



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 104 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WINFRED NDILA KIOKO.....ACCUSED**

**RULING**

Counsel for the accused Mrs. E. B. Nyamongo raised an objection when PC Nickson Kiunga, PW15, was put on the witness stand. This was on 29<sup>th</sup> June 2016 and the reason for the objection was that the defence had just been served with the statement of this witness. The response by the prosecution counsel then was that the statements of this witness and another were not part of the original committal bundles. This court ordered that PW15 be stepped-down and directed that the matter be adjourned to 27<sup>th</sup> July 2016 to allow the defence counsel time to consult her client and prepare to cross examine this witness. Due to intervening circumstances this matter was not heard until 23<sup>rd</sup> November 2016.

Proceedings did not however proceed because Mrs. Nyamongo informed the court that she wished to address the court on the same issue of the additional statements. She submitted that the committal bundle was served on the defence on 11<sup>th</sup> November 2014 and it contained a list of 15 witnesses and their respective statements; that the defence was served, on 29<sup>th</sup> June 2016, with statements of witnesses who were not in the original list. She asked the court not to admit the statements as this would go against the principle of fair trial under Article 50(1) of the Constitution 2010; that the right to fair trial includes the right to be informed of the charges the accused is facing with sufficient details to prepare the defence and be given time and facilities to prepare for the trial. Counsel submitted that since 11<sup>th</sup> November 2014 when the defence received the original committal bundle the defence signed for it and prepared for the defence on the strength of the statements in the bundle. Counsel cited Peter Mwangi v. Republic and Petition No. 317 of 2012 [2012] eKLR to support the submissions that to call witnesses at the last minute of the trial is a trial by ambush and is against the right to a fair trial.

Counsel further submitted that in the additional statements by PC Eliud Orindo Nandi and PC Nickson Kiunga, the two witnesses are referring to the evidence of the witnesses who have already testified and that this can only mean that the two were in court during the hearing of the case and heard the witnesses testify.

On the other side, the prosecution counsel Ms Matiru submitted that the Constitutional Petition cited by the defence does not assist their case since the same was dismissed. She submitted that the right to fair trial will not be prejudiced if the two witnesses are called to testify since the accused will have time to cross examine the witnesses. She urged the court to overrule the objection raised by the defence and allow the two witnesses to testify.

I have read the two additional statements. I have noted the role the two officers played in the case. It is true as submitted by defence counsel that the two statements refer to the witnesses who testified as PW1 etc. This issue was not addressed by the prosecution but in my view it can only mean that the two officers recorded their statements after the witnesses had testified. The information contained in their statements in my view does not prejudice the accused's right to fair trial. These are police officers who played various roles in the investigations of this case including arresting the accused who was at large or collecting samples to take to the Government Analyst.

I have noted from the record that the defence has had ample time to read the statements of the two witnesses since they were served with them in July 2016. I have read and considered the Petition No. 317 of 2012 and agree with the prosecution counsel that it does not assist the defence on the issue at hand. I have satisfied myself that the accused's right to a fair trial has not been breached. I will and do hereby over-rule the objection and allow the prosecution to call the two witnesses whose statements have already been served on the defence. It is so ordered.

**Dated, signed and delivered this 29<sup>th</sup> day of November 2016.**

**S. N. MUTUKU**

**JUDGE**