



**Republic v Okuku (Criminal Case E012 of 2023)
[2024] KEHC 6991 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E012 OF 2023**

**KW KIARIE, J
JUNE 11, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

LUKAS OCHIENG OKUKU ACCUSED

RULING

1. Mr Jura, the advocate, was instructed by the deceased's family to hold a watching brief. He, therefore, requested to be allowed to participate actively in the proceedings. The participation, he indicated, included submissions, victim's views on bond and cross-examination of the witnesses.
2. Kenya has adopted an adversarial system. A Concise Dictionary of Law second edition defines it as: accusatorial procedure (adversary procedure)A system of criminal justice in which conclusions as to liability are reached by the process of prosecution and defence. It is the primary duty of the prosecutor and defence to press their respective viewpoints while the judge acts as an impartial umpire, who allows the facts to emerge from this procedure.
3. From this definition, there are only two parties: the prosecution and the defence. Criminal procedure, as provided in the Criminal Procedure Act, envisages these two parties. Watching briefs is not recognized by criminal procedure. It is a creature of fear, mistrust and the perception of corruption by the judicial officer, judge, or prosecutor.
4. Do we, therefore, give in to fear, mistrust, and perception and create a non-existent entity to watch over the performance of independent institutions, or do we strengthen the institutions? I believe that we ought to ensure that our statutory institutions are made accountable by weeding out the players who cultivate negative perceptions.



5. It is fallacious to assume that the interests of the victim's family are not represented unless an advocate is appointed to "watch" their brief. All criminal cases are brought in the name of the Republic for the complainant's interest.
6. This request poses three issues: the role of precedent by the superior court, the place of court-made law without the backing of the statute, and whether an accused person will be prejudiced.
7. It cannot be gainsaid that when it comes to the order of priority on which law to prevail, *the Constitution* ranks highest, followed by Acts of Parliament and at the bottom are the pronouncements by superior courts. For the statutes and the precedents to have the force of law, they must conform with *the Constitution*. For the precedents to be binding, the decisions must correctly interpret the laws applicable lest they be declared per incuriam.
8. Article 157 (10) & (11) of *the Constitution* of Kenya provides:
 - (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.
 - (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
9. *The Constitution* did not envisage a situation where the prosecution may be shared with any other entity, including the victim. Secondly, the powers conferred to the Director of Public Prosecutions are meant to regard the public interest and the interests of the administration of justice. Allowing the victim's advocate to cross-examine witnesses will breach *the Constitution*.
10. Criminal proceedings are strictly to conform with the provisions of the Criminal Procedure Act. The advocate for the victim's participation in the proceedings is not curtailed by the mere fact that they are not allowed to cross-examine witnesses. If need be, they can still have their input through the prosecutor in court.
11. Article 50 of *the Constitution* has detailed what is expected to arrive at a fair hearing.
12. I was referred to the decision of the Supreme Court in *Waswa vs Republic (Petition 23 of 2019)* [2020] KESC 23 (KLR at paragraph 77 where the Court said:
 77. Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the *Supreme Court Act* as the Court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:
 - 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 to consider the victim’s views and concerns, the Court has no obligation to follow the victim’s preference of punishment.
13. The Supreme Court’s direction cannot be read selectively, as the applicant in this case did. The attempt to confine this court to paragraph 77 (f) was meant to lead the court to assume that that was all the Supreme Court said. This decision must be read with the Constitutional provisions as well as the provisions of the Criminal Procedure Act. The entire paragraph will guide me.
14. The request to cross-examine a witness, including the defence witnesses, will only be allowed upon satisfaction that the advocate for the family is not usurping the DPP’s role or compromising the fair trial for the accused.

DELIVERED AND SIGNED AT HOMA BAY THIS 11TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE

JUDGE

