



**State v Owino (Criminal Case E012 of 2023)
[2024] KEHC 1367 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E012 OF 2023
DO OGEMBO, J
FEBRUARY 15, 2024**

BETWEEN

STATE PROSECUTION

AND

FELIX CHARLES OWINO ACCUSED

RULING

1. The accused person, Felix Charles Owino, faces a charge of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The Prosecution has called a total of 6 witnesses. At the close of the evidence of PW6, the Learned Prosecuting Counsel, Ms. Mumu, indicated that the prosecution had closed its case.
2. Upon the statement of the Prosecution that it had closed its case, the Defence Counsel Mr. Nyaberi, teaming up with Ms. Mugambi raised an objection to the closure of the Prosecution's case. This is the basis of this ruling.
3. Submitting on the objection, Mr. Nyaberi submitted that these proceedings should culminate in justice and that the parties must meet the guidelines of article 50 on fair trial, that same bars trial by ambush and no party should be allowed to mutate the case midway. Counsel relied on the case of [Thomas Patrick Cholmondeley v R](#) Cr Appeal No. 116/2007.
4. Counsel went on to submit that it is the duty of the court to establish the truth and the Prosecution cannot be allowed to cherry pick on witnesses. That the defence initially made this application when Prosecution's case was still on.
5. It was submitted that the relevant witnesses include the mother of the deceased and others whose statements had been supplied to the defence and also that one of the relevant documents not produced is in fact what formed the basis of charging the accused. And that as it stands now, there is nothing to show that the accused is fit to stand trial.



6. Counsel even went further that there is no difficulty in bonding the witnesses and failure to produce these documents would defeat the defence cause. And that whereas Article 157 gives the ODPP powers, such powers should not be exercised arbitrarily.
7. Mr. Okinyo for the victims, on the other hand, submitted that court has a right to call for such necessary evidence (*Bukenya v R*).
8. Ms. Mumu, for the Prosecution opposed this objection and application that prosecution's case be re-opened. First that it is the defence who opposed the production of the mental assessment report by the investigating officer, and the prosecution abandoned the evidence. That the prosecution has proceeded to close its case. That the mental assessment report filed in court and supplied to the defence confirms that accused is fit to plead and the court rightly found so and charges were read to the accused.
9. Counsel recalled that the prosecution had exposed fears of interference and they have called the witnesses they managed to get and the prosecution cannot be compelled to open this case to call a Psychiatrist for a document already relied on by the court on taking plea. And lastly, that the defence is at liberty to call the witness if he is of assistance to the defence.
10. I have considered the submissions made by the parties herein regarding this application that the prosecution be compelled to re-open its case so as to call certain witnesses whose statements had been supplied to the defence but were not called to testify.
11. I have also considered the authorities relied on by the defence in making this application.
12. To me, this application hinges on the constitutional powers of the office of Director of Public Prosecutions. Article 157 of The *Constitution* states:
 - (6) The Director of Public Prosecutions shall exercise state powers of prosecution and may.
 - (a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
 - (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
13. The *Constitution* of Kenya therefore bestows on the office of Director of Public Prosecutions the mandate to undertake public prosecutions. *Constitution* further declares that in undertaking its mandate, the Office of Director of Public Prosecution shall not require the consent of any person or authority and shall not be under the direction or control of any person or authority. The *Constitution* of Kenya therefore guarantees the independence of the Office of Director of Public Prosecutions in the exercise of its mandate.
14. In our instant case, the Prosecution is on record as having closed its case against the accused. The defence has objected to this and demanded that this court do order the prosecution to re-open its case and call certain witnesses whose statements were supplied to the defence but were never summoned to testify. The issue therefore is whether this court possesses such powers over the prosecution in the current constitutional order.
15. As seen above, The *Constitution* of Kenya declares that in the exercise of its functions, the Director of Public Prosecutions shall not be under the direction or control of any person or authority. The *Constitution* does not give any exception or proviso to this general expression of independence of the Office of Director of Public Prosecutions. In the submissions of Learned Counsel for the accused, the



court was not referred to any constitutional or statutory provision that would give the court the powers to direct the office of Director of Public Prosecutions to re-open its case once it is on record to have closed its case against an accused person.

16. Had the people of Kenya intended to reserve such powers for the court, nothing would have prevented them from declaring or expressing the same in the Constitution. They did not. The defence application seeks that this court issues orders that would obviously go against the express provision of the Constitution.
17. This court shudders on imagining a situation where the court would be directing the prosecution on which witness to call and which one not to call, when to close its case and when not to close its case. The court would have removed itself from being in the position of an impartial umpire to being an active player in the arena of presentation of the evidence before it.
18. It is to be noted that we operate under an adversarial system where it is upon the respective parties to present their best evidence, and the court, an arbiter, to consider such evidence presented by the parties and to come up with a just decision based on the law and the evidence tendered.
19. The defence made submissions to the effect that out of curiosity and fear that the prosecution would close their case before calling the relevant witnesses, the defence had made the application that the witnesses be summoned. This may very well have been the case. That application, if indeed made, must have been speculative and the court could not issue any orders based on speculation and fears of the defence. The objection of the defence as to the investigating officer producing the mental assessment report was on the basis that the maker of the document would best qualify to produce it and be cross examined on it.
20. The court duly made its ruling on the same. If the Prosecution has abandoned the issue of producing this document, it can only impact on the prosecution's case. In any case, the document was intended to have been prosecution evidence, not defence evidence.
21. In view of the above observations, this court is not convinced that this application of the defence has any merit. I dismiss it. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 15TH DAY OF FEBRUARY, 2024

D.O. OGEMBO

JUDGE

15/2/2024

Court:

Ruling read out in presence of the accused, Mr. Nyaberi, Mr. Okinyo for the family and Ms Mumu for State.

D.O. OGEMBO

JUDGE

15/2/2024

Mr. Nyaberi:

We seek copy of the ruling.

Court:

Copy of the Ruling to be supplied to parties.



D.O OGEMBO

JUDGE

15/2/2024

15/2/2024

Before Hon. Justice D.O Ogembo, J

C/Assistant: Achieng

For State: Ms. Mumu present

For Accused: Mr. Nyaberi present

Accused: Present

Language:

Mr. Okinyo for Victims present

Mr. Nyaberi:

We ask for 14 days to file submissions.

Mr. Okinyo:

We shall also submit.

Court:

Parties to file submissions on case to answer as Prosecution already closed file. Mention on 22/4/2024.

D.O OGEMBO

JUDGE

15/2/2024

