Republic v Koskei alias Nicholas Korir (Criminal Case 14 of 2017) [2024] KEHC 4097 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4097 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL CASE 14 OF 2017

RM MWONGO, J

APRIL 9, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

NICHOLAS CHERUIYOT KOSKEI ALIAS NICHOLAS KORIR ..... ACCUSED

RULING

1. This is a notice of motion application by the State seeking to be allowed to adduce evidence to rebut the accused's *alibi* evidence. The application has been made during the hearing of the defence case. The grounds are that the Accused has extensively mentioned the name of one Kulitiang as part of his *alibi*.

2. The applicant asserts that in his initial statements to the police, the Accused never mentioned meeting the said Kulitiang, which he has done only in his sworn defence testimony.

3. In her supporting affidavit the DPP points out that in the Accused's statements which she attached as NM1 and NM2, the Accused did not make any mention of Kulitiang. As such, the DPP feels compelled to request that they be allowed to call the said Kulitiang in order to present rebuttal evidence.

4. The DPP relies on Sections 212 and 309 of the *Criminal Procedure Code*. These provide that where the accused person introduces a new matter which the prosecutor could not by reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

5. The DPP recognises that in order to introduce rebuttal evidence after the close of defence, the prosecution must satisfy several conditions. These include: First, that the calling of rebuttal evidence is not a ploy to re-open the case in order to cure perceived defects or shortcomings in the prosecution evidence; Second, that the rebuttal evidence is not being called merely to confirm or reinforce the prosecution's case or to respond to contradictory evidence adduced by the defence; and Third, that the prosecution can only introduce rebuttal evidence on matters raised by the accused in their defence which the prosecution could not reasonably have foreseen.

6. The DPP cited the cases of *Stephen Mburu Kinyua v R* [2016] eKLR; and *Danmark Ochieng Otieno v R* [2017] eKLR. The DPP also asserts that the court can of its own motion, invoke Section 150 of the *Criminal Procedure Code*.

7. The defence opposes the application; and filed grounds of opposition. They object to the DPP making reference to the extrajudicial statements of the accused on grounds that the statements were not properly introduced by the author, and should be expunged. Further, the defence objects to the accused's statements being introduced through an affidavit of the DPP as a violation of the Accused's fair trial rights. In addition, the defence asserts that the provisions of the *Criminal Procedure Code* relied on by the DPP are not available in the High Court.

8. Finally, the defence argues that there is no factual basis in the allegation that the defence's alibi is new and enforceable matter, as the defence position has all along been that the accused was not in the room with the deceased at the moment she was killed. That this position was clear from the point of the Pre-trial questionnaire and throughout the hearing.

9. In his supporting affidavit the accused indeed highlighted several circumstances during the evidence of prosecution witnesses 2, 3, 4 and 5 when the name of the said Kulitiang was mentioned in testimony. In such circumstances, the defence asserts, the defence of alibi is nothing new and had been asserted so frequently that the prosecution ought to have had the said Kulitiang in contemplation as a prosecution witness.

10. Finally, the defence asserts that allowing the application would set a bad precedent and erode the constitutional right of the accused to a fair trial.

11. The defence in their submissions, impugned the affidavit of the DPP as fatally defective for being commissioned by a law firm instead of a commissioner for oaths. Further, they impugn the attempted exhibition of the statements of the accused as admitted evidence, and attack the attempt of the DPP to introduce and give evidence on the said statements, which the accused considers extra judicial.

12. The accused relies on a number of authorities, including: *Geoffrey Githinji Mwangi & 2 Ors v Jubilee Party & 11 Ors* [2018] eKLR; *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Ors* [2018] eKLR; *Magnolia PVT Ltd v Synermed Pharmaceticals (K) Ltd* [2018] eKLR; *Musili Tulo v R* [2014] eKLR *Douglas Sila Mutuku & 2 Ors* [2014] eKLR and *Stephen Mburu Kinyua* [2016] eKLR. I have perused these authorities.

13. To conclude, the defence asserts that the DPP's supporting affidavit should be struck out, the purported annexed statements of the accused should be expunged; and the said Kulitiang should be held as unavailable for the prosecution, whose application should be dismissed.

Issues for Determination

14. The sole issue for determination is whether in the circumstances of this case, the DPP should be allowed to summon the said Kulitiang for purposes of rebutting the alibi evidence of the Accused.

The Law

15. Section 309 *Criminal Procedure Code* provides as follows:

> " If the accused person, adduces evidence in his defence introducing a new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it".

16. This Section, broken down, indicates that to invoke it the matter adduced by the defence must be: At the defence stage of evidence; That the defence has introduced new evidence or matter; That such new evidence or matter could not possibly have been foreseen by due diligence on the part of the prosecution; and that it is such new matter as demands a rebuttal by the prosecution.

17. Both counsels cited the case of *Stephen Mburu Kinyua v R* [2016] eKLR which well lays out the threshold for invocation of the provisions that allow for calling by the prosecution of rebuttal evidence. The court quotes from *R v Harris* (6) 1927, 20 Cr. App R 86, 89 where Avory J stated:

> " There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if the matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown...."

17. In *Stephen Mburu's case*, Ngugi J (as he then was) adopted the ex improviso rule, stating the general principles for allowing rebuttal witnesses as follows:

> " I am of the view that the prosecution can only call rebuttal witnesses where the following conditions are satisfied:
>
> i) Such evidence must have arisen ex improviso to the extent that no human ingenuity or reasonable diligence could reasonably have anticipated, or foreseen the possibility of its being adduced by the defence.
>
> ii) The evidence must have probative value in the determination of the issue or issues under consideration, and in particular in the process of assessing the innocence or culpability of the Accused;
>
> iii) It must relate to the significant issue arising from the Defence case for the first time.
>
> iv) The prosecution must demonstrate that:
>
> a. The calling of the evidence in rebuttal is not a ploy to re-open its closed case with a view to curing certain perceived defects or shortcomings in the prosecution case.
>
> b. That the rebuttal evidence is not being called to merely confirm or reinforce the Prosecutions 'case or to respond to contradictory evidence adduced by the defence.
>
> c. The rebuttal evidence is not being called on a collateral issue related to the credibility of the witness.
>
> d. That the granting of permission to adduce the evidence in rebuttal will not in any way violate the principles that underlie the doctrine of equality of arms between the prosecution and the defence, or otherwise violence to the doctrine of fundamental fairness or unduly delay the proceedings thereby compromising

the constitutional obligation of ensuring on fair and expeditious trial..."

19. . It is necessary to apply these principles to the case at hand. The first question is whether the defence has indeed introduced new matter which the prosecution could not reasonably have foreseen; That is a matter introduced ex improviso. The answer, clear as day, is no.

20. The defence has referred to the Pre-Trial Questionnaire which was completed in open court on 2.5.2019. The proceedings of that date indicate that:

" Pre-Trial Form completed with participation of all parties."

The Pre-Trial Questionnaire at Paragraph 18 on "Case Management Information" indicates:

"

" 18. The Accused was present at the time and place of the offence (if applicable) or otherwise took part on the conduct alleged.....Yes.....No.....No Answer"

The answer indicated is 'Yes'

" "In Hotel, not in Room" (Emphasis added)

21. Clearly, therefore, right from the commencement of the hearing process, the Accused clarified that he was at the hotel but not in the room where the offence occurred, hence setting up his alibi from that time.

22. Further, the Accused has pointed out to evidence of prosecution witnesses who made reference to the said Kulitiang as follows:

1) PW2 Ambrose Mapesa in cross-examination (at Page 25 of 128 of proceedings) stated:

" I found the security officer in the room - he was Kurutiang - I now remember spelt Kulitiang. He did not live in the hotel.....He was on duty."

2) PW3 Dalmas Kairish - in his evidence in chief stated he was a security guard. He stated that (Page 25 of 128 of proceedings)

" John Kulitiang covered Eburru Area.

Again, he testified (Page 26 of 128 of proceedings)

" John Kulitiang was patrolling near the rooms - He also came to Room 17."

In cross-examination by Mr. Ngunjiri (Page 27 of 128) he stated:

" Room 17 Warthog was under Eburu Area in terms of security.

Eburru Area was under John Kulitiang for security purposes. When I escorted Accused to Room 17, I stood outside the door"

3) PW5 Anthony Mwai also testified (Page 32 of 128 Proceedings) that:

" I saw the bed with the accused seated on the bed.....

He was seated with one of the guards, Kulitiang"

Conclusions & Disposition

23. From the evidence of the above prosecution witnesses, there can be no doubt about the following: That the room where deceased was found was Room 17 Warthog which was in Eburru Area; That the said Eburru Area was under the security of Kutiang or Kulitiang on the material night; That the said Kulitiang spent substantial time together with the accused on the material night at the said room.

24. In my view, taking the Accused's position in the Pre-Trial Questionnaire, together with the evidence of witnesses PW3, 4 and 5; there can be no doubt that the place of Kulitiang in the evidence is not ex improviso, or sudden or unexpected. It is not information which the prosecution could not reasonable have been expected to have, or have known, or uncovered, in terms of Section 309 *Criminal Procedure Code*.

25. The mere fact of the presence of Kulitiang in so prominent a place at the deceased's room on the material night as a security officer, and his actual presence inside the material room with the Accused, is sufficient to suggest that the prosecution ought to have called him as a witness from the start of the proceedings. I so find and hold.

26. In light of the foregoing, the mere fact that the said Kulitiang has been referred to by Accused in his alibi defence, does not warrant the court to call him to give rebuttal evidence in that regard. The prosecution had reasonable opportunity all through to call the said Kulitiang.

27. Accordingly, the applicant's application to call Kulitiang to rebut the defence alibi does not lie, and is hereby dismissed. The matter shall proceed without summonses being issued to the said Kulitiang.

28. Orders accordingly.

DATED AT KERUGOYA THIS 9TH DAY APRIL, 2024

R. MWONGO

JUDGE

Delivered in the presence of:-

N. Maingi for Applicant

Muriithi for Respondent

Owuor - for Victim's Family

Quinter, Court Assistant