



REPUBLIC OF KENYA



**Republic v Silatei (Criminal Case E018 of 2022)
[2023] KEHC 880 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL CASE E018 OF 2022
F GIKONYO, J
FEBRUARY 15, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ZACHARIAH NGETICH SILATEI ACCUSED

RULING

Challenge to legal representation, and affidavits

1. Before me are two preliminary objections. One is on legal representation. The other is on affidavits; one is sworn by a chief- likely to be a witness- in support of an application for bail by the accused; the other two are sworn by the accused.

Of legal Representation of accused

2. Mr. Ondimu, the prosecution counsel, orally submitted that Mr. Kipkoech advocate is conflicted in representing the accused because; his firm represents the defendants- who are victims herein- in civil case no. E174 of 2022 at Narok filed by the accused person. He asked the court relieve him of representation of the accused in these proceedings.
3. In response, Mr. Kipkoech orally submitted that he knows the family of the victim and some of them are his clients. He stated that Mr. Sena Charles; a brother of the victim had called him. But, instructions in the civil case were given to Mr. Ogola's advocate; his partner, who is the one handling the case. He has never been instructed by the victim's family.
4. Of the civil dispute, Mr. Kipkoech stated that it was a burial dispute in respect of the deceased in this case. But, he emphasized, that did not act in the matter. He urged this court to balance the right of the accused person against those of the victims. According to him, no prejudice will be suffered whatsoever.



He argued that the accused has a right to representation of choice. He urged the court to break the Chinese wall in representation by counsel.

5. Mr. Kinyanjui also orally submitted that Mr. Kipkoech was instructed by victims in the civil case against the accused. He was of the view that the victim's position is direct contra that of the accused. Of importance, according to him is that he is a part of the law firm. Article 25(c) of *the constitution* states right to fair trial cannot be limited by any act such as the one by Kipkoech. He is now on the opposite side of the victims whom he represented in the civil case. Justice must not only be done but be seen to be done.
6. Mr. Ondimu further added that Mr. Kipkoech has annexed the order from the civil case in the affidavit of the accused in this case.

Of affidavits

7. Mr. Ondimu raised the following preliminary objections
 - i. Affidavit of Cheruiyot Korir assistant chief Sogoo sub location. He is in charge of part of the scene of crime. The assistant chief is a likely witness except has not recorded a statement. He was the 1st person who visited the scene. His affidavit is not proper. On 16/1/2023, the said assistant chief wrote to the deputy registrar wishing to withdraw the affidavit. On that basis, this court should expunge his affidavit.
 - ii. Two affidavits by the accused person sworn on 7/1/2023 are purportedly sworn in Narok before a commissioner for oath whilst he has always been in custody.
8. Mr. Kinyanjui submitted that the affidavits of 7/1/2023 were sworn before the commissioner for oaths at Narok town yet the accused has been in custody since the inception of these proceedings. The jurat thereto is false and constitutes perjury a stand-alone criminal offence. No order that he comes to Narok to make depositions in the affidavit. Thus, affidavits in issue are a nullity. The accused was at Ololulunga whilst it is alleged to have sworn the affidavit at Narok. There are no affidavits at all. Article 159(2) (d) of *the constitution* does not avail cure. No direction in section 5 of cap 15.
9. Mr. Kipkoech submitted that it is not denied that the assistant chief swore the affidavit. He is duty-bound to assist the court in assessing the situation on the ground. We suspect mischief in the letter to the court. They are hearing of the letter for the first time. The chief's affidavit is critical in assessing the circumstances on the ground. He urged the court to find mischief in this application.
10. On item 2, the affidavits are on record. This affidavit was sworn in Narok which encompasses the entire county. Tanyasis commissioned it. He practices here in Narok. He may be summoned to court. it does not mean that when you are in remand you cannot swear an affidavit. Counsel could access him in prison.
11. The authorities referred to i) Mary Gathoni case is on the law but not in all fours in this case.
12. The affidavit of the assistant chief is not challenged on competence. The accused person deposed the affidavits and as it was deposed to in Narok the authorities do not apply. The deponent is in Narok and the affidavit was deposed in Narok. Khaminwa J stated court should grant the deponent an opportunity to redeem the affidavit.
13. Mr. Kinyanjui stated that a defective affidavit was struck out in spite of the courts noting rule 7(1) of the CPR. It squarely governs affidavits. The charge sheet shows the accused was at Ololulunga affidavit does not state the specific place it was sworn. The affidavit of the assistant chief is in question. This is a point of law. Their objection is on a clear point of law



14. The prosecution has relied on the following authorities;
 - i. *Uganda v Patricia Ojangole* Criminal Case No. 1 of 2014
 - ii. *Maina Njenga v Republic* [2017] eKLR
 - iii. *Emmanuel Emilio Villa vs Valerio Bucciareli* [2004] eKLR
 - iv. *Mary Gathoni & Another v Frida Otolu & Another* [2020] eKLR
 - v. *C.M.C Motor Group Limited v Bengeria Arap Korir Trading as Marben School & Another* [2013] eKLR
 - vi. Section 412 (b) Of the *Victim Protection Act* 2014
 - vii. Section 5 of the Oaths and Statutory Act-

Analysis and Determination

15. I have carefully considered the objections before me as well as the rival submissions of the legal counsel for the respective parties. I have also considered the judicial authorities relied on by counsel. I must determine: -
 - i. Whether there exists a conflict of interest in Mr. Kipkoech representing the accused in the matter having represented the victims to defend a civil case on the burial of the deceased filed by the accused against them;
 - ii. Whether the affidavit of Cheruiyot Korir should be expunged from the record.
 - iii. Whether the two affidavits by the accused person sworn on 7/1/2023 were sworn in Narok before a commissioner for oaths.

Of conflict of interest

16. Citing self is not glorious. But, I will only repeat a work of the court on disqualification of legal counsel to represent a client- in the case of *Dorothy Seyanoi Moschioni v. Andrew Stuart & another* (2014) eKLR, that: -

“(12) I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “ I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in



the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in *the Constitution* as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

(23) In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious.”

17. The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which are not compatible or serves or attempts to serve two or more interests that are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.
18. Conflict of interest can arise in varied circumstances. But of pointed significance, is where an advocate acts for a party against whom he or his company or a company in which he is an associate or partner acted in another proceeding with a relation with the current proceeding; but now against the party for whom he acted in the other proceeding. This is primarily a conflict of interest in the nature of a conflict of duties. Such conflict of interest involves breaching fiduciary duty to your client or former client to wit:
 - a. The duty of loyalty to the client.
 - b. The duty of confidentiality.



- c. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.
 - d. The duty not to put your own or anyone else's interests before those of the client.
19. This is the basis of the conflict-of-interest problem in this case.
20. It has been claimed that the conflict of interest here obscures justice and justice will not be seen to be done. This is not perceived conflict of interest per se as much more is revealed.
21. Rule 9 of the Advocates (Practice Rules) basically prevents an advocate from appearing as an advocate in a case in which it is known or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court. But, of specific importance is that, as Mr. Kipkoech advocate admits he knows the family of the deceased who are victims in this case, and although he alluded that his partner in the law firm was the one acting for the victims in the burial dispute where the accused had sued them, there is real danger of breach of fiduciary duty to his former clients- the victims herein. And in his position, it will seem an abuse of professional standing and privilege to act for a person in the criminal case where he is charged with murdering their kin. Cross-examination of such former clients will be problematic and may create absurd dilemmas for the advocate, the court and the trial.
22. Accordingly, I find that representation of the accused by Mr. Kipkoech or any other counsel in the firm of Ogola will produce such prejudice to the accused, the court, the victims as well as the trial which is exceptional circumstance to disqualify them from acting for the accused.
23. The objection is upheld and allowed.

Expunging or not of affidavit of Cheruiyot Korir

24. The affidavit by the chief has not been challenged on any fatal deformity, except, that it is made by a person who is a witness in the case. Its contents have not been impeached for being prejudicial to the trial or witnesses. Except, that it has been made by a person who is likely to be a witness in the case for he was the first to arrive at the scene. There is no proof that the making of the affidavit in a bail application by the accused will prejudice or is any collusion to prejudice the trial. At least none of these was alleged by the prosecution or victims. The core content of the affidavit is that the ground is no longer hostile. This may be contested during the hearing of the bail application and is subject to the rules of perjury. In any event, the information by the chief is one which the court may seek if one of the major grounds or the sole ground of opposition to bail is that the ground is hostile.
25. I do not see how the affidavit will prejudice the trial or his stature as a witness. The affidavit in its essential core and form does not violate any rule or law.
26. In light of the above, I am of the considered view that the affidavits bear no harm and shall not be expunged from the record.

Whether the affidavits were sworn before a commissioner for oaths.

27. The major objection to the two affidavits sworn by the accused on 7.1.2023 is that they were purportedly sworn at Narok before a Commissioner for Oaths, Tanyassis advocate when the accused was at Ololunga police station. According to the prosecution and the victims, failure to give the precise description of the place of swearing the affidavit renders the affidavit fatally defective. To them, these are not affidavits in the sense of the *Oaths and Statutory Declarations Act*. And the defect cannot be cured by article 159(2)(d) of *the Constitution*.



28. Rule 7 of Order 19 of the Civil Procedure Rule (CPR) 2010 was referred to in the submissions of parties; it reads as follows; -

“7. The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

29. Article 159(2)(d) of the Constitution 2010 which has been alluded to provides; “justice shall be administered without undue regard to procedural technicalities,...”.

30. Relevant also are Section 1A and 1B of the Civil Procedure Act whose overriding objective is that all disputes brought before the court shall be disposed of in a just expeditious, proportionate and affordable manner.

31. The jurat show that the affidavits in question were sworn at Narok Before a commissioner for Oaths in Narok. The legal counsel for the victims alleged that the deponent- the accused- was at the time at Olulunga police station. Other than the submissions by the legal counsel, there was no evidence to prove this was the case. I do note however, that it is generally the practice that once a person has taken a plea, unless with specific order by the court, should be remanded in the remand prison. I take judicial notice that Olulunga police station is not such remand prison. There is also no succinct evidence that the deponent and the commissioner for oaths were at different places at the time of signing and commissioning the affidavit in question. Proof towards that end was necessary as both the deponent and the commissioner were within Narok County. Therefore, the objection is neither here nor there. The authorities cited by the prosecution on this issue make reference to and were based on evidence which showed the deponent and the commissioner for oaths were in two complete different towns.

32. Accordingly, the preliminary objection on this ground lacks merit and is dismissed.

Conclusion and Orders

33. In conclusion, the court finds as follows;

- i. Mr. Kipkoech and the firm in which he is partner have a conflict of interest in this matter and cannot represent the accused. Mr. Kipkoech is accordingly discharged from the proceedings.
- ii. The affidavit of Cheruiyot Korir shall not be expunged from the record.
- iii. There is no evidence the two affidavits of the accused person were not sworn in Narok before a commissioner for oaths as required by the Oaths and Declarations Act.
- iv. The objection is dismissed.

34. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15TH DAY OF FEBRUARY, 2023

.....
F. GIKONYO M.

JUDGE

In the presence of:

1. Mr. Kasaso – CA



2. Harrison Kinyanjui/Sena for victims

3. Kipkoech/Okinyi for accused

