



**Republic v Onyango (Criminal Case 9 of 2020)
[2023] KEHC 549 (KLR) (Crim) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 9 OF 2020
DO OGEMBO, J
FEBRUARY 7, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

WASHINGTON OCHIENG ONYANGO ACCUSED

RULING

1. The prosecution has applied under section 153, 154, 161 and 163 of the *Evidence Act* to have PW10 be declared a hostile witness so that the prosecution may cross examine the witness on his recorded statement. The defence has opposed this application on grounds that no basis has been laid for the application. That in his testimony, the witness has clearly stated that he had been coached. That this is a calculated move to intimidate the witness so as to give the evidence that the prosecution wishes. And lastly, that the witness has not declined to answer any question.
2. The prosecution has gone ahead to point out the fact that the witness has confirmed that the signature is his but disowns it. That cross examination will bring out the contradictions.
3. I have considered this application and the short submissions made to it. Section 153 of the *Evidence Act* allows for cross examination of a witness as the previous statements made by him in writing or reduced in writing and relevant to the matters in question. Section 154, on the other hand, gives directions on the questions that may be asked to the witness as to his credibility, while section 161, allows, with permission of the court, a person who calls a witness to put to him any question which might be put in cross examination by the adverse party. And lastly, section 164 allows, again with consent of the court, a party who calls a witness to impeach the credit of the witness.



4. The *Evidence Act*, therefore allows a party calling a witness to ask that witness questions that the adverse party may ask on cross examination, so as to test his memory or to discredit his credibility. In that case the adverse party shall still have the right to cross examine the witness.
5. A hostile witness is one who refuses to answer questions or contradicts what he had said before. A party who calls one as a witness expects the witness to provide to the court evidence similar to what the witness had said in any statement prior to the trial, so that if the witness deviates from the said earlier statement, the party has a right to apply to court to declare to witness hostile. The witness would then be subjected to cross examination by the party calling him, before the same witness may be cross examined further by the adverse party. The prosecution herein has pointed out the fact that whereas PW10 acknowledges that the signatures on the statement is his, he disown the statement, making it necessary that he be cross examined either to test his memory or to discredit him.

The *Blacks Law Dictionary*, 2nd Edition, defines a hostile witness as;

“a party that the court feels is hostile against the party they are supposed to testify for. They can be cross examined if they are called. They can be impeached by their own credibility.”

6. In *Republic Versus Kiilu Wambua* (2018)eKLR, the court do held that a hostile witness is not just a person whose evidence is unfavourable to the party calling him, but a witness who appears to be biased or unwilling to tell the truth. And that in that case, the court has the discretion to permit the party calling the witness to put any question to him which might be put in cross examination by the adverse party.
7. Authorities are a bound on this point from earlier times. In *Alowo Versus Republic//* (1972)EA, 324, the Court of Appeal of East Africa, held:

“The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable and this makes his or her evidence negligible.”
8. This is exactly the position in our instant application I which the prosecution has urged the court to declare PW10 hostile on grounds of giving evidence not in tandem with what he wrote in his initial statement with the investigators. The provisions of the law as seen above as well as the decisions of the courts grants the prosecution, and indeed any party, the right to apply to court to declare their own witness hostile, with the adverse party retaining the right to also cross examine the witness.
9. The witness sought by the prosecution to be declared hostile is the prosecution’s own witness. I find no law that bars a party from seeking that their own witness be declared hostile. I accordingly therefore allow the oral application of the prosecution herein, and declare PW10, Nicholas Otieno a hostile witness as prayed. It is so ordered.

D O OGEMBO

JUDGE

7TH FEBRUARY, 2023

Court:

RULING READ OUT IN OPEN COURT IN THE PRESENCE OF THE ACCUSED, MR. KAMAU FOR ACCUSED AND MS. NJOROGE FOR THE STATE.

D O OGEMBO



JUDGE

7TH FEBRUARY, 2023

