



REPUBLIC OF KENYA



**Republic v Agwei & 9 others (Criminal Case E021 of 2023)
[2025] KEHC 5964 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E021 OF 2023**

A MABEYA, J

MAY 14, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

ABSALOM RABOTE AGWEI 1ST ACCUSED

HENRY OTIENO NYAWARA 2ND ACCUSED

SIMON ONYANGO ADOYO 3RD ACCUSED

JOHN OPIYO OPIYO 4TH ACCUSED

CHARLES ONYANGO ONG'AYO 5TH ACCUSED

HENRY JUMA OGUTU 6TH ACCUSED

JAMES OCHIENG ODIYO 7TH ACCUSED

GERSON OTIENO OCHOLA 8TH ACCUSED

ABEL OMONDI OKUKU 9TH ACCUSED

WASHINGTON ODHIAMBO OTIENO 10TH ACCUSED

RULING

1. The [Constitution](#) 2010 came into effect to expand the democratic space of Kenyans. One of the remarkable development and reform introduced was Article 50 which frowns on opaqueness in the prosecution of cases.
2. That Article expanded the rights of an accused person and did away with the hitherto mundane manner in which criminal cases were being prosecuted in this Country. Simply, prosecution by ambush no longer has any space in our system.



3. For this reason, the prosecution is required to, amongst other things, disclose to the defence at the earliest, the evidence it intends to rely on against the accused. In this regard, Courts have developed a system of pre-trial sessions where all disclosures are done. The prosecution supplies all evidential documents in its possession including but not limited to witness statements. It is expected that after pretrials close and trial begins, no more surprises are expected.
4. On 5/9/2023, the Accused were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They pleaded not guilty. The matter was severally mentioned during pre-trials. During that period, the Court made orders to the effect that the prosecution do supply the defence with all witness statements and documentary evidence in its possession.
5. Believing that all these directions were complied with, the trial commenced on 11/3/2023 whereby 3 witnesses testified. Today, PW4 has testified and was about to identify 4 photographs that were allegedly taken at the scene on the date of the offence. The defence has objected to the witness identifying the same on the basis that the same were never supplied to them. Ms. Kagali for the prosecution submits that she did not know that the earlier prosecutor did not supply the photos. That in any event, 3 of the 4 photos were contained in a ventinary Report dated 20/6/2023.
6. I have considered the objection and the answer thereto. It is no doubt that the right of an accused set out in Article 50 of the Constitution of Kenya are not cosmetic. That Article provide; inter alia, that: -
 - “(2) Every accused person has the right to fair trial, which includes: -
 - a. ...
 - b. ...
 - j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.
 - ...”
7. The Court directed the prosecution to comply with this requirement. It is no defence that now we have a different prosecutor. The prosecution is the same, the State. The actions or inaction of the previous prosecutor binds Ms. Kagali.
8. I have looked at the 4 photos. I have also looked at the report dated 20/6/2023. Two of the 4 photos are contained in the report dated 20/6/2023. The defence objects to the reliance of the photos in that report on the basis that they are blurred. I have gone through the record and nowhere did the defence object to the report on the ground that the photos contained therein were blurred. It is assumed that they were contended with their status and the defence cannot raise that objection now. They should have done so before trial.
9. Further, it has not been denied that the witness statement of PW 4 was not supplied. Or, that he did not refer to the photographs of his statement.
10. Having in mind that PW 4 did refer to some photographs in his statement, two of the photos in the report of 20/6/2023 having been supplied in that report, the witness can identify those two only for whatever evidentiary significance they may have.
11. Accordingly, the objection is upheld in respect of the two photos that are not contained in the Report dated 20/6/2023.

It is so ordered.



DATED AND DELIVERED AT KISUMU THIS 14ND DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

