



**Republic v Ithong'a & another (Criminal Case E030 of 2022)
[2024] KEHC 10665 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 10665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE E030 OF 2022
DO CHEPKWONY, J
MAY 24, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

RICKSON KIBIRU ITHONG'A 1ST ACCUSED

LESKAR L SIARA ALIAS BARAKA 2ND ACCUSED

RULING

1. On 13th December 2023, the court heard the first prosecution witness (PW1) in finality. Immediately afterwards, Mr. Macharia, Counsel for Defence informed the court that PW2 was said to be an expert witness but the prosecution had not availed his witness statement and bundle of documents to the defence and he objected to this testifying.
2. Ms. Ngesa, counsel for the prosecution, admitted that indeed the bundle of documents had not been availed to the Defence and she proceeded to stand down PW2 so that she could avail the same.
3. In response, the Defence Counsel stated that prosecution's actions were unfair to the Accused persons and the documents should not be admitted in evidence since they had not been availed during the pre-trial conference as required by law. Counsel went on to fault the prosecution for detaining the accused persons for more than three months before taking plea which is unconstitutional. He submitted that the court should not take the actions of the prosecution to be a procedural technicality. He contended that the matter had been mentioned before court more than 7 times that the prosecution ought to have availed the said documents by then to enable the Accused persons prepare for the trial. He urged the court not to admit the evidence and stated that the prosecution had not made any application for inclusion of further documents.
4. In response, the prosecution's counsel stated that the documents were prepared by the expert from Safaricom but the same were not supplied to the Defence counsel. She stated that the request was made



through a letter dated 18th July, 2022 which was before the accused took plea on 4th August, 2022 and that it was not an afterthought. She stated that the report was eventually made dated 4th December, 2023 by an officer named Daniel Hamisi from Safaricom. She stated that there are Court of Appeal decisions that state that investigations and disclosures in criminal trials are a continuous process which go on until close of the prosecution's case. On the issue of pre-

detention of the accused persons before plea, the prosecution counsel stated that it was not an illegal process since they had sought for the same vide Kikuyu SPM Misc. Application No. 25 of 2022 and the process was sanctioned by the lower court. She urged the court to consider the constitutional requirements with regard to substantive justice overriding any procedural technicalities and give the prosecution an opportunity to call the expert witness so it can be established who killed the deceased, John Ithongá Kahuho.

5. The Accused persons' Counsel stated that he agreed with the prosecution that they were in court to determine who killed the deceased but no one should be fixed. He stated that in law disclosure must be made before hand for adequate preparation for trial and not for the defence to hear things for the first time in court as this amounts to trivializing the disclosure process.
6. This Ruling is therefore and adduce whether the court should allow the prosecution to proceed with the evidence of PW2. It is trite law that an accused person must be given all information that is intended to be used in the case so as to give the accused person a chance to prepare for the case in a bid to ensure fair trial. This is provided for under Article 50(2)(j) of the Constitution and is in the case of Juma and Others –vs- The Attorney General (2003)2 EA 461, the court recognized the importance of fair trial as follows:-

“The accused person must be given and afforded those opportunities and means, so that the prosecution does not gain an underserved or unfair advantage over the accused; and; so that the accused is not impeded in any manner and suffer unfair disadvantage and prejudice in preparing his defence, confronting his accusers, and arming himself in his defence; and so that no miscarriage of justice is occasioned.”

7. On the duty of disclosure, it is clear that it is not a one time process but a continuous one throughout a criminal trial. This was stated in the case of Dennis Edmond APAA & 2 Others –vs- Ethics and Anticorruption Commission & Another[2012]eKLR, where the Court held that:-

“The case of R v Ward (Supra) cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial.”(emphasis added).

8. In this case, it is common ground that the expert witness statement and document were not availed to the Defence at pre-trial stage and the same was noted on the day of trial. It would have been prejudicial to the accused persons had his Counsel not noted the same. However, since the same was noted and stopped before PW2 proceeded with his evidence, the court finds that it would not be prejudicial to give the prosecution time to allow the said documents and the defence to enable the Defence Counsel analyze the same in preparation of further trial.
9. It will be appreciated that during hearing, the Defence Counsel will also have a chance to cross-examine on the said documents, if need be, so as to test their credibility/authenticity. Therefore, in light of the principle that a criminal trial being a continuous process, this Court cannot bar the prosecution Counsel from calling the expert witness at this stage.



10. In the end, the Court hereby allows the prosecution counsel's prayer to stand down PW2 and:-
 - a. Directs the prosecution to avail the expert witness statement and report to the Defence within 7 days of this Ruling to enable the Defence prepare for their trial.
 - b. Hearing on 19th September, 2024 and 23rd September, 2024.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF MAY, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gacharia counsel for the State

Mr. Macharia counsel for accused persons

Accused – Both present

Court Assistant - Martin

