



**Republic v Langat & another (Criminal Case E026 of 2020)
[2024] KEHC 5016 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E026 OF 2020
HI ONG'UDI, J
MAY 17, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ROBERT KIPROTICH LANGAT 1ST ACCUSED

DAUDI KIPLANGAT KOECH 2ND ACCUSED

RULING

1. The accused persons who are facing a murder charge were on 13/03/2024 placed on their defence. The matter came up for defence hearing on 13/05/2024. In the course of giving his sworn statement of defence Robert Kiprotich Langat (1st Accused) referred to a witness statement by one Sheila Chepkemoi which statement he sought to produce as part of his defence. The said Sheila Chepkemoi who had recorded the statement as a prosecution witness did not however testify on behalf of the prosecution.
2. The prosecution counsel M/s Okok opposed the production of the witness statement by the 1st accused. The reason being that the said Sheila has not testified as a witness and there is no way the prosecution would confirm her existence and recording of the statement.
3. In response Mr. Kipkoech for the defence submitted that in the Cholmoldey v Republic and Joan Sawe v Republic cases the Court of Appeal held that the prosecution was duty bound to avail all evidence collected whether or not it was favourable to them. He contended that Sheila recorded a statement on 15/10/2020 with the DCI – Njoro. And in a case where the prosecution fails to call such a witness the benefit of doubt goes to the defence. That Articles 49 & 50 of *the Constitution* calls for fair hearing and so Sheila who was at the scene ought to have been called to testify.
4. I have carefully considered the arguments in respect of the production of the witness statement by Sheila Chepkemoi.



5. It is not disputed that Sheila Chepkemoi recorded a witness statement in respect of this case. It is equally not disputed that the said Sheila did not testify as a witness for the prosecution in this matter.
6. The 1st accused wishes to have the statement of Sheila produced as his evidence herein. The said request if granted would mean the maker is not availed for cross examination.
7. Section 33 of the [Evidence Act](#) (Cap 80 Laws of Kenya) gives instances when statements by persons who cannot be called as witnesses may be admitted by the court. These are persons who are dead, or cannot be found or who have become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which in the circumstances of the case appears to the court unreasonable, and are themselves admissible in the following cases:
 - a. Relating to cause of death
 - b. Made in the cause of business
 - c. Against the interest of the maker
 - d. An opinion as to public right or custom
 - e. Relating to existences of a relationship
 - f. Relating to family affairs
 - g. Relating to a transaction creating or asserting etc a custom
 - h. Made by several persons and expressing feelings
8. In the case of [Kinyathi v Republic](#) [1984] e KLR the Court of Appeal had this to say of hearsay evidence:
 4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying offers as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence
 5. The rule against hearsay evidence is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of stated facts.
 7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made”.
9. Upon perusal of what is contained in section 33 of the [Evidence Act](#) and the cited decision from the Court of Appeal, I find that the statement by Sheila does not fall in any of the categories under section 33 [Evidence Act](#).
10. There is no dispute that the witness statement of Sheila was one of the statements served on the defence by the prosecution. Justice is not one sided for it cuts across. Since the prosecution did not find it necessary to call Sheila as a witness and the defence is interested in her evidence, the best way out is for the defence to call her as their witness. This will give room for the prosecution and the court to hear her evidence and for the prosecution to cross examine her. In this way her evidence will have been tested.
11. I therefore disallow the request by the 1st accused to produce Sheila’s witness statement. The defence is however at liberty to call her as a witness, even if by means of a court summons.
12. Orders accordingly.



**DELIVERED, DATED AND SIGNED THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT
NAKURU.**

H. I. ONG'UDI

JUDGE

