



**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 55 of 2006**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**THOMAS PATRICK GILBERT CHOLMONDELEY...ACCUSED**

**RULING**

This Ruling relates to an objection which was raised by Mr. Fred Ojiambo, defence Counsel, when the P.W.16 – Chief Inspector Lawrence Riungu, the OCS, Gilgil was giving evidence on 28<sup>th</sup> November, 2006. The gist of the objection was that the said witness – the P.W.16 wanted to refer to the past history of the accuse. While giving his testimony, the P.W.16 explained that on 10<sup>th</sup> May, 2006, he had arrested both the accused and Carl Tundo before taking them to Nakuru Police Station. It was while the P.W.16 wanted to rationalize his action that the defence Counsel interjected. Since the defence Counsel viz, Mr. Fred Ojiambo and the DPP Mr. Keriako Tobiko could not agree, the Court allowed them to address the Court. In his submissions Mr. Tobiko pointed out that the nature, and conduct of the defence was to denigrate and savage the character of the prosecution witnesses. Besides the above, he also submitted that the defence Counsel has gone beyond testing the veracity of the prosecution witnesses. In order to support his submissions, Mr. Tobiko referred the Court to the cross-examination of two prosecution witnesses. These are the P.W.5 – Carl Jean Pierre Tundo and the P.W.14 – Jeff Mitto. According to Mr. Tobiko, during the cross-examination of the P.W.5, it was suggested that Tundo was armed with a 9 mm semi-automatic pistol and the serial number was also given. It was also suggested that he shot and killed a white dog. In addition to the above, Mr. Tobiko informed the court that Mr. Ojiambo had written a letter to him indicating that he had instructions that Carl Tundo had discharged four shots from a Berretta – semi – automatic pistol S/No.921962 and that one of the shots had in fact killed a white dog. Apart from the above, the letter also states that their investigations uncovered two unspent cartridges and that the defence Counsel had offered to avail the said cartridges for further investigations. Mr. Tobiko took issue with the said letter since the same does not state when the two spent cartridges were recovered. Secondly, the letter does not state the place of recovery of the cartridges – nor the person who made the recoveries. Mr. Tobiko emphasized that the witness was not allowed to talk about the previous history because he was stopped on his tracks. In addition to the above, Mr. Tobiko also lamented that there were even suggestions that Carl Tundo was treated preferentially by the police officers since he was not watched closely at the scene and the clothes were not recovered.

Besides the above, Mr. Tobiko also submitted that when Jeff Mitto testified about the issue of 23<sup>rd</sup> May, 2006, it was said that the police went to Soysambu without informing him. On the following day cartridges were found despite efforts for thirteen days to trace them with the use of mental detectors. According to Mr. Tobiko, the imputation was that the police officers sneaked into the ranch and planted the cartridges. Having given the above two examples, Mr. Tobiko was of the view that there cannot be a more savage attack on the conduct of the prosecution witnesses than has happened in this case. Earlier,

Mr. Tobiko had quoted verbatim, the provisions of Sec.57 of the Evidence Act. The same states as follows:-

**“(1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character is inadmissible unless:**

**(aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue or**

**(a) the proof that he has committed or been convicted of such other offence is admissible under Sec.14 or Sec.15 to show that he is guilty of the offence with which he is then charged; or**

**(b) he has personally by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character;**

**(c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecutions; or**

**(d) he has given evidence against any other person charged with the same offence.**

**\*Provided that the Court may, in its discretion, direct that specific evidence on the ground of the exception referred to in para (c) shall be led if, in the opinion of the Court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial”**

Apart from the above, Mr. Tobiko also quoted Sec.14 and 15 of the Evidence Act in verbatim. It is clear that Section 14 of the Act deals with facts showing state of mind or feeling. On the other hand, he submitted that Sec.15 of the Evidence Act deals with facts showing system or a series of similar occurrences. Mr. Tobiko submitted that they wanted to rely on Sec.15 to adduce evidence of similar occurrences like shooting that would be relevant in demonstrating that the accused had *mens rea* in the present charge. He justified that by referring to the evidence of some witnesses who had earlier stated that the accused had informed them that he had shot a person by mistake. Mr. Tobiko was of the opinion that the fact that the accused had shot somebody previously and the same excuse offered into the previous shooting would be relevant in evidence within the meaning of Sec.15 of the Evidence Act and therefore admissible. In support of the above submissions, he quoted the following authorities:-

**BLACKSTONE’S CRIMINAL PRACTISE pg.2158 to 2167**

**MAKIN –VS- ATTORNEY GENERAL FOR NEW SOUTH WALES**

**MORTIMER (1936) 25 CR. APP.** where evidence was adduced to show that Makin had knocked down other women.

**SMITH (1915) 11 CR. APP R 229**

Where evidence was adduced that two other women whom Smith had induced to “marry” had met with the same fate.

In each of the above three examples, the function of the similar fact evidence was to put a different complexion on what had occurred.

Besides the above, Mr. Tobiko also submitted that Sec.57 of the Evidence Act entitles them to adduce evidence of the accused’s bad character, disposition and general reputation. That is because the accused through his Counsel has thrown the first stone by attacking the conduct and reputation of certain prosecution witnesses who have been mentioned earlier. To support his submissions, he quoted several

authorities. Among them was:

**REGINA –VS- POWELL 1 WLR (1985) pg.1364**

In the above case, the accused had been charged on living wholly or partially on earnings of prostitution. The Judge acting in pursuance of **Sec.1 (f) (ii)** of the Criminal Evidence Act allowed the prosecution to cross-examine the accused on his previous convictions. The appeal was dismissed on the ground that if a deliberate attack was being made on the conduct of a prosecution witness, the Judge was entitled to allow the jury to know about the previous conduct of the person who made the attack.

**REG –VS- SELVEY (H.L.(E) (1970)**

In the above case, the accused suggested that exhibits were planted on him. The previous record of the appellant was put to him in the presence of the jury. The appellant was convicted and his appeal was dismissed. It was held that his defence made imputations on the prosecution witnesses and hence the jury was entitled to know his past record.

Mr. Tobiko further submitted that if the prosecution witnesses are attacked then they are also entitled to attack the character of the accused in like manner. He was of the view that the accused cannot claim privilege when he has already attacked the character of the prosecution witnesses. In concluding his submissions, Mr. Tobiko quoted **Sec.77(1)** of the Kenya Constitution and stated that a fair trial is not limited to the accused only. That is because, a criminal case has other parties like the victims, their families, dependants and witnesses who also have their rights. He expressed his intentions of challenging the proviso to **Sec.57** which restricts itself to the rights of the accused person. He was of the view that the proviso is unconstitutional.

On the other hand, Mr. Ojiambo who is the lead Counsel for the defence took issue with the fact that no mention was made to the institution of cross-examination. He quoted **Sec.154** of the Evidence Act which states as follows:

***“When a witness is cross-examined he may, in addition to the questions herein before referred to, be asked any questions which tend –***

***(a) to test his accuracy, veracity or credibility;***

***(b) to discover who he is and what his position in life;***

***(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.***

Mr. Ojiambo was of the view that the law itself allows the shaking of the credit of the witness in relation to the evidence that he has given. To support the above, he referred the Court to **the Black’s Law Dictionary** in which the definition of credibility has been given. He was of the view that a very wide latitude has been given under **Sec.154** of the Kenyan Evidence Act that is similar to **Sec. 146** of the Indian Evidence Act. According to Mr. Ojiambo, the questions that were put to Mr. Tundo related to the evidence that he gave relating to what happened or what never happened. He further added that they wanted to establish that Mr. Tundo never told the whole truth. He was of the view that none of the questions were vexatious and irrelevant. That apart, he was of the view that the questions were put in fulfillment of the law. Besides the above, Mr. Ojiambo conceded that they had written a letter to the DPP and copied the same to the investigating officer. He was of the view that a case actually begins at cross-examination and that both the Court and cause of justice is best served by vigorous probing without which the accused may sit back without being convicted or acquitted. He further submitted that Carl Tundo was cross-examined vigorously on his evidence and not character. Mr. Ojiambo later narrated how the police had looked for cartridges for 13 days and never found them. He pointed out that the above evidence was confirmed by the P.W.11 – Snr. Sgt. Mukolwe. On the 23<sup>rd</sup> May, 2006, unlike the previous practice, the

police went to the farm at night and went to the scene. On the following day, the police officers found cartridges within half an hour after arrival at the scene. According to Mr. Ojiambo, if the prosecution believe that it was not true, then they are free to lead any evidence. He concluded the above submission by urging the Court to reject the application under **Sec.57 (c)** of the Evidence Act. Apart from the above, Mr. Ojiambo submitted that allowing antecedents to be admitted would have the effect of deepening the suspicion against the accused who has been pilloried by the media and found “*guilty*” before coming to Court. Besides the above, Mr. Ojiambo also distinguished **Sec.1** of the Criminal Act of England and **Sec.57** of the Kenyan Evidence Act. He was of the view that should an accused opt to remain silent then a gross injustice may be caused.

This Court has carefully considered the detailed submissions by both learned Counsels. I must admit that I am gratified by the extensive research that they have carried out. At the outset I must note that the trial had previously gone smoothly and the Court heard fifteen witnesses without any major problem. It is unfortunate that the P.W.16 – C.Insp. Lawrence Riungu could not finish his evidence since Mr. Ojiambo intervened when he started talking about the “*past history*” of the accused. Apparently, the witness had not uttered any single word that was adverse or prejudicial to the accused person. In fact when the P.W.16 started his testimony his demeanour showed that he had enjoyed a brief but cordial relationship with the accused.

Though Mr. Ojiambo never referred to any specific past about his client – who is the accused – nobody can claim any accolades or medals for making an intelligent guess. It was obvious that Mr. Ojiambo was referring to the case where the accused had been charged for murdering one Ole Sisina. In that case, the accused was charged for murder and the State later entered a *nolle prosequi* – and hence the accused was discharged. Subsequently, a constitutional reference was filed in the High Court. In his wisdom, the Hon. Chief Justice of the Republic of Kenya constituted a panel of two senior and experienced Judges to deal with the weighty and far reaching constitutional issues that have been raised. The purpose why the Court has outlined the above is to remind the defence team that the above event is very much within the public domain. Even assuming that the P.W.16 had that particular incident in mind, he would not be telling the Court anything new or fascinating. In addition to the above, assuming that the P.W.16 had wanted to dwell on that issue in details, then the Court would definitely have intervened since the same is “*sub judice*”. It is on that note that this Court concurs with Mr. Tobiko that the P.W.16 was not allowed to talk about the previous history because he was stopped on his tracks. Though defence Counsels may defend their clients with zeal and dedication, I am of the opinion that Mr. Ojiambo was over protective in a matter within public domain.

Secondly, as far as the cross-examination is concerned the law relating to the same has been clearly outlined by the Court. Specifically, **Sec.154** of the Evidence Act provides all the parameters. These relate to the accuracy, veracity, credibility, position in life and character of a witness. My considered view is that in an adversarial system of law, that section has to be interpreted widely and liberally to test the evidence being adduced. However, in this case, the P.W.5 Carl Tundo gave his evidence in Court. He was later cross-examined vigorously both in the Court and in the *locus in quo*. As if that was not enough, the defence Counsel wrote a letter complaining of the conduct of the same witness. His letter raised many issues but also left many questions unanswered. From the gist of the questions that were put to the P.W.5 – Carl Tundo, it was obvious that the defence team feels that he had abandoned his friend in the hour of need. They also seem to feel that the P.W.5 betrayed his friend and also tried to create a distance from himself and the accused. Whether those feelings and perceptions are justified – it is upon the Court to make a final decision. I am not inclined nor obliged to comment on the manner and demeanour of the P.W.5 at this stage. I will definitely give my considered view at the end of the trial. However, it is obvious that the cumulative effect of the cross-examination and the letter by the defence counsel against the witness is to savage the character of that prosecution witness. The imputation is that Carl Tundo is an accomplice being shielded from the criminal process by some police officers. It looks strange for Mr. Ojiambo to suggest that some police officers entered in a clandestine manner to the Soysambu on 23<sup>rd</sup> May, 2006 – and on the following day, empty cartridges and a live ammunition were recovered. On the other hand his letter does not show who recovered the two spent cartridges. He also does not show where the same were recovered. The position of the court is very simple. Assuming that there is any new evidence, then the defence is at liberty to tender to the court the same for consideration.

As far as the recovery of the cartridges and live bullet are concerned, the court has noted the sequence of events. However, I do not wish to make any comments at this stage.

Ideally, the law allows the Court the discretion to give the prosecution the go ahead to attack the character of the accused since the defence has attacked the character of the P.W.5. However, in exercise of my discretion, under Sec.57 of the Evidence Act, I hereby direct that evidence of the past character of the accused will not be admissible. I am of the considered view that the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the P.W.5 to prevent a fair trial. It is also on that score that the defence team is advised that they can defend their client zealously and vigorously without in any way damaging or savaging the character of prosecution witness. This Court has deliberately acted with restraint and patience to enable the trial continue in a cordial and professional manner. Earlier, when the trial commenced, the Director of Public Prosecution made opening remarks in which he expressed his intentions and desire to prove all the ingredients relating to the charge before the Court. He has called several witnesses who have testified on various issues. There are many more witnesses who are remaining to enable him achieve his objective. In all fairness the DPP should be granted the full opportunity to present the prosecution case. As a parting shot, I do wish to state that I have always subscribed to the view that a fair trial has to consider the rights of the accused, the victims of the offence, the family and more significantly the society at large. I do not wish to hide those views since I had expressed the same when I handled the case related to the late Ole Sosina. Unfortunately, the only paper that carried those sentiments and quoted me was the East African. My considered view is that both the prosecution and the defence should be allowed to ventilate their case fully and vigorously without any hindrances within the parameters of the law. Despite the wide publicity and media attention that this case has attracted, the Court wishes to give an assurance to the accused, the family of the deceased and society at large, that the same will be decided fairly and impartially. Since the P.W.16 has not state anything objectionable, the Court will allow him to continue with his evidence on the next hearing date.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open Court in the presence of:

Mr. Tobiko – DPP and

Mr. Ondari, State Counsel

Mr. Ojiambo & Mr. Muthui for Accused

MUGA APONDI

JUDGE

6<sup>TH</sup> DECEMBER 2006