



Republic v Oketch & 4 others; Wamaitha (Respondent) (Criminal Case E011 of 2025) [2025] KEHC 8250 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E011 OF 2025
PN GICHOHI, J
JUNE 12, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER OKETCH 1ST ACCUSED

JOSEPH KIHARA KARIUKI 2ND ACCUSED

STEPHEN MASHETI MUSODA 3RD ACCUSED

EVANS ASEKA OKUTUTI 4TH ACCUSED

GEOFFREY NNGU WILLYDU 5TH ACCUSED

AND

MUTHAMA ROSALINDA WAMAITHA RESPONDENT

RULING

1. Geoffrey Ndungu Willy (herein referred to as the 1st Accused) moved this Court by a Notice of Motion dated 1st April, 2025, brought under Articles 10(2)(b), 25(c), 50(2)(a),51(1) and 159(2)(d) of *the Constitution* of Kenya 2010 seeking for Orders that: -
 1. This Honourable Court be pleased to Order the Advocate watching brief for the family Ms. Muthama Rosalinda Wamaitha of P:105/17466/20, commonly practicing in the name of Ms. Wamaitha be recused and or barred from participating in the proceedings herein.
 2. Counsel watching brief for the family Ms. Muthama Rosalinda Wamaitha of P:105/ 17466/20 commonly practicing in the name of Ms. Wamaitha be compelled by this Honourable Court to confirm the firm for which she practices in.



3. Counsel watching brief for the family Ms. Muthama Rosalinda Wamaitha of P:105/ 17466/20 commonly practicing in the name of Ms. Wamaitha and /or her agents be restrained from visiting the accused persons herein where they are currently held at Nakuru G. K prison.
2. The basis of this application is on the face of it and supported by the Affidavit of the 1st accused sworn on 1st April, 2025 with authority of the 2nd- 5th Accused persons. He states that they were all charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal code and are currently remanded at Nakuru main prison awaiting hearing of their bond terms.
3. It is his case that prior to the arrest, Ms. Wamaitha (herein referred to as the Respondent) advocate watching brief for the victims' family in this case, called the 2nd accused requesting to meet him in Njoro on 23/02/2025. The 2nd Accused agreed to meet her on 25/2/2025 and they had a lengthy conversation pertaining to this case. She promised to help him (2nd Accused) with the case herein. Thereafter, she offered to buy him lunch.
4. He states that based on their conversation, he shared with her very important information pertaining to this murder case, hence the two initiated an advocate-client relationship. He depones that, while the 2nd accused was about to partake of his lunch bought by the Respondent, she, out of malice, called the police officers who arrested the 2nd Accused.
5. He states further that the Respondent was with the 2nd Accused at the DCI offices while he was recorded his statement and that she promised to help him with the case, However, upon the 2nd Accused being arraigned in Court, she declined to represent him and shifted to the other side to watch brief for the family.
6. He maintains that the 2nd Accused gave the Respondent a lot of crucial and incriminating information concerning the case herein and therefore, her inclusion in this case would be detrimental and prejudicial to his case.
7. He explains that while they were remanded, the Respondent called them through the welfare office saying that she wanted to meet them the following day as she had crucial information to share with them. That when they asked her to go through their Advocates , she replied that the information need not be shared with their Advocate.
8. He states that the Respondent took advantage of her position as an advocate and visited the 1st to 3rd Accused on 12/3/2025 and connivingly convinced them to plead guilty to the charge of murder upon which they will be assisted by the MP commonly known as KK. In addition to agreeing to plead guilty, the Respondent promised them a reward of Kshs 100,000 each.
9. He expounds that on 13/2/2025, the Respondent met with the 5th Accused and asked him to plead guilty on the basis that he too would be assisted by the MP. His position is that despite their refusal to bow to the Respondent's pressure to plead guilty, she persisted in her quest and even sent proxies to convince them while they were in remand.
10. He states that the Respondent's unrelenting spirit caused them to dig deep into the relationship between her and the deceased and they were astonished to learn she was the deceased's lover and a friend of the MP thus her clouded judgement in the matter.
11. He further states that the Respondent has taken her practicing certificate under the firm of Kariuki Muigua & Co Advocates but upon inquiry, it has been confirmed by Mr. Muigua Advocate that the Respondent does not practice under his law firm.



12. He explains that further investigation reveal that the firm of Wamaitha Makori & Co Advocates, where the Respondent claims to be working from is not registered. On that note, he urges this Court to allow the application as prayed and adds that application of cab-rank rule is not absolute especially in instances such as this where there is apparent conflict of interest.
13. The 3rd Accused has filed an Affidavit sworn on 8th April, 2025 supporting this application and reiterating the averments in the Supporting Affidavit of the 1st Accused. He adds that the Respondent has been mobilising a mob to resist this application herein and halt the bond hearing. Further, he states that a video of this was posted in tik tok account @mc.toto.mose.
14. The Respondent has opposed the application. In her Replying Affidavit sworn on 7th April, 2025, she states that she is an Advocate of the High Court of Kenya, with a current practicing certificate. She prays for dismissal of this application with costs for being unmerited, bad in law and an abuse of Court process. It is her case that the allegations against her are unsubstantiated and aimed at barring her from watching brief for the family of the deceased in this murder trial.
15. Her position is that an advocate has the right to act for any client and a client has the right to appoint whichever advocate he/she desires to represent him/her in any matter. She maintains that it is a constitutional right to be represented by counsel of choice and that right should not be interfered with on allegations which are otherwise tainted by malice. She therefore terms effect of the prayers sought herein as infringement on the family's right to representation.
16. She elaborates that the right of representation may be limited in certain circumstances, either where there is a possibility an advocate will be called as a witness or there is a conflict of the interest. Conversely, that there is no indication that she is likely to be called as a witness in this murder trial. In any event, that she has neither recorded any witness statement with the police nor have the prosecution given any indication that they intend to summon her during the trial.
17. She refutes the allegation of meeting the 2nd accused and having lengthy talks regarding the instant matter and even agreeing to represent him in Court. Moreover, she states that no scintilla evidence is tendered before this Court in support of allegations of existence of any advocate-client relationship between her and the accused.
18. She maintains that the Applicants must provide a proper basis to the Court to enable it make a determination and states that without establishing any professional relationship between the Advocate and the accused, no basis has been laid for allegation of protecting purported confidential and/or privileged information that could be used in a detrimental manner. She states that for instance, she was not paid any professional fees and there was no evidence that she drew any documents on behalf of the accused persons.
19. She questions the authority of the 1st Accused to swear the Affidavit on behalf of the other Accused persons and states that no such authority is tendered and besides, the Accused persons are represented by different advocates.
20. She further denies calling police to arrest the 2nd Accused person or visiting the prison to discuss the case herein and coerced the Accused to plead guilty to the charge against them. Further, she denies offering a bribe of Kshs. 100,000 to the Accused persons to plead guilty to the charges herein.
21. She is aggrieved by the tone used by the Applicants herein arguing it is a confirmation that the applicants are just coming up with allegations in the bid to try and convince the Court yet this Court is convinced only by evidence not abstract.



22. On the claim that she had an affair with the deceased, she states that such allegations are aimed at maligning and tainting her name and is in fact insensitive to the family of the deceased especially the wife of the deceased.
23. On alleged non-existence of her firm, she has annexed a copy of Certificate of Registration of her firm, Wamaitha Makori & Company Advocates and states that the Applicants ought to have conducted due diligence before making such falsified allegations.
24. On the claim of blocking the instant application and bond application, she states the allegations are without any basis as it is Courts that make such Orders and not an advocate of the purported mob. Lastly, she states that no compelling reasons have been tendered in support of the current application and therefore, urges the Court to find it unmeritorious and proceed to dismissed it with costs to her.
25. Margaret Mwihaki Njoroge, the widow of the deceased also filed an Affidavit dated 7th April, 2025 in opposition of the removal of their Advocate herein. She states that in support of their application, the Applicants herein have raised unsubstantiated allegations in bid to have the advocate , who has been representing her late husband in other cases , barred from watching brief for the family in this murder trial.
26. She depones that her family has confidence with the Respondent’s legal expertise and that they have a right to choose their Advocate and therefore, the prayer seeking to bar their advocate from acting for them is in violation of their right to representation. She maintains that if the Respondent is barred, they are apprehensive that they will not get justice.
27. She terms arguments advanced that Respondent had an affair with her husband as untrue, malicious and made in bad faith. She therefore prays that the application be dismissed and they be allowed to have their advocate watch brief for the family in this matter.

Analysis and determination

28. From the material before this Court, what comes up is the Respondent’s alleged display of conflict of interest in this case for having allegedly received information from the accused persons then turning on to represent the family of the deceased.
29. The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, published on 26th May, 2017 has this to say at paragraph 93 in regard to conflict of interest:-

“A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interests or by the Advocate’s duties to another current client, former client or a third person.”
30. Paragraph 96 thereof, list instances where conflict of interest can be inferred as follows: -
 - a. Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm , for instance in situations where the representation involves the assertion of a claim by one client against another client;
 - b. Where the nature or scope of representation of one client will be materially limited by the Advocate’s responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.



- c. Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.”
31. Conflict of interest is invariably linked to the duty of confidentiality against disclosing information received from client in the line of duty. This is expressly provided for under section 134 of the Evidence Act which reads:’-
- “(1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
- Provided that nothing in this section shall protect from disclosure;-
- (a) any communication made in furtherance of any illegal purpose;
- (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment,
- (2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.”
32. From the law quoted above, it is discernible that before a party can accuse an Advocate for conflict of interest, they must first demonstrate that there was previously a creation of Advocate-Client relationship between them and the Advocate they are seeking to bar from acting for the adverse party, for such an advocate to owe them fiduciary duty and for them to be protected from conflict of interest and their information termed confidential.
33. The issue then is whether there was an advocate client relation between her and the accused persons which would bar her from watching brief for the deceased’s family.
34. In the present case, it is noted that save for allegations that the Respondent had lengthy talks with the 2nd accused and tried convincing the accused in remand to plead guilty, there is no evidence to suggest that there was creation of Advocate-Client relationship between the Respondent and the Applicants.
35. Further there is nothing placed on record to show that any information or documents were supplied to the Respondent that could be used against the Applicants thus prejudicing their defence. In essence, there is nothing on record in support of allegations of conflict of interest whether real or perceived.
36. On the issue of disqualification of an Advocate, O’Kubasu, JA had this to say in William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04):-

“I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. ..Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that



the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.”

37. The issues raised regarding the Respondent’s intimate relationship with the deceased herein seem too personal and with no proof and therefore, an unwanted attack on her.
38. Further, no evidence was tendered to show that the Respondent is not registered to practice. It does not suffice for the Applicants to throw wild allegations against the Respondent. If indeed she is not qualified, then that is an issue within the mandate of the Law Society of Kenya (LSK). Indeed, the Applicants stated that the issue is under investigations by the LSK. There is however no evidence of the ongoing investigations and the status thereof.
39. There is also no evidence tendered on any reports made by the Applicants or their advocates, to the police or any investigating arm of the government regarding the issues raised against the Respondent.
40. There is no doubt that the Applicants have right to a fair trial under Art. 50 of the Constitution. Indeed, the Court of Appeal in the case of *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] KECA 297 (KLR), held:-

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness...”

41. On the other hand, the role of an advocate watching brief for the victim was stated by the Supreme Court in the case of *Waswa vs Republic* (Petition 23 of 2019) [2020] KESC 23 (KLR) at paragraph 77 thus:-

“Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the Supreme Court Act as the Court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:-

- a. The applicant must be a direct victim or such victim’s legal representative in the case being tried by the Court.
- b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for.
- c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings.
- d. The victim’s presentation should be strictly limited to “the views and concerns” of the victim in the matter granted participation.
- e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused.



- f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor.
- g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial.
- h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP.
- i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest.
- j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim.
- k. While the Court has a duty to consider the victim's views and concerns, the Court has no obligation to follow the victim's preference of punishment."

42. It is therefore evident that the right to representation is both on accused persons and the victims. Their choice cannot be denied without justification. Some of the reasons warranting interference with the right of representation by an advocate of choice are conflict of interest and in effect breach of confidentiality.

43. However, there is no evidence that the Respondent is a witness in this case and further, if the Respondent ever contacted the Applicants as alleged, and which has not been proved, then anything they shared with her does not amount to a confession and it cannot be admissible against them. The Applicants have failed to demonstrate how their rights will be prejudiced by the victim's choice of the Respondent to represent them in this matter.

44. They have failed to show that their right to fair trial has been or will be violated or threatened in any way by the Respondent's participation in this matter. In the circumstances herein, there is no reason to interfere with the deceased's family's choice on the Respondent to watch brief in this case.

45. Likewise, the Applicants herein are duly represented by their respective advocates of choice. The Respondent should not have any reason to contact or visit them in prison.

46. In the upshot, the application dated 1st April, 2025 partially succeeds in that that this Court makes the following orders:-

- 1. Counsel watching brief for the family Ms. Muthama Rosalinda Wamaitha of P:105/ 17466/20 commonly practicing in the name of Ms. Wamaitha and /or her agents are hereby restrained from visiting the accused persons herein where they are currently held at Nakuru G. K prison.
- 2. All other payers are dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF JUNE, 2025.

PATRICIA GICHOHI

JUDGE

