the right to adduce evidence that has been left out....

The law above is clear and simple. A victim who is a complainant in a criminal case can adduce additional evidence that has been left out. As stated earlier, a victim can participate either in person or through an advocate. To my mind therefore, nothing stops an advocate from drawing up affidavits when he or she is representing a victim in criminal proceedings. Such actions do not in my view amount to investigation of a crime and therefore usurping of the mandate of the 2<sup>nd</sup> Respondent.’

74. The only comment I wish to make about [Mwiti Irea](#) case, (supra) is fact [section 13](#) of the VPA applies where the victim is the complainant in the criminal case. In the cited case, the complainant in the case was allowed to participate in the trial. The Constitutional Court held that there was nothing wrong for the complainant to take part in the trial and even call evidence if she required to do so. In the instant case, the victims are not the complainants, as the victims are deceased. By that I mean that the primary victims are the complainants in the case. [Section 13](#) of the VPA does not therefore apply to this case.

75. Participation by victims does not of itself compromise the fair trial guarantees. It is how such participation is conducted that must be measured to guard against jeopardizing the rights of an accused, and it is the duty of the court to so ensure. The law recognises and supports victims’ participation so long it does not tip over the right of an accused to fair trial. Furthermore, by participating in the proceedings, a victim’s counsel does not take over the role of the prosecutor.

#### **WHETHER OR NOT PARTICIPATION BY A VICTIM INFRINGES ON THE ACCUSED PERSONS’ RIGHT AND INTERFERES WITH FAIR TRIAL.**

76. The interest of the court is to find out the truth. The objective of a criminal trial is not limited to securing a conviction or otherwise. The participation of the victim must also be in this context: to find out the truth. I find the words of the court in the Indian case of [Zahira Habibullah Sheikh & another vs State of Gujarat & Others AIR 2006 SC 1367](#) instructive where the Supreme Court stated:

**‘It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical or comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted..... Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and presence....The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.’**

77. The criminal justice system in Kenya places the right to a fair trial on a high pedestal. An accused person is presumed to be innocent until proved guilty. The accused person is entitled to a fair trial and the court plays a pivotal role in this regard to ensure it is actualized. The court plays a balanced role in the trial of an accused person; that of a custodian of the law and a guardian of the constitutional safeguards. The trial should manifestly conform to the requirements of **Article 50** of the **Constitution**. In furthering this protection, the court takes into account the interests of the accused, the victim and the public in whose name criminal proceedings are instituted.

78. Having set out the case by all parties and considered their rival submissions and the authorities submitted, I find that the cross-examination of witnesses by the advocates for the victims neither compromised the accused persons’ right to a fair trial, nor hindered the prosecution’s ability to conduct a focused prosecution of the matter. I find that the cross- examination of witnesses by the counsels for the victims was the best avenue that a victim could use to bring out the evidence that had been left out by the prosecution in the examination in chief, and which evidence was within the statement of the witness supplied to the defence and the victim.

80. Having considered this application and the submissions by counsel, I find that the victims’ right to participation in the trial process subsists throughout the court process, and is not passive but active within the limits set herein. I find that the participation of the victims is a non-derogable right under **Article 25** of the **Constitution**.

81. 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. Other safeguards include:

**(a) Whether the victim had sought permission from the court to be a participant in the proceeding; and,**

**(b) Whether in ensuring the rights of the victims were protected, was it in a manner that was prejudicial to the accused.**

82. The court has to remain vigilant throughout the trial. It must satisfy itself:

**i) that the victim in their line of cross-examination are not infringing on the rights of the accused, or**

**II) that the victims’ participation does not infringe on the right to fair trial.**

**III) that the accused are not ambushed or embarrassed by new evidence being introduced by the victims, which has not been supplied to them.**

83. However having settled the rules of engagement at the Pre-Trial Conference stage, there is no need for the victims to always seek permission from the court before they cross-examine witnesses. The court

retains the right to intervene and stop or give directions on the nature of cross-examination where necessary.

84. In order to save time and ensure that the accused are not forced to seek leave to further cross-examine a witness after cross-examination by the counsel for the victims, I think that it is best to have the advocates for the victims to go first and cross-examine the prosecution witness immediately after examination –in-chief by the prosecution as a result of new evidence

83. Finally on the issue of the expungement of the record touching on the victims participation already recorded in the court proceedings, I find that the Applicant has not shown what prejudice the accused have suffered as a result of that participation, or how their rights under **Article 50** has been affected or violated, or that the participation of the victims was inconsistent with a fair and impartial hearing.

#### **CONCLUSION AND FINAL ORDERS.**

84. I have come to the conclusion that the Applicants application lacks in merit. Accordingly I order:

- i. That the Notice of Motion application dated 18<sup>th</sup> April, 2017 be and is hereby dismissed.**
- ii. That the victims shall continue to participate in the proceedings through their appointed counsel as agreed at the pre-trial conference.**
- iii. In regard to the order of examination of prosecution witnesses, counsel for the victims shall if necessary examine the prosecution witnesses immediately following examination in-chief by the prosecution and before the defence.**
- iv. The advocates for the victims will go first and cross-examine the prosecution witnesses immediately after examination–in-chief by the prosecution.**

**DATED AND SIGNED AT NAIROBI THIS 24<sup>th</sup> DAY OF MAY, 2017.**

**LESIIT, J**

**JUDGE**