



**Director of Public Prosecutions v Kipyegon & another (Miscellaneous Criminal Application E205 of 2022) [2023] KEHC 40 (KLR) (16 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 40 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CRIMINAL APPLICATION E205 OF 2022  
EM MURIITHI, J  
JANUARY 16, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**AND**

**JOSEPH KIPYEGON ..... 1<sup>ST</sup> RESPONDENT**

**CHEBET WINNIE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Court has considered the Notice of Motion dated 13<sup>th</sup> October 2022 filed by the Prosecution pursuant to supervisory jurisdiction and revisionary powers of the High Court for Orders:-

- “ 1. That the Honourable Court do revise the orders issued on 08/06/2022.
- 2. That the Honourable court do allow the Prosecution to allow the 2<sup>nd</sup> Accused person to be brought as a prosecution witness in Meru Criminal Case NO. 1973 of 2016.”

2. The order sought to be revised is a refusal by the trial court to allow the prosecution to call the 2<sup>nd</sup> accused in the case, which was made upon a request by the Prosecution to withdraw the charges against the said accused person to enable her be called as a prosecution witness. The Proceedings of 8/6/2022 before the trial court on this application are attached to the Notice of Motion as follows:

“REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE COURT AT MERU  
CRIMINAL CASE NO. 1973 OF 2016  
REPUBLIC .....PROSECUTOR



VS

KIPYEGON JOSPHAT ..... 1<sup>ST</sup> ACCUSED

ROSE KAJIRA .....2<sup>ND</sup> ACCUSED

WINNY CHEBET .....3<sup>RD</sup> ACCUSED

8/6/2022

Before Hon T M Mwangi SPM

Prosecutor Magoma

C.A Nkatha

Accused

Mrs Mutegi

I appear for 2<sup>nd</sup> accused. Nyadimo appears for 1<sup>st</sup> and 3<sup>rd</sup> accused.

Prosecutor

I have 3 witnesses.

Court

File placed aside.

T M Mwangi SPM

1. 20PM

Coram T M Mwangi SPM

C.P Magoma

C.A Nkatha

Accused All 3 present

Nyadimo

I appear for 1<sup>st</sup> and 3<sup>rd</sup> accused.

Mutegi

I appear for 2<sup>nd</sup> accused.

Prosecutor

We will withdraw case against 2<sup>nd</sup> accused and have her as the prosecution witness. She recorded a plain statement which we shall rely upon.

Nyadimo

We are not aware of this statement. We object to her being a state witness. From the charge sheet, she was never indicated to be a state witness. The application is an affront to right of my clients as enshrined in *the constitution*. Article 50 of constitution provides that accused be provided with all evidence to be relied upon by prosecution.

State seeks to have case start de novo. This is an abuse of criminal justice system. 2<sup>nd</sup> accused has heard witnesses give evidence. The evidence is brought in bad faith.



Mutegi.

No objection to case withdrawal against 2<sup>nd</sup> accused and she being a state witness so long as other co-accused are not prejudiced.

Prosecutor

We are not introducing new evidence. Having 2<sup>nd</sup> accused as a state witness will not prejudice defence.

Court

The accused took their plea on 17/10/2016. The prosecutor has not disclosed why it is sought to withdraw case against the 2<sup>nd</sup> accused almost six years later and rope her in as a prosecution witness. If that necessity has dawned on the prosecution just recently, surely somebody has been sleeping on their job and that should not be a matter of concern for the defence.

No court can allow witness to be roped in 6 years down the lifespan of the case when their witness statements were not supplied to the defence to enable them prepare for trial. I read mischief in the application by prosecution because it gives them room to cook evidence through the co-accused intended to be roped in as a witness. Application by prosecution is declined. Case to proceed.

T M Mwangi -SPM

8/6/2022

Prosecutor

I apply for a copy of the ruling.

Court

To be typed and supplied to the defence and prosecution.

T M Mwangi -SPM

8/6/2022

Prosecutor

I apply to withdraw case against 2<sup>nd</sup> accused Under Section 87(a) of Criminal Procedure Code.

Court

Case is withdrawn against 2<sup>nd</sup> accused.

T M Mwangi -SPM

8/6/2022”

3. From the record of the trial case, the prosecution had at the time of the applications to withdraw charges on the 2<sup>nd</sup> accused called 6 witnesses in the trial which started on 17/10/016. In its ruling of 8/6/2022 the court adverted to the unfairness of the introduction of the witness 6 years after the commencement of the trial.



### **Discretion of the Prosecutor to call witnesses**

4. The Court accepts the guidance of the Court of Appeal in *Mwangi v. R* [1984] KLR 595 that “whether a witness should be called by the Prosecution is a matter within the discretion of the prosecutor and a court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive.” I should add that because there can be no limitation to fair trial guarantee pursuant to Article 25 of *the Constitution*, the court may interfere where the rights of the accused are violated by the manner in which the discretion to call witnesses is exercised.

Breach of right of an accused to be informed of evidence used against him

5. Article 50 (2) (j) and (k) of *the Constitution* protects the rights of an accused “(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; [and] (k) to adduce and challenge evidence”.
6. Although a witness and witness statements may be introduced after the commencement of trial when material evidence on ongoing investigations is discovered, I should agree that to allow the introduction of a witness six years after trial is opened is unfair, because the accused, who will have to deal with the witness statement for the particular witness at that particular point, cannot be deemed to have been afforded a reasonable opportunity to know the evidence to be used against him and or to challenge the evidence which is introduced late in the day.

### **Risk of doctored evidence**

7. The situation is exacerbated by the fact that the relevant witness in this case as an accused sat through the testimony of the previous prosecution witnesses and her testimony may be engineered to correspond or corroborate that of the foregoing witnesses. In this case a whole 6 witnesses of the prosecution had testified. There is clear likelihood of prejudice!
8. It is precisely for the reason of risk doctored evidence that investigating officers are not permitted to conduct identification parades or to take confessions by an accused.

### **No illegality**

9. Although the High Court does have supervisory power under Article 165 (6) of *the Constitution* and revisionary jurisdiction under section 362 of the *Criminal procedure Code*, for purposes of ensuring legality of the criminal trial process, this Court is not satisfied that the order of the trial court in refusing to allow the prosecution to call the hitherto 2<sup>nd</sup> accused as a witness was illegal or in any way an abuse of discretion as to call for the interference by this Court.

### **No prejudice**

10. The Prosecution was always ready to proceed against the three accused persons, the 2<sup>nd</sup> accused included, and no conceivable prejudice to the prosecution’s case is possible by the denial of leave to call as a witness the 2<sup>nd</sup> accused person charges against whom have only now been withdrawn and who was not, therefore, among the Prosecution list of witnesses. Moreover, the evidence of such a witness may technically be that of an accomplice which accomplice evidence should “generally not be accepted” (see *Otieno v. R* (1985) KLR 241) and is unreliable (see *Mwangi v. R*, supra), or that of a co-accused which is not admissible against the co-accuseds unless it is an admission (See *Asira v. R* (1986) KLR 227).
11. The background to all this is the constitutional right to fair trial within a reasonable time, or in the words of *the Constitution* “to have the trial begin and conclude without unreasonable delay” under



Article 50 (2) (e) of *the Constitution*, which is compromised by the delay that would be occasioned by the making of a fresh witness statement for the 2<sup>nd</sup> accused, the service thereof to the remaining accused in compliance with the right to be informed of evidence to be used against them, the necessary allowance of time to prepare for the continued trial on the basis of the new evidence by the 2<sup>nd</sup> accused, and the consequential need to call evidence in rebuttal should they be put on their defence on the basis of this new evidence.

### **Ulterior Motive**

12. On the test of *Mwangi v. R*, supra, as to the exercise of discretion to call witnesses, the court must read ulterior motive, as indeed the trial court surmised, in the callous disregard of the consequences on the accused's right to fair trial of the late calling of the witness, six years after the commencement of the trial and six prosecution witnesses down the line!

### **Orders**

13. Accordingly, the court does not find any need to call on the accused persons to submit on the point of revision and the Notice of Motion dated 13<sup>th</sup> October 2022 is declined. There is no order as to costs.
14. The original trial court file Meru Chief Magistrate's Court Criminal Case NO. 1973 of 2016 shall be returned to the trial court forthwith for further progress of the trial.

Order accordingly.

**DATED AND DELIVERED ON 16<sup>TH</sup> DAY OF JANUARY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

Mr. Masila, Principal Prosecution Counsel for DPP.

