



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 75 OF 2011

REPUBLICRESPONDENT

VERSUS

MOHAMMED ISMAIL MADEY1ST ACCUSED

ABDI ELMOGE ABDI2ND ACCUSED

DAVID KIHARA MUCHIRI3RD ACCUSED

JOSEPH MUCHIRI MACHARIA4TH ACCUSED

RULING

BACKGROUND

1. The accused persons herein face a charge of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 21/9/2011 at Thome Area within Nairobi County jointly with others not before the court murdered **ANTHONY NAHASHON NGUNJIRI**.

2. On 9/10/2011 they took their plea before Mwilu J (as she then was) when a plea of not guilty was entered for all of them. On 24/1/2012 their trial commenced before Kimaru J who took the evidence of five prosecution witness before proceeding on a transfer. On 25/2/2013 the then presiding Judge of the Criminal Division directed that the matter proceed further for hearing before Kimaru J who on 17/2/2014 proceeded with further hearing up to **PW10 FRANCIS MATHENGE WANDERI** before disqualifying himself from hearing this matter on personal grounds.

3. On 22/5/2014 Muchemi J issued Directions under Section 200(3) of the Criminal Procedure Code that the matter proceed from where it had reached which order was confirmed by Lesiit J on 29/10/2014 and retook the evidence of PW10 before the Defence raised an objection through Mr. Sagana Advocate for the 1st and 2nd Accused persons in respect of further witness statement by PW10 and the subject matter of this ruling, on the basis that the said statement was made as a result of remarks allegedly made by Justice Kimaru in the course of the trial and the judge directed that the defence file a formal application in respect of his objection.

APPLICATION

4. By a Notice of Motion dated 27th April, 2015 under **Article 50(2)(c) (j) (k)** and **Article 24** of the

Constitution of Kenya 2010 and **Section 4** of the ODPP Act the applicants moved the court for the following ORDERS:-

1. THAT unless leave is granted this court be pleased to restrict the prosecution to evidence and exhibits disclosed to the 1st accused during pre-trial disclosure.
2. THAT this Honourable court be pleased to refrain the prosecution from submitting the further fresh witness statement of PW10 FRANCIS MATHENGE WANDERI or adducing evidence contained therein that is materially different from the evidence in his written statement supplied during the pre-trial.

5. The application was supported by the affidavit of MOHAMED ISMAIL MADEY in which he deponed that he applied for the prosecution witness statement and exhibits – (Pre-trial disclosure or committal bundle) which order was given in September, 2011 and that he has based his defence which included cross examination of all the prosecution witnesses based upon the witness statements and exhibits supplied to him at the pre-trial. He further stated that during an advanced stage of the trial, Kimaru J who was then the trial judge made a remark in court that the prosecution needed to prove that he knew the deceased was an advocate and not an armed robber as reported to the police in order to prove the murder case against the same.

6. That none of the 23 prosecution witnesses including PW10 Francis Mathenge Wanderi mentioned in the pretrial witness statements that the accused knew the deceased and more particularly that he was a lawyer in a land dispute where he was killed. That after the remark of the trial judge PW10 recorded a new statement that is a complete departure from his initial statement provided to him at pre-trial and in line with the judge's remark and that the prosecution has offered no explanation as to why the further witness statement of PW10 was not issued to him during pre-trial disclosure.

7. The 2nd accused person ABDI ELMOGE ABDI also swore an affidavit in similar terms in support of the application herein, while the state in response filed a replying affidavit sworn by CPL PATRICK MURAGURI in which it was deponed that the initial report of the brutal killing of the deceased was made by JOSEPH MACHARIA MUCHIRI the 4th accused to the 1st and 2nd accused persons and a similar report was made at Kasarani police station by Maswali Mogire George a court process server who was with the deceased at the time of the incident.

8. That on 23/1/2012 he proceeded to the office of the DPP with seven prosecution witnesses, among them Mr. Francis Wanderi (PW10) for pre-trial session in the course of which the witnesses raised concern that his statement did not contain the full account of the events and circumstances preceding the killing of the deceased which he had given to the police. He was therefore requested to go ahead and record a further statement from the said witness which statement is substantially the same with one dated 24/9/2011.

9. It was further stated that the events and occurrence surrounding the disputed access roads including but not limited to the civil suit that was filed by Mr. PATRICK WAINAINA's lawyer and all the reports to the police were relevant facts which ought to be tabled in court for the court to have a just determination of the case, further that there is neither a rule of law nor practice compelling the prosecution to solely rely on witness statement to prove the case against the accused.

10. It was deponed that the prosecution had supplied the applicant with the further statement in time and therefore ought to have tested the credibility of that statement in court through cross examination.

11. In further response to the said application, the State through Mr. MM O'MIRERA filed preliminary objection on points of law to wit:- The orders sought for are legally untenable and if granted could blatantly violate the fundamental/cardinal principals of criminal jurisprudence, rule on admissibility of evidence and seriously impede, negate, vitiate the constitutional principles on the independence of both the judiciary and the office of the Director of Public Prosecutions functions.

SUBMISSIONS

12. On behalf of the applicant it was submitted by Mr. Sagana that under **Article 50** of the Constitution of Kenya 2010 which provides the right of the accused person to a fair trial includes the right to be given adequate time and facilities to prepare for their defence. It was submitted that the defence has a right to be informed in reasonable time in advance of the evidence the prosecution intends to rely on. It was therefor submitted that the prosecution owes a duty to the court to ensure that all relevant evidence of help is either led by them or made available to the accused reasonably early as was held in the case of **GEORGE NGODHE JUMA vs ATTORNEY GENERAL (2003) eKLR**.

13. It was submitted that statements supplied to an accused person are necessary so as to avoid a trial by ambush on the part of the prosecution and must be supplied in advance of trial – reference was made on the case of **THOMAS PATRICK GILBERT CHOLMONDELEY V R (2008) eKLR**. It was submitted that the prosecution election to adduce new evidence through PW10 which evidence was not availed to the accused infringed on their right to equal and fair trial as secured by **Article 50(2)** of the Constitution and that withholding that statement was to serve in the interest of the prosecution in violation of the Constitutional right of the accused since no reason has been offered as to why the statement was not availed.

14. In support of the submissions herein reference was made to the case of **Republic vs Musa Kwamoi Criminal Case No. 24 of 2011** where Gikonyo J stated that:-

“Cross examination is one of the tools which actualize the right of the accused to adequately defend self against the charges. But it will lose its value if the accused is to be confronted with evidence without any knowledge of it. Such is what in the legal circles is referred to as “practice by ambush” and is loathed in criminal justice system.”

The court was therefore urged to disallow the use of the said further witness statement.

15. On behalf of the other accused persons, Mr. Wetangula submitted that under **Article 50(2) (j)** the constitution provides for a right to be informed in advance of the evidence against an accused person and that under **Article 20(3) (b)** the court ought to apply an interpretation that favours enforcement of the right. It was submitted that the evidence should be supplied before the trial and not during trial.

16. It was submitted that the defence they had had been based on the material that had been availed to court and therefore the prosecution should not be allowed to introduce fresh evidence that was not availed at the beginning of the trial since this would have the net effect of prejudicing the rights of the accused persons to fair trial. In support of these submissions reference was made to the case of **REPUBLIC VS RAPHAEL MUOKI KALUNGU HIGH COURT AT NAIROBI CRIMINAL CASE NO. 77 OF 2014** where Mutuku J held that the court as legally bound favours an interpretation that most favours the enforcement of a right. The court was therefore urged to exclude the further statement dated 23rd January, 2012.

17. On behalf of the State it was submitted that at the beginning of the trial the State made an opening remark where it was stated that the deceased was an officer of this court acting as an advocate for the parties in a land dispute and therefore did not need the input of Justice Kimaru in respect of the further affidavit which was inadvertently not served until the witness was called to testify upon which the court gave the defence time to look at the said statement. It was submitted that the rule of exclusion of the evidence is not provided for under the constitution.

18. It was submitted that the defence is only entitled to be granted time to look at the said further statement and can during cross examination impeach the credibility of the said witness based upon the two statements.

ISSUES

19. The following facts are not in dispute from the proceedings herein:-

- a. That the prosecution had before the commencement of the trial herein supplied the defence with all written statements of the witnesses it intended to call save for an alleged further statement of PW10 dated 23rd January, 2012.
- b. That so far nine (9) prosecution witnesses had testified before Justice Kimaru by the time when the judge disqualified himself from hearing this matter.
- c. That directions were issued under **Section 200(3)** of Criminal Procedure Code that the matter proceeds from where it had reached before another judge and
- d. That at the time of the said directions the defence had a right to recall any of the prosecution witnesses who had testified for purposes of further cross examination.
- e. That the further statement of PW10 had not been supplied to the defence as at the time when Justice Kimaru disqualified himself.
- f. Both Justice Lesiit and myself directed that the evidence of PW10 be taken afresh.

20. The only issue in dispute in this matter is as to whether the said further statement was made as a result of an alleged remarks made by Justice Kimaru in the course of this trial or as stated by the prosecution the same was made during the pre-trial briefing with the said witnesses but inadvertently not served.

21. From the record herein I am unable to confirm whether Justice Kimaru made the alleged remarks since nothing is recorded in the proceedings and the judge gave personal reasons as to why he disqualified himself from hearing this matter and I would therefore not comment on those allegations noting that these facts would have been best placed before Justice Kimaru.

22. The issue therefore for determination is whether the prosecution witness No. 10 MR. FRANCIS MATHENGE WANDERI should be denied the right to refer to his further statement recorded on 23rd January, 2012 but not served upon the defence and whether the use of the said statement if allowed would prejudice the defendants' Constitutional rights to fair trial.

23. The Constitution of Kenya 2010 has been described as one of the most progressive Constitutions in the world and the same has broadened the application of fundamental rights and freedoms to all Kenyan citizens. The duty of safeguarding those rights have been under Article 165(3) (b) placed upon this court in the following terms:-

(3) Subject to Clause (5) the High Court shall have

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

24. Article 23(1) further confers the authority on this court to uphold and enforce the Bills of Rights. One of the fundamental Rights under the Bills of right is the right to a fair hearing which includes the Right to be informed in advance of the evidence the prosecution intends to rely on and to have access to the said evidence.

25. In this matter it has been conceded to by the prosecution that the further statement recorded in respect of PW10 was never served upon the defence and that the same was served when the said witness was already on the witness stand. It is therefore the applicants' contention that his statement should have been served in advance of the commencement of the trial and having not been so served should be excluded. Reference was made to the case of **JARED ONYANCHA OBAR vs REPUBLIC** in the **HIGH COURT OF KENYA AT KISII CRIMINAL APPEAL NO. 02 OF 2012**.

DETERMINATION

26. The right to witness statements is very fundamental to the criminal justice as it is through those statements that the accused person is placed in a level playing field with the prosecution and in a position to prepare his/her defence. This position was reinstated by the Court of Appeal in **THOMAS PATRICK GILBERT CHOLMONDELEY vs REPUBLIC COURT OF APPEAL AT NAIROBI CRIMINAL**

APPEAL NO. 116/2007 in the following terms:-

“To satisfy the requirement of a fair trial the prosecution is now under a duty to provide an accused person and to do so in advance of trial all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be provided at the trial.....”

The Court of Appeal went further and adopted the holding in the case of **REPUBLIC VS WARD 1993 2 ALLER 557** where the Court of Appeal in England stated as follows:-

“The prosecution’s duty at Common Law to disclose to the defence all relevant material i.e. evidence which tended either to weaken the defence case or to strengthen the defence required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such statement and make copies unless there were good reasons not to do so. Furthermore the prosecution were under a duty, which continues during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure.....” (Emphasis added)

27. In the case of **DENNIS EDMOND APAA & OTHERS vs ETHICS & ANTI CORRUPTION COMMISSION HIGH COURT AT NAIROBI PETITION NO. 317 OF 2012** reported in (2012) eKLR the court had this to say on the same:-

“The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received.”

28. This position that the right to supply the evidence continues throughout the trial was reinstated in the case of **THUITA MWANGI vs THE ETHICS & ANTI CORRUPTION COMMISSION PETITION NO. 153/2013** where the court once again stated as follows.

“The duty to disclosure is a continuing one throughout the trial. The right to be provided with the material the prosecution wishes to rely on is not a one off event but is a process that continues throughout the process of trial from the time the trial starts when plea is taken. The reality is that there will be instances when all the information relating to investigation may not all be available at the time of charging the suspect or taking pleas. The disclosure of evidence both inculpatory and exculpatory is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right when fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.”

29. In the case of **GEORGE NGODHE JUMA & OTHERS vs THE ATTORNEY GENERAL** in **THE HIGH COURT OF KENYA AT NAIROBI MISC. CRIMINAL APPLICATION NO. 345 OF 2001** reported in (2003) eKLR and submitted by the applicants, Mbogholi and Kuloba JJ had this to say on the duty of the prosecution:-

“Always remember that the purpose of Criminal prosecution is not to obtain a conviction, it is to lay before the court what the court considers credible evidence

relevant to what is alleged to be a crime. The prosecution has a duty to see that an available proof of facts are presented and this should be done firmly and pressed to its legitimate strength but it must be done fairly.....” (Emphasis added)

30. In the matter before the court the defence was provided with all the materials the State intended to use including the statement by PW10 initially recorded but left out the further statement by the said witnesses. Since it is admitted that the said statement was not supplied and since that statement is not being produced without the said witnesses testifying on oath, I am of the considered view that this does not mean that the said witness cannot be examined on the same as it was and is still open to the defence to ask for time to study the said statement and if need be to recall any of the prosecution witnesses. I find no provision in the constitution and Criminal Procedure Code which requires the court to refuse to receive and record such evidence unless it is proved that the same was deliberately withheld to defect the course of justice.

31. The accused’s right to fair trial will still be protected since the same still retains the right to recall any of the prosecution witnesses and to discredit the said statement by way of cross examination. Whereas the court has been urged to exclude the said statement I find that there is no prejudice suffered or likely to be suffered by the accused persons as the accused persons have not shown that failure to supply that statement has resulted in or will result in failure of justice since the defence can still use the previous statement to discredit the evidence of the said witness.

32. I have had the advantage of reading all the authorities submitted by the defence and note that all of them emphasize the need to supply the accused person with witness statements the prosecution intends to use as this will aid in fair trial but there is none that calls for exclusion of statements provided to the defence during trial. In the present case I find and hold that the applicant’s rights to fair trial has not been violated as the same is still protected since they can still exercise the right to recall any or all prosecution witnesses as held in **MUTUKU MUSYOKI NDOLO Vs Republic HIGH COURT OF KENYA AT MACHAKOS CRIMINAL MISC. NO. 111 OF 2013**. I have further not found any bad faith on the part of the prosecution to enable me hold that the omission to supply the further statement was deliberate there being no evidence on record that it was made allegedly as a result of remarks made by Justice Kimaru in the course of trial or that it was deliberately withheld from the defence.

33. It is the trial court that shall determine the evidential value and the credibility of the said witness and therefore to lock out that evidence at this stage before the same is presented to court and subjected to cross examination will in my view result in a miscarriage of justice.

34. In the final analysis I would allow the prosecution to use the further witness statement recorded by PW10 FRANCIS MATHENGE WANDERI and grant the defence leave to recall any of the prosecution witnesses who have already testified should there be any issue they intend to clarify in view of the content of the further witness statement by PW10.

SIGNED, DATED and DELIVERED at Nairobi this 17th day of March, 2016

.....

J. WAKIAGA

JUDGE

In the presence of :-

Mr. Omirera for the state

Miss Kinyanjui for Mr. Sagana for the 1st and 2nd accused

Mr. Wetangula for 3rd and 4th accused

Miss Ndumba for the family of the deceased

Tabitha court clerk