



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Criminal Case 24 of 2011**

**REPUBLIC**

**VERSUS**

**MUSA KWEMOI**

**RULING**

**ISSUE**

[1] I am invited to decide whether the evidence-in-chief tendered by PW 1 on 26<sup>th</sup> November, 2012 is substantially different from the statement she recorded with the police on 8<sup>th</sup> October, 2011. The statement made on 8<sup>th</sup> October, 2011 was the one that was supplied to the defence.

**Application by the defence**

[2] The defence argues that substantial information given in evidence-in-chief by PW 1 is not in the statement that she recorded with the police, and which was provided by the prosecution. According to the defence, this is a negation of Article 50(2) (j) of the Constitution which provides:-

***50. (2) Every accused person has the right to a fair trial, which includes the right-***

- (a).....***
- (b).....***
- (c).....***
- (d).....***
- (e).....***
- (f).....***
- (g).....***
- (h).....***
- (i).....***

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

**Rejoinder by the prosecution**

[3] The prosecution on the other side argues that the statement recorded on 8<sup>th</sup> October, 2011 is not necessarily content of everything. In examination-in-chief, further information may come to light except that the witness should be subjected to cross-examination in order to avoid prejudice to the accused. The prosecution posits that it is in the interest of justice that all information on the case is brought before the

court. The information is basically about the relationship between PW 1 and the accused.

### **Court decides thus**

[4] It is a constitutional requirement that the prosecution should disclose in advance to the accused of the evidence they intend to rely on in the case. This requirement entails disclosure of full and material details of the evidence, (including exonerating evidence), to be relied upon by the prosecution in the case in order to enable the accused to prepare for his defence. See the famous case of **THOMAS PATRICK CHOMDOLEY**. In an adversarial system of justice, 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. It should therefore be a dangerous path to allow the prosecution to record half-baked statements on the basis that the witness will be cross-examined by the defence. That path would be a total trodden on and completely oozes out the essential content of the right to a fair hearing.

[5] It is only in very limited cases, the prosecution may produce further information with the permission of the court. But proper basis must be laid for the request particularly that the prosecution could not with all due diligence been expected to have had knowledge of the information at the initial instance of investigation. Even in any such event, the evidence should be given to the accused in advance in accordance with article 50(2) (j) of the Constitution, who will be accorded an opportunity to contest its admissibility in order to preserve the inviolable right to fair trial. But, minor clarifications of the statements for the benefit of the court or the accused person would not be offending Article 50(2) (j) of the Constitution.

### **The decision**

[6] I have perused the evidence-in-chief by PW 1 tendered in court on 26<sup>th</sup> November, 2012 and the statement she recorded on 8<sup>th</sup> October, 2012. I find that the evidence of PW 1 adduced on 26<sup>th</sup> November, 2012 contains information that is substantially different from the statement she recorded on 8<sup>th</sup> October, 2011. Unless a further statement is recorded and supplied to the accused in accordance with Article 50(2) (j) of the Constitution, the witness should confine her evidence to her statement except making such minor clarifications on statements as would be necessary. The evidence of PW 1 adduced on 26<sup>th</sup> November, 2012 is therefore expunged from the record, and she will be required to give evidence afresh. Orders accordingly

**Dated, signed and delivered in open court this 22<sup>nd</sup> day of January, 2013.**

**F.GIKONYO**  
**JUDGE**