Republic v Kimuge (Criminal Case E010 of 2020)
[2025] KEHC 5744 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5744 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL CASE E010 OF 2020

EM MURIITHI, J

MAY 8, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

LUKA CHEPKONGA KIMUGE ..... ACCUSED

RULING

1. This is a Ruling on an oral application made on 11/3/2025, the Accused sought to be supplied with his own statement made to the Police during their investigations before charge. The DPP opposed the application on the principal ground that the Prosecution shall not be relying on he accused's state and it, therefore, was not obliged to supply the statement as it was not "evidence the prosecution intends to rely on" in terms of Article 50 (2) of *the Constitution*, which provides for the accused's right -

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

2. The submissions of the Counsel are set out in the record of the day's proceedings as follows:

> "11/3/2025
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> Mr Mathenge for the Accused:
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> The accuse seeks to be supplied with his statement under Article 50 of *the Constitution* in advancing the right to hearing. The Prosecution has declined to provide the same. It is the accused's version of the case which does dos nt prejudice the DPP's case. The accused is entitled to both exculpatory and inculpatory evidence, whether the DPP is going to rely on it or not. The DPP does not that the accused's statement is not in their possession. It will assist the defence in trial in readiness for hearing. We pray that the statement be availed as

there is no law which precludes prosecution from providing the same as long as it is in their possession.

Ms. Maari for the DPP.

Article 50(2) (j) of *the Constitution*. Right to fair trial right to be informed in advance of the evidence the prosecution intends to rely on and to have a reasonable access. We are not going to use the cautionary statement. We do not have the statement. I did not get the statement. It may be in the original file. When I organised my pre-trial, it is not something we are going to use. According to the law, we are not supplying it because we are not going to use it. I rely on Criminal Case No. E010 of 2021 R v. Keya Nyundo Alias Mrefu (2021) eKLR where it was held that the duty of the prosecution is to supply what is relevant and what it intends to rely on. Prosecution cannot be compelled to supply what is not in their possession and what it does not intend to rely on. The decision is by Mutende, J."

Mr. Mathenge in Reply:

We refer the Court to Article 25 (2) of *the Constitution* that the right to fair trial is not limited. The decision is persuasive authority by a court of concurrent jurisdiction. It is not clear what directions were requested in that case to warrant a denial or non-issuance of the documents.

The Prosecution does not deny that statement. The Defence can use defence witnesses, witnesses who are not used by the prosecution. The mere fact that the prosecution does not intend to use the statement does not deny the accused the right to use his statement. The prosecution has its theory and the defence its own theory. The mere fact that the Statement does not fit with their theory does not deny the defence from using the statement.

Article 50 (2) (j) of *the Constitution* does not deny the defence right to ask for the Statement. It only applies to statements the prosecution intends to rely on and not denying statements which they do not intend to rely on. It is immaterial that the Accused shall use it; we should have it for our preparation."

Issue for determination

3. There may not be contest that the prosecution may not be compelled to supply what is not in their possession. The question before the court is whether the Accused is entitled to the obtain evidence in passion of the Prosecution which the Prosecution does not wish to use in the prosecution of the case.

Determination

4. The question is not novel.

5. The Court has respectfully noted the persuasive decision in Republic v 241569 PC Keah Nyundo alias Mrefu (2022) KEHC 2303(KLR), where the Court (L. N. Mutende J.) held as follows:

> " 10. According to *the Constitution* of Kenya, 2010, it behooves the prosecution to disclose evidence to be relied on in the course of the trial, a duty that should be discharged during pre-trial conference to enable the defence prepare for the case adequately and/or in the course of trial where the accused should be accorded time to interrogate and also have adequate time to prepare for the defence. Evidence to be relied on by the prosecution must be disclosed because it is the basis of the investigative process that results into charges being brought.

11. The upshot of the above is that since the provisions of Article 50 (2) (j) of *the Constitution* limits the duty of the prosecution to supply the defence with what is relevant and what it intends to rely on, the prosecution cannot be compelled to furnish what is not in its possession and what it shall not be relying on. As earlier ordered, the prosecution is however directed to furnish the defence and the counsel for the victim with all documents to be relied on."

6. In Republic v Raphael Muoki Kalungu [2015] KEHC 5940 (KLR) the Court (S. N. Mutuku, J.) said:

> " The prosecution and the defence have taken their stand. The prosecution maintains that it has provided the defence with all the material necessary for their defence. It maintains that all the evidence relevant to their case and which they intend to use has been availed to the defence and therefore the defence is not entitled to evidence that is not relevant to the prosecution and which the prosecution does not intend to use in their case. In other words, the only evidence the defence is entitled to be provided with is the evidence that is relevant to the prosecution and which the prosecution intends to use in their case.
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> The defence on the other hand maintains that they are entitled to all the evidence surrounding the circumstances of this case whether relevant to the prosecution case or not and whether the prosecution intends to use it or not. They maintain that this material is vital to them for they are entitled to formulate their own theory of the case just as the prosecution is entitled to theirs.
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> In the replying affidavit by Detective Clement Mwangi, the crime committed was murder and therefore police did not cause the motor vehicle No. KBT 545Y to be inspected since the scene was not that of a road traffic accident; that the police have supplied to the defence all the relevant exhibits they intend to rely on in respect of the scene of crime and from the body of the deceased; that the deceased's mobile handset was not recovered to retrieve the short message service data; that the police and the family of the deceased are not aware she owned an Airtel number; that the statement of one Peter Mwangi Muchekehu was availed to the defence and that they did not retrieve the Airtel data of the said witness and the same cannot be retrieved after the lapse of 90 days; that the owner of mobile number 0723 606 842 is not known to the prosecution and is not a witness; that prosecution does not intend to use short message service data of Peter Mwangi Muchekehu; that the diary said to belong to the deceased and contents of the bag are unknown to the investigating team and that the only relevant provision of *the constitution* in respect of this matter is Article 50 (j) (I think he means Article 50 (2) (j)) and the prosecution has complied with it.
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> The prosecuting counsel understands the constitutional obligation of disclosure of information to the defence to mean only information relevant to the State as the prosecutor and which the State intends to use during trial. This is the reason the prosecutor maintains that they have complied with Article 50 (2) (j) of *the Constitution* and that this is the only relevant article in terms of disclosure of material to the defence.
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> Among the rights to a fair trial guaranteed under Article 50 (2) of *the Constitution* are the right to have adequate time and facilities to prepare a defence under Article 50 (2) (c) and the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence under Article 50 (2) (j). Does sub-article 2 (c) place an obligation on the prosecution to facilitate the defence in any manner?

As submitted by the defence, which this court agrees with, the right to a fair trial cannot be limited (see Article 25 of *the Constitution*). Further, as submitted by the defence a court in applying the Bill of Rights shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom (see Article 20 (3) (b) of *the Constitution*).

In interpreting Section 77 (2) (c) of the former Constitution of Kenya which is similar to Article 50 (2) (c) of the current Constitution in reference to the right of an accused to a fair hearing, the High Court in the George Ngodhe case had this to say:

"..... In general terms, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case."

The court in the above case went further to state that:

"In an open and democratic society based on freedom and equality, with the Rule of Law as its ultimate defence, such as ours, the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type, courts cannot give approval to trials by ambush, and in criminal litigation the courts cannot adopt a practice under which an accused person will be ambushed."

The Court of Appeal in the Cholmondeley case while relying on R. V. Stinchchombe [1992] a Canadian case on the issue of disclosure of information had this to say:

"Our understanding of this Canadian decision is that there is a duty on the part of the prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced, weaken the prosecution's case and strengthen that of the defence; whatever may be its nature, the prosecution is still obliged to disclose it to the defence. That duty continues during the pre-trial period and during the trial itself, so that if any new information is obtained during the trial, it must be disclosed."

This court totally agrees with the two decisions above and having considered the court's interpretation of what "facilities" means and the legal obligation placed on the prosecution towards the defence, this court's view is that the prosecuting counsel misapprehended the issues when she submitted that the prosecution does not have a duty to disclose to the defence evidence the prosecution does not consider relevant and which the prosecution does not intend to use in their case. In line with the Court of Appeal in the Cholmondeley decision above, the prosecution has a legal duty to disclose to the defence not only the evidence the prosecution does not consider relevant to its case but also evidence the prosecution does not intend to use. As submitted by defence counsel, each party is entitled to formulate its own theory in a trial.

This court, as legally bound, favours an interpretation that most favours the enforcement of a right or fundamental freedom and for that reason find that the prosecution has a legal duty, just as this court, to facilitate the accused in terms of affording him adequate time

and facilities to prepare his defence. The facilities here include full disclosure of all relevant information as shown in this ruling."

See also Director of Public Prosecutions v Peter Aguko Abok & 35 others [2020] eKLR (J. N. Onyiego, J.):

"

"70. What does the provision 'supply in advance' and in 'sufficient detail' entail? From the plain reading of Article 50(2)(b) and (j), prosecution has a legal and binding obligation to supply to the defence all material evidence in its possession which it intends to rely on to enable the defence prepare its defence adequately. The rationale behind this provision is to avoid practice by ambush. It is meant to put both the prosecution and the defence on equal footing so that none is caught by surprise. Secondly, it is in fulfillment of Article 35 of *the Constitution* which underpins the right to access information. See Republic vs. Raphael Muoki Kalungu (2015) eKLR where the court stated that all evidence in possession of prosecution be supplied to the defence to avoid trial by ambush.

71. The essence of disclosure of evidence in advance was aptly captured in the case of George Ngodhe Juma, Peter Okoth Alingo and Susan Muthoni Nyoike v Attorney-General [2003] eKLR where the court stated that:-

"In general, it means that, an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case."

7. For my part, the Court is unable to accept that our Kenya Constitution 2010, a liberal transformative Constitution, which by its preamble is a product of "RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law", would restrict rather than expand the extent of rights and protections available to an accused.

8. Even before the Kenya Constitution 2010, as shown in the Ngodhe and Cholmondeley cases cited in the two decisions above, the law required the fullest disclosure of all material available including those that the Prosecution would not use in the trial with the rationale, no doubt, that the material may be able to prove the innocence of the accused or otherwise assist in the preparation of the accused's defence.

9. Indeed, this is the observation made in the Kenya Judiciary Criminal Procedure Benchbook, Feb. 2018, citing Cholmondeley and Ngodhe cases, as follows:

" Disclosure by the Prosecution

42. Accused persons have the right to be informed in advance of the evidence that the prosecution intends to rely on (art. 50 (2) (j) CoK). The accused person is also entitled to reasonable access to the evidence (art. 50 (2) (j) CoK) for purposes of preparation of his or her defence (Thomas Patrick Cholmondely v. R Court of Appeal at Nairobi Criminal Appeal No. 116 of 2007; George

> Ngodhe Juma & 2 Others v. Attorney General, High Court at Nairobi Misc. Criminal Application No. 345 of 2001). This includes access t the charge sheet and the witness statements. The Prosecution must disclose all the evidence in its possession regarding the case, including evidence that the Prosecution does not intend to rely on."

10. It is inconceivable that the transformative Constitution based on respect for human rights would constrict the rights and freedoms previously enjoyed by the accused under the old constitutional regime.

11. This Court respectfully accepts the ratio in Ngodhe case that an accused "should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case."

12. In the fullest appreciation of the right to adequate facility under Article 50 (2) of *the Constitution*, the provision of all evidence which may have a bearing on his defence to the charge by proving his innocence or raising a doubt as to his guilt is part of the right to fair trial. It would be an injustice to deny an accused person the evidence in possession of the Prosecution by means of which the accused could prove his exonerate the accused or raise doubt as to his guilt. The Prosecution dos not have to win the case at all possible cost including the cost of convicting an innocent man. The old adage that it is better nine guilty persons erroneously be set free than for one innocent person be convicted remains true!

Orders

13. Accordingly, for the reasons set out above, the Court finds that the Accused's application has merit and the Court makes an order for supply by the prosecution of the accused's cautionary statement to the Police and all information available to the prosecution, including information that the Prosecution does not intend to use using to prove its case against the Accused.

Order Accordingly.

DATED AND DELIVERED THIS 8TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mathenge for the Accused.

Ms. Maari for the DPP.