



**Republic v Gatimu (Criminal Case E032 of 2021)
[2023] KEHC 17228 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE E032 OF 2021
RM MWONGO, J
MAY 9, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MARTIN MWANGI GATIMU ACCUSED

RULING

1. The Accused is charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 2nd day of July, 2021, at Kagumo Market, in Kirinyaga Central Sub - County he murdered Mark Karimi Mureithi. The accused was arraigned in court on 29th July, 2021, and pleaded not guilty.
2. On 27th June, 2022, the accused filed a motion seeking that the prosecution do avail a copy of the Investigation Diary before commencement of trial. The reasons are that the accused needs the Diary to enable him to adequately prepare his defence; that it contains entries in the police occurrence book such as the report of the offence, recovery of exhibits. Retrieval of the body, arrest of the accused, and so
3. The prosecution objected to the said application, and the court directed the parties to file skeletal submissions thereon. The parties complied
4. The applicant argues that his rights under article 50(2) of *the Constitution* are sacrosanct and includes under sub-Article 2(j) and (k), the rights:
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
 - (k) to adduce and challenge evidence”
5. The applicant further argues that it is not enough for the state to say they have provided all the evidence they will rely on, as if the accused feels it is necessary to have the Investigation Diary, then it should



be availed. He relies on the decision of Lesiit J (as she then was) in *Emilio Gitonga Mutegi & 3 Ors v Republic* [2013] eKLR where it was stated:

“*The constitution* gives an accused person the right to be informed of the evidence the prosecution intends to use in the case against them. By evidence it means both oral and documentary evidence the prosecution has in support of their case and against an accused person. This evidence includes witness statement and any documents expert reports and such like evidence that they intend to use against an accused person. An Investigation Diary is a record of the investigations carried out by the prosecution and does not really constitute the evidence that the prosecution will rely on. It is not a requirement that such a record is provided to an accused person before his trial. However, if the accused felt that it was necessary to have that report in support of their case then they should make an application for the same”.

6. The applicant also relies on *Republic v Ward* (1993) 2 ALL ER 557 where the English Court of Appeal held:

“The prosecution’s duty at common law is to disclose all relevant material

.....whether it strengthened or weakened the prosecution case or assisted the defence case, and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution was required to make available the records of all relevant experiments and tests carried out by expert witnesses....”

7. The applicant submits that the duty of disclosure extends to both materials intended to be used for the prosecution as well as any other relevant material gathered in the course of investigations.
8. I note that in Emilio Gitonga’s case, one of the applicants’ prayers was that the trial court had violated their constitutional rights by refusing to issue them with the Investigation Diary claiming it contained prosecution secrets. The High Court, Lesiit J (as she then was) ultimately dismissed the application after holding that the prosecution must avail all material which it seeks to rely upon and finding that the trial court had made no ruling on that point.
9. The applicant also relies on the cases of James Mwangi & Ors v Republic [2019] eKLR where it was held that an investigation report under the *Anti-Corruption and Economic Crimes Act* is a statutory internal administrative report which the EACC is mandated to avail to the DPP, but that there is no duty of disclosing it to the defence.
10. The prosecution submits that they will not be relying on the Police Investigation Diary, and had already furnished all the relevant material it intends to be relying on in court. they argue that *the Constitution* places a limitation on the material to be availed to an accused as being that which the prosecution intends to rely on.
11. The applicant also annexed the case of James Maruga Mwangi v R [2016] eKLR which authority I am not sure is relevant, as there is nothing in it kernel to the demand for an investigation diary. There, the issue highlighted was one concerning how the information in the investigation diary contradicted the evidence tendered in cross examination. It appears that in that case the investigation diary had been produced by the prosecution.



12. On their part, the prosecution has cited the following authorities: R V Josephat Koech Sirma & 5 Others [2017] where Achode J (as she then was) said:

“The Investigation Report is an assessment prepared by the investigating officer of the material gathered during the investigation. It is based on the witness statements and the documentary evidence that the Applicant has already made available to the Respondents herein. Furthermore, the Applicant is not bound by the assessment or recommendations contained in the report, or any other agency and neither is the court. The Applicant has expressly indicated that the report in question does not form part of the evidence which the State shall rely on at the trial. As such, it is my considered opinion that it does not form part of the evidence referred to in Article 50(j).

21. Whoever comes to court requiring the court to assert a right or fundamental freedom, must do so with precision and place material before the court to demonstrate why the court is called upon to enforce the right or fundamental freedom, or how the right of fundamental freedom will be infringed or threatened if the orders sought are not granted. The Respondents have not demonstrated how this document which is an internal memo between two institutions is crucial to their defence, bearing in mind that the recommendations therein are not binding on the ODPP or the court, and the ODPP has stated categorically that it is not part of the evidence.

R v Francis Muniu Kariuki [2017] eKLR where Ngugi J (as he then was) held:

- “18. Our case law has now established without a doubt that it is the Prosecution’s duty to provide the witness statements to an Accused Person and the Trial Court’s duty to ensure compliance with the constitutional requirement. Article 50(2)(c) and (j) are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one’s defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness’ statements and copies of any documents which will be relied on at the trial.”

13. In its submissions the state insists that it has:

“furnished to the defence all the evidence they will be relying on during the trial and we shall not be citing any evidence from the Police Investigation diary”

14. I have carefully considered the parties’ submissions and the material availed before me. the only issue before me is whether the applicant/defence is entitled in this case to be availed the Investigation Diary as demanded by them.

15. Article 50(2)(j) which underpins the applicant’s claim provides as follows:

2. Every accused person has the right to a fair trial, which includes the right:
- a
....



- j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
16. There is no doubt that a defendant is entitled in advance to evidence which the prosecution will rely upon. The obvious reason is that, being presumed innocent, he has a right to be able to adequately defend himself which includes and incorporates the rights under Article 50:
- b. to be informed of the charge, with sufficient detail to answer it;
- c. to have adequate time and facilities to prepare a defence
-
- j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”
17. The first question that naturally arises is what is “evidence” which is referred to in Article 50 (2) (j) to which the defendant is entitled? In *James Mawngi & Ors [2019] supra* this question was dealt with by Mumbi Ngugi J (as she then was) as follows whilst finding that an investigations report is not ‘evidence:
- 22 The term ‘evidence’ is defined in the Cambridge English Dictionary as ‘one or more reasons for believing that something is or is not true.’ In Black’s Law Dictionary, 10th edition ‘evidence’ is defined as something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact.
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24. In my view, the prosecution is correct in its assertion, and the trial court was correct in reaching the finding, that the investigations report is not one of the documents required under Article 50(2)(j) and (k). It is not ‘evidence’ on the basis of which the trial court could make a finding on the guilt or otherwise of an accused person.”
18. *The Constitution* 2010 is clear that evidence that the prosecution intends to rely upon is what must be availed to the defence. No more. That is to say, the testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact. This must be made available to the defence.
19. I think the courts are agreed on this point which is made in numerous cases. Mativo J.(as he then was) in *Joseph Ndungu Kagiri Vs Republic [2016] eKLR* held thus:
- “ Article 50(2) (j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution’s evidence at the opportune time both in cross-examination and in his defence.”
20. In *Antony Watuku Kibandi vs. Republic (2020) eKLR*, Kimaru J (as he then was) stated:
- “ This court agrees with the prosecution that it cannot be compelled by this court to avail to the Applicant evidence which DOES NOT constitute part of the evidence that it will rely on to prosecute its case against the Applicant. The prosecution can only avail to the Applicant what it is under constitutional and legal obligation to provide. If the Applicant wishes to rely on other evidence which is not within the prosecution’s possession, he has to



lay sufficient basis for the trial court to consider whether or not such other evidence has any relevance to the case at hand. The request for documentary evidence not in the possession of the prosecution cannot be granted. The Applicant is at liberty to pursue the avenues available to him under the Evidence Act to have the said documents added into evidence at the appropriate time.”

21. Similarly, the court has declined to order production of material that was outside the scope of Article 50(2)(j), for example, in Republic v John Njoroge Chege [2018] eKLR. There, the accused had sought to be supplied with email correspondence between the office of the DPP and the officer investigating an offence in which the DPP instructed the officer to charge the accused with an offence. In revising and setting aside an order of the trial court that the email be supplied to the accused, Ong’udi J observed that:

“The email is said to have contained the approval by the DPP. So, what is the issue the Respondent wishes to raise about the email?

14. It is not every document or statement referred to by a witness that must be produced. The prosecution supplies the documents that it intends to rely on to establish its case.”

22. The principle to be drawn here is that prosecution cannot rely on material which it has not previously given to the defence, and if the defence requests any such material that will be relied upon, it must be availed.

23. I note that the applicant relied on the English case of Rv Ward. That case sets out the common law duty for the prosecution to avail any material in its possession, that is relevant whether or not it strengthens or weakens the prosecution case or assisted the defence case. I do not see in our Constitution, any similar principle. The constitution explicitly requires the production to the defence of all evidence the prosecution intends to rely on.

Conclusion

24. Ultimately, I agree with the prosecution that any evidence which they will not be relying upon, and therefore against which the defendant need not defend himself, need not be availed to the defence.

25. In so concluding, I note that it will be for the defence to be watchful and raise the alarm should the prosecution seek to rely on any evidence which has not already been disclosed to them. This is the attitude of Ngugi, J (as he then was) in Republic v Francis Muniu Kariuki [2017] eKLR supra when he stated:

“23. However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Courts duty to ensure the documents are supplied before commencement of the trial”.

26. Accordingly, I decline the applicant’s request and dismiss the application.

27. Orders accordingly.

DATED AND SIGNED IN KERUGOYA THIS 9TH DAY OF MAY, 2023



R. MWONGO

JUDGE

Delivered in the presence of:

Mamba for State

Hamba for Accused

Accused - Present in Court

Mr. Murage, Court Assistant

