



**Republic v Nyaga & 2 others (Criminal Case 34 of 2023)
[2025] KEHC 8599 (KLR) (Crim) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL CASE 34 OF 2023
KW KIARIE, J
JUNE 19, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

WILLIAM NYAGA 1ST ACCUSED

TATIO KAMPHINE 2ND ACCUSED

FRANCIS MURIITHI 3RD ACCUSED

RULING

1. The victim's family moved the court through a Notice of Motion dated April 4, 2025. The application is made under sections 9 and 13 of the [Victim Protection Act](#). They are seeking the following orders:
 - a. The application be certified urgent, and service be dispensed with at the first instance. [Spent]
 - b. That this honourable court be pleased to allow the victims to cross-examine the witnesses.
2. The application is premised on the following grounds:
 - a. The matter will be heard again on 23rd April 2025, when the last prosecution witnesses will testify.
 - b. That the victim's interests and plight ought to be considered in the remaining hearings as they have been during the pendency of this trial.
 - c. If this application is not allowed, crucial evidence that the victims intend to rely on may be overlooked.



- d. This Application is in no way intended to prejudice the rights of the accused persons, as their counsels will cross-examine any issues raised by the victims. The Applicant only seeks to have her rights as a victim considered, as her role is established separately from the state.
 - e. If this application is not certified urgent and allowed, the victim will suffer the injustice of having their interests not considered.
 - f. It is in the interests of justice and fairness that this application be allowed and decided expeditiously.
3. The 1st accused opposed the application on the following grounds:
- a. The applicant has been made late in the day.
 - b. If the application is allowed, it will contravene Article 50 of the Constitution of Kenya.
4. On the 23rd day of April 2025, the parties agreed to canvass the application through written submissions. The prosecution opted not to file any.
5. This application raises three issues that need to be addressed. These are:
- a. The victim's role vis-à-vis the criminal procedure;
 - b. The role of a victim in a criminal trial; and
 - c. The right to a fair trial.
6. The applicant argued that the Supreme Court's pronouncement in Waswa v Republic (Petition 23 of 2019) [2020] KESC 23 (KLR) settled the issue of the victim's participation. The Court *inter alia* held:
1. Although the adversarial criminal trial process was a contest between the State, represented by the Director of Public Prosecutions (DPP), and the accused, usually represented by defence counsel and the traditional role of victims in a trial was often perceived to be that of a witness of the prosecution, that flowing from both the Constitution and the Victim Protection Act (VPA) and in particular section 9(2)(a) of the VPA, a victim too, had the right to participate in criminal proceedings.
7. A thorough reading of the Supreme Court's decision in Waswa (*supra*) indicates that it does not undermine the procedure outlined in the Criminal Procedure Code. This decision should not be interpreted selectively. Such an approach may lead to confusion, undermining the right to a fair hearing as enshrined in Article 50 of the Constitution.
8. Section 9 of the Victim Protection Act provides:
- (1) A victim has a right to —
 - (a) be present at their trial either in person or through a representative of their choice;
 - (b) have the trial begin and conclude without unreasonable delay;
 - (c) give their views in any plea bargaining;
 - (d) Have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;



- (e) be informed in advance of the evidence, the prosecution and defence intends to rely on, and to have reasonable access to that evidence;
 - (f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and
 - (g) be informed of the charge which the offender is facing in sufficient details.
- (2) Where the personal interests of a victim have been affected, the Court shall—
- (a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and
 - (b) ensure that the victim's views and concerns are presented in a manner which is not—
 - (i) prejudicial to the rights of the accused; or
 - (ii) inconsistent with a fair and impartial trial.
- (3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.
9. Section 13, on the other hand, provides:
- Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to-
- (a) subject to the provisions of the *Evidence Act*, (Cap. 80), adduce evidence that has been left out;
 - (b) give oral evidence or written submission.
10. These two sections discern the role of a victim. The state champions the victim's interests through the prosecutor in court, and additionally, the victim can appoint an advocate who will ensure, in collaboration with the prosecutor, that all necessary evidence has been adduced.
11. Kenya has adopted an adversarial system. A Concise Dictionary of Law, second edition, defines it as:
- accusatorial procedure (adversary procedure)A system of criminal justice in which conclusions as to liability are reached by the process of prosecution and defence. It is the primary duty of the prosecutor and defence to press their respective viewpoints while the judge acts as an impartial umpire, who allows the facts to emerge from this procedure.
12. From this definition, there are only two parties: the prosecution and the defence. As outlined in the *Criminal Procedure Code*, criminal procedure envisages these two parties. Watching briefs are not recognized by criminal procedure. However, the *Victim Protection Act* acknowledges the role of an advocate watching brief for the victim. The victim's participation is limited and must conform to Article 50 of the *Constitution* and the *Criminal Procedure Code*. The law did not envisage a trial akin to WWF wrestling, essentially a brawl.
13. In the case of the *Republic v Hassan*(Criminal Case E070 of 2023) [2024] KEHC 11684 (KLRDR) Kavedza, J, after an analysis of several decisions on the issue, said:
- It is only through an application at the pre-trial conference stage that the court can gauge if the participation will not violate the right to a fair trial or is prejudicial to the rights of the accused person. In my view, a departure from this general rule is when unforeseen circumstances have arisen in the course of the trial or new evidence not disclosed at the pre-



trial stage has been introduced by the witness, that is prejudicial to the victims, that the victim's counsel can apply to question a witness at the trial stage.

14. I agree with the learned judge. This ensures that issues are not convoluted and that the accused's right to a fair trial as prescribed in Article 50 of the Constitution is not derogated or abridged.
15. This application comes late in the day. The applicant has also not demonstrated to the court which issues the prosecution has left out.
16. The application is dismissed.

DELIVERED AND SIGNED AT NYANDARUA THIS 19TH DAY OF JUNE 2025

KIARIE WAWERU KIARIE

JUDGE

