



**Republic v Terah & another (Criminal Case E044 of 2024)
[2025] KEHC 10798 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E044 OF 2024
HI ONG'UDI, J
JULY 23, 2025**

BETWEEN

REPUBLIC STATE

AND

RUTH CHELANGAT TERAH ACCUSED

AND

CLARIS MGHOI APPLICANT

RULING

1. Claris Mghoi the applicant filed the Notice of Motion dated 17th February, 2025 seeking the following orders:
 - a. That the Honorable Court be pleased to allow counsel for the Applicant, to actively represent and protect the interests of the Applicant and her family by extension, as victims of the offence of Murder contrary to Section 203 of the [Penal Code](#), presently being prosecuted before the court.
 - b. That the Honorable Court be pleased to allow the active participation of counsel as the legal representative of the Applicant and her family by extension, as victims of the offence of Murder contrary to Section 203 of the [Penal Code](#), presently being prosecuted before the Honorable Court.
 - c. That the Honorable Court in particular be pleased to allow counsel ask questions to the witnesses, adduce evidence that has been left out, file written submissions for consideration by the court, file victim impact statements for consideration by the court, and undertake any other activities that are necessary in advancing the interests of the victim and helping the court achieve a just determination.



- d. Any other orders that this court would deem fit for the administration of justice for the Applicant and her family by extension.
2. The application is premised on several grounds and the applicant's supporting affidavit. The main ground being that the applicant is a daughter of the deceased and so meets the definition of the word 'victim' as delineated by section 2 of the *Victims Protection Act* of 2014 (VPA). The applicant therefore wishes to fully participate in the proceedings, adduce evidence, cross examine witnesses, make submissions on the same. She relies on Article 27 of the *Constitution* of Kenya and Sections 4(2) (K) 9, 13, 4 of the VPA.
3. The applicant and family wish to be represented by a legal counsel due to the trauma and emotional pain experienced following the death of the deceased, who was a father and family member.
4. The applicant's submissions were filed by M/s Wanjira Maina advocate and are dated 20th February, 2025. On whether counsel for the applicant should be allowed to actively participate in these proceedings, it was argued that victims have similar rights to those of accused persons. Reference was made to Article 50 and the enactment of the *VPA*.
5. Counsel submitted that sections 4, 9 and 14 of the *VPA* 2014 mirrors the various provisions of:
- clause 6 (b) of the *United Nations Declaration and Basic Principles of Justice for victims of Crime and Abuse of Power of 1985*.
 - Article 68(3) of the *Rome Statute on the Establishment of the International Criminal Court*.
6. She also submitted that the rights of an accused cannot be considered in isolation without considering those of the victim. She cited the Supreme Court of Kenya decision in Petition No. 23 of 2019 – *Joseph Lendrix Waswa v Republic* [2020] KESC 23 (KLR) where the court stated:
- “..... victims too have a legitimate interest in the court's exercise of its jurisdiction, and as such, criminal proceedings should be a process that inspires the trust of both the accused as well as the victims.....”
- It further stated at paragraph 70
- “..... the trial Judge must protect the rights of all parties involved in criminal proceedings. The rights of victims, properly understood, do not undermine those of the accused to the public interest. The true interrelationship of the three is complementary.....”
- “71. Therefore, we fail to see how the 'participatory rights of victim' violate the 'fair trial' rights of the accused.....”
7. Still referring to the *Lendrix Waswa case* (supra) counsel contended that the applicant has no intention of usurping the role of the DPP. She invited the court to consider the elaborate list of guiding principles under paragraph 78 of the *Lendrix Waswa* (supra) decision. She thus urged the court to allow the application and grant the order sought.
8. The 1st respondent (DPP/Prosecutor) filed a replying affidavit sworn by Emma Okok dated 24th March, 2025. A summary of the response is that the 1st respondent confirms that the applicant is a daughter of the deceased hence a victim in the case. Further that the 1st respondent is not opposed to the applicant actively participating in the case but asks the court to set parameters for the participation. The main



- issue is on the cross examination of witnesses. The 1st respondent would want the applicant's counsel to share with the respondents in advance the questions to be asked for purposes of preparation.
9. The 1st respondent's submissions were equally filed by Emma Okok Principal Prosecution counsel and are dated 24th March, 2025. Counsel referred to sections 9, 13 of the VPA and the guidelines in the case of Joseph Lendrix Waswa (supra) which have been heavily relied on by the applicant. Based on these, counsel urged the court to set parameters to the applicants participation to avoid inordinate delay of the trial and prejudice to the accused in any way.
 10. Still on this point of limitations counsel referred to the case of Leonard Maina Mwangi V Director of Public Prosecutions & 2 others [2017] KEHC 9669 (KLR) where Lessit J (as she then was) stated as follows:
 68. In regard to cross examination I must put a rider. The need for having a focused prosecution as opposed to a parallel or competitive one must be guarded jealously. It is important that whatever cross examination that takes place must be within what is contained in the evidence provided by the defence and prosecution as the one they intend to rely on. that way the accused persons will not be taken by surprise or ambushed. A failure to observe this rule would be highly prejudicial to the accused person and may compromise fair trial
 69. Adducing evidence through cross examination cannot therefore, be viewed outside the evidence before the court. Participation by a victim is premised on already existing evidence. The other prerequisite is that such evidence is subject to the dictates of the Evidence Act as to relevance and admissibility, the rights of an accused to a fair trial and requirements of a fair and impartial trial. Therefore, even where the victim has been allowed to cross-examine witnesses thereby adducing evidence, it is not an open cheque. It must be within the limits set out herein above, and even then, there should be no comprise to the standards required of a fair trial.
 11. On the issue of cross examination counsel referred to the case of Republic v Hassan (Criminal case No. E070 of 2023) [2024] KEHC 11684 (KLR). She pressed on the need to be made aware of the areas to be cross examined on, well in advance.
 12. The 2nd respondent is the accused herein. She filed a replying affidavit, sworn on 28th April, 2025. She does not oppose the applicant's participation in the case but the same should not infringe on her rights and fair trial as an accused person. She averred that the participation should be premised on already existing evidence and questions and or evidence availed by the applicant. Further that the applicant or her counsel should not take over the role of the prosecutor. On this she requests the court to set parameters for purposes of cross examination.
 13. The 2nd respondent filed submissions through her advocate Phyllis Muthoni which are dated 28th April, 2025. Counsel presented one issue for determination which was the scope of an active participation without jeopardizing the rights of an accused person and the provisions of a fair trial. Counsel submitted that they were not opposed to the applicant's participation in the trial as enshrined in the Constitution of Kenya 2010 and the VPA 2014, as she is a victim by dint of section 2 of the Act. Relying on section 9(2) of the Act she urged that the victim's counsel should ensure that views and concerns of the victim do not undermine the rights of the accused as enshrined under Article 50(2)(c) which states "the accused shall have adequate time and facilities to prepare a defence, which is expounded further in Article 50(2) (i) which says, "to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence".
 14. Counsel made reference to the cases of Republic v Sammy (Criminal case No. 36 of 2019) [202] KEHC 195 (KLR) and Leonard Maina Mwangi (supra) to buttress the point that the accused should not



be taken by surprise by the victim's evidence. Thus, parameters must be set and the same must be complied with. Lastly, that the applicant must not play the role of a deputy prosecutor, See *Joseph Lendrix Waswa* (supra). Counsel further pointed out that this was a sensitive matter including family members including the accused's children who are minors and are witnesses.

15. Counsel for the applicant filed supplementary submissions dated 13th May, 2025, in which she reiterated her earlier submissions. She referred the court to the case of *Republic V L. P Veronica Mutai and PC Issa Mzee* [2016] eKLR where the Court of Appeal recognized the rights of victims including the right "...to put questions to witnesses, including the accused person". She further did highlights on the case of Leonard Mwangi (supra) where Lessit J (as she then was) outlined the mode of participation.
16. I have carefully considered the application, all affidavits, submissions by all parties, cited authorities and the law. This court has to determine whether the application dated 17th February, 2025 is merited or not.
17. When this matter came for mention on 10th February, 2025 to confirm service of witness statements on the defence M/s Maina appeared and requested to come on record as watching brief for the deceased's family. She further requested to be given an opportunity to cross examine witnesses and file submissions. Only the issue of cross examination of prosecution witnesses was opposed by the prosecution counsel. Counsel for the accused was not opposed to the application.
18. This court noted that there was no objection to M/s Maina coming on record as watching brief for the deceased's family as the same was not opposed. It however directed counsel Maina to file a formal application on the other issues for full participation in the case of the deceased's family. Directions were also issued for the prosecution and defence to file their responses once served. The application was canvassed by way of written submission as already noted above.
19. This application is premised on Article 20(3)(b), 27(1) 50(a), 159(2)(a), 259(1) and (3) the *Constitution* and Sections 4, 9, and 13 of the *VPA*, Part IXA of the *Criminal Procedure Code* specifically sections 329 (A), (C) (2) and (3)(a). The VPA was enacted in compliance with Article 50(9) of the *Constitution*. Section 2 of *VPA* defines a victim as "any natural person who suffers injury, loss or damage as a consequence of an offence. From the material before the court it is clear that all the parties recognize the applicant as a victim in this case.
20. Section 9 of the *VPA* provides for the victim's rights during the trial process in the following terms:

9

- (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 being 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.

21. Section 9 of the [VPA](#) clearly sets out what must be considered in a matter of the kind before this court. Again, from the material before me the parties have no objection to the applicant's full participation in this matter as a victim. Of course, this is a new area in our jurisprudence.

22. The respondents have therefore requested the court to set parameters for the applicant's participation for two reasons:

- i. To avoid interference with the role of the prosecution
- ii. To protect the accused's right to fair hearing.

The Supreme Court of Kenya has already set the pace on this through the case of [Joseph Lendrix Waswa V Republic](#) (supra). This is what the court stated:

72. Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the judge's discretion, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.

77. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the [VPA](#), victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean that the Court's judgment will follow the wishes of the victim. The trial Judge will, of course, take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

23. The Supreme Court in the same decision set out guiding principles to assist the trial court when considering an application by the victim or his legal representative to participate in a trial and the manner and extent of the participation. They are as follows:



- 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 consider the victim's views and concerns, the court has no obligation to follow the victim's preference of punishment.
24. Besides this Supreme Court decisions, I have also considered the other cited cases by all counsel which are very helpful. What clearly comes out is that there have to be parameters laid out by the court on the victim's participation. In the case of *Republic V Hassan* (supra) D. K. Mochache J allowed an application similar to this one and issued certain terms. Such terms are very important since they assist the court in managing the victim's participation to avoid interference with the prosecutor's role and the accused's position. This mainly touches on cross examination and the introduction of new evidence.
25. I also note that in the application dated 17th February, 2025 the applicant did not disclose the specific areas she/her counsel wished to pursue. She stated she wanted the counsel to represent her interests and those of her family and to also participate in the case before court. In prayer C she outlines a number of activities she wants to undertake.
26. After due consideration of all the above I allow prayers (a) & (b) of the application dated 17th February, 2025
27. Prayer (c) is allowed on the following terms
- i. The applicant to file and serve the prosecution and defence with the set of questions she intends to ask each witness or the affected witness/witnesses within 14 days.
 - ii. Applicant to file and serve the prosecution and defence with witness statements/statements of any witness she intends to call within 14 days.



- iii. Applicant to file and serve the prosecution and defence with the evidence left out if any which she intends to adduce within 14 days.
 - iv. Cross examination of witnesses by the victim shall only be limited to the evidence and material before the court. Any new or relevant evidence not before the court should be forwarded to the investigative authorities to deal.
 - v. To avoid unnecessary delays, the victim's counsel shall not in cross examination address issues already dealt with by the DPP.
28. Counsel for the applicant shall also appreciate that she is not deputizing the DPP nor taking his/her role. Those boundaries must be strictly observed.
29. The 1st respondent to ensure that all the witness statements and documents to be relied on if not yet served, to be served on the applicant within 7 days, from today before the applicant can comply with the terms stated above under paragraph 27 of this Ruling.
30. The defence to also supply to both the prosecution and victim any document the accused intends to rely on.
31. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 23RD JULY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

