



**Republic v Obado & 2 others (Criminal Case 46 of 2018)
[2025] KEHC 9071 (KLR) (Crim) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 9071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 46 OF 2018**

CW GITHUA, J

MAY 19, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

ZACHARIA OKOTH OBADO 1ST ACCUSED

CASPAL OJWANG OBIERO 2ND ACCUSED

MICHAEL JUMA OYAMO 3RD ACCUSED

RULING

1. I have carefully considered the oral application made on behalf of the 2nd accused by his learned counsel Mr. Oganda Messo. The application seeks that the 2nd accused be allowed to call another witness before he testifies in his defence on grounds that given the use of the word ‘may’ in Section 307 of the *Criminal Procedure Code* (CPC), an accused person has an option of deciding whether to open his defence with his testimony or to call other witnesses to testify first so that his testimony is taken at a later date.
2. Mr. Oganda argued that the 2nd accused should be allowed to call another witness first as he was unable to give his evidence immediately given the unavailability of call data records which were yet to be supplied to him by Safaricom Ltd. He claimed that the aforesaid call data records were crucial to his defence and he was unable to give his testimony before studying them with his Advocate.
3. The prosecution through learned prosecution counsel Ms. Gikui Gichuhi contested the application arguing that a reading of Section 307 of the *CPC* clearly showed that an accused person was required to testify first before calling other witnesses; that this was in tandem with Article 50 (2) of the *Constitution* which guaranteed to an accused person a fair trial which included the right to be present during his trial at every stage of the proceedings unless his presence made it impossible for the trial to proceed. Ms.



Gikui submitted that allowing other witnesses to testify before the accused gave his testimony would run counter to the aforesaid constitutional provision as it would require the accused to leave the court room when the other witness or witnesses testified since as a matter of practice, in order to ensure impartiality and reliability of evidence, a witness should not testify in the hearing of another witness.

4. I have duly considered the submissions made by learned counsel Mr. Oganda Messo and learned prosecution counsel Ms. Gikui Gichuhi in support and in opposition to the application.

Having done so, it is important to point out that Section 307 of the [Criminal Procedure Code](#) precedes Section 306 (2) and (3) of the same code which gives to an accused person who had been placed on his defence the right to choose how to prosecute his or her defence.

5. Under the above provisions, the accused had a right to elect whether to give a sworn or an unsworn statement or to remain silent and say nothing in his or her defence. Irrespective of the election made by an accused person, the accused had a right to call or not to call witnesses in support of his or her defence. Once the election under Section 306 (2) and (3) of the CPC was done, Section 307 of the CPC kicked in to provide the procedure through which the accused was to present his or her defence in court.
6. For clarity and for the avoidance of doubt, I think it is useful to reproduce Section 307 of the [CPC](#). The provision states as follows;

“The accused person or his advocate may then open his case stating the facts or the law on which he intends to rely on and making such comments as he thinks necessary on the evidence for the prosecution; the accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case. “

7. My reading of the above provision reveals that an accused person had discretion in deciding whether or not to make an opening statement either personally or through his advocate but he did not have discretion to decide whether to call another witness or witnesses first before testifying in his defence.
8. In my considered view, Section 306(2) read together with Section 307(1) of the [CPC](#) leaves no doubt that whether or not an accused person made an opening statement, he was required to open his defence by testifying first before calling other witnesses.

In my opinion, the use of the word “may” in Section 307(1) of the [CPC](#) is not meant to give an accused person an option of deciding whether or not to call other witnesses in his defence before he testified but is meant to cover instances in which an accused person had elected to remain silent and did not therefore require to say anything in his or her defence. It is important to remember that the right of an accused person to remain silent is both a constitutional and statutory right.

9. Drawing from the foregoing, it is my finding that as a matter of law and practice, an accused person who elected to give a sworn statement and to call witnesses in his or her defence ought to testify first in order to lay a foundation for his or her case by responding to the allegations made against him or her by the prosecution after which other witnesses would follow.
10. As correctly submitted by Ms. Gichuhi, the requirement that an accused person should open his or her defence by testifying first gives effect to the fair trial rights of an accused person guaranteed under Article 50 (2) of the [Constitution](#) which under Article 50(2) (f) includes the right to be present throughout his trial unless his presence made it impossible for the trial to proceed.
11. If the 2nd accused was allowed to call his witnesses first as prayed, he would have to leave the court room when his witnesses testified which would violate his right enshrined in Article 50(2)(f) of



the Constitution since he would be forced to be absent from his trial for reasons which were not contemplated by the above constitutional provision.

12. For the above reasons, I decline to allow accused 2 to call other witnesses before he testified. I direct that he opens his defence by testifying first before calling other witnesses in support of his case.
13. With regard to the alternative prayer that if I declined to allow the 2nd accused to call other witnesses first, I should allow his advocate to make an opening statement, I can only reiterate what I stated earlier in this ruling that under Section 307(1) of the CPC, an accused person had discretion to open his case by making an opening statement either personally or through his advocate. It is therefore up to the 2nd accused to decide whether or not to make an opening statement and then inform this court accordingly. It is not up to the court to decide for him.
14. It must be clear by now that I have come to the conclusion that this application lacks merit and it is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2025

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C.W GITHUA

JUDGE

In the Presence of:

All 3 accused persons

Ms. Gikui Gichuhi for the State

Mr. Kilukumi (SC) together with Mr. Rodger Sagana for the 1st Accused

Mr. Ogada Messo for the 2nd Accused

Mr. Jack Oronga for the 3rd Accused

Mr. Ezekiel Awour for the Victims family

Mr. Kinyua - Court Assistant

