Republic v Koskei (Criminal Case 14 of 2017) [2023] KEHC 20522 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20522 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL CASE 14 OF 2017

RM MWONGO, J

JULY 21, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

NICHOLAS CHERUIYOT KOSKEI ALIAS NICHOLAS KORIR ..... ACCUSED

RULING

1. The accused is charged with the murder of his wife Rhoda Mumbi Mutua contrary to section 203 as read with section 204 of the *Penal Code*. After the close of the prosecution's case, the Court ruled that the he had a case to answer. The accused then indicated:

> " We will give sworn evidence and we will call the accused and one other witness"

2. The Victims' counsel then made an oral application seeking to be provided with the written defence statement. The court directed that the application be formally presented to enable the accused to properly respond thereto. Accordingly, a formal application was made by the Victims' counsel. It seeks that the Accused do supply to the prosecution and the victims his written statement and that of the witnesses he intends to rely on in his defence,

3. The application is premised on the ground that the victims are entitled to be supplied with the accused statement and his witnesses statements in advance.

4. The application is stated to be made pursuant to Section 50 of the *Civil Procedure Rules*, Article 50 (a) of *the Constitution* and Section 9 (1) (e) of the *Victim Protection Act*.

5. In addition to the grounds, the applicant, through counsel, has deposed a supporting affidavit in which the following are the main averments:

   i) That he acts on behalf of the victims.

   ii) That on 17th March, 2022 the court placed the accused on his defence.

iii) That upon being put on his defence, the accused elected to give a sworn statement and that he will call one witness.

iv) That the victims now wish to be supplied with the accused's and his witness's statements in advance.

6. The accused filed grounds of opposition and a Replying Affidavit both dated 13th April, 2023. In the affidavit, the accused deposed that:

i) he had not written an extrajudicial witness statement intended as his evidence in this case that he could supply to the prosecution and the advocates of the family of the deceased

ii) the deponent has not averred and/or disclosed under what law the prosecution and the victims are entitled to statements from him as an accused person as averred at paragraph 5 of the said affidavit.

iii) he is advised by his advocate that having opted to give sworn evidence in his defence *the Constitution* and the law only obliges him to give his sworn oral evidence/statement from the witness box in Court and be cross-examined by the prosecution and counsel for the victim and there is no obligation for him to make a prior written extra-judicial witness statement.

iv) he is further advised by his advocate on record that *the Constitution* obliges the prosecution to disclose its case to the accused and victim in advance but does not place a reciprocal, positive and/or mandatory enforceable obligation on an accused to disclose to the prosecution or a victim any extrajudicial evidence, witness statement or any material an accused intends to use in his or her defence.

v) he is further advised by his advocate that section 9(1)(e) of the *Victim Protection Act* that the application is purportedly anchored upon is inoperative and no longer law the same having been declared unconstitutional, null and void in Joseph Nduvi Mbuvi v Republic [2019] eKLR for being inconsistent and in violation of the rights of an accused averred to at subparagraph (iii) above.

7. The parties filed written submissions as directed by the court, and highlighted them on 27th April 2023.

Applicant's Submissions

8. The applicant argues that the *VPA* was enacted pursuant to the provisions of Article 50(9) of *the constitution*. Article 50(9) obligates Parliament to enact legislation providing for the protection, rights and welfare of the victims of offences.

9. The applicant relies on the Supreme Court case of *Joseph Lendrix Waswa* where the Court noted with approval the practice in the International Criminal Court that the statements and evidence of the accused are made available to the victims under the rule of evidence that the victim had a right to be fully informed about the case. it was noted that there is no suggestion that this negated or infringed on any of the rights of the accused.

10. The accused has intimated that granting the application would infringe on his right to silence and right against self-incrimination. The victims respectfully reject those arguments as non-sequitur.

11. The applicant submits that granting the victims right to the statement the defence intends to rely on cannot infringe on the accused's right of silence because in choosing to give sworn testimony, the accused has essentially waived that right. It was submitted that there is no doubt that where an accused

party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, such a witness will be treated like any other witness and cross examined with the same latitude as would be exercised in the case of any other witness as to the circumstances connecting him with the alleged crime. A witness on the stand cannot then claim a right to silence. It is not consistent with his act of giving sworn testimony.

12. As to whether section 9(1)(e) of the *VPA* is unconstitutional in that victim rights in section 9 infringe on the rights of the accused, the victims submit that the section is constitutional. They urge that application of section 9(1)(e) in the particular circumstances of this case does not infringe on the rights of the accused and that the interests of justice are served by granting this application.

13. The applicant cited the following authorities:.

14. In *Leonard Maina Mwangi v DPP & 2 Ors* [2017] eKLR Lesiit J (as she then was) determining whether a victim's cross examination of an accused violated his rights held that it did not. The learned Judge affirmed Section 9(1)(e) of the *VPA* stating that:

> " There is no other purpose for supplying the victim with statements comprising the evidence the defence and the prosecution intend to rely on.....The purpose to have prior information about the case before it commences is to aid them to knowledgeably prepare for the trial....The latest developments in the law and the promulgation of *the Constitution* 2010 increased the space for victims to participate actively at the trial and to be fully informed about the case"

15. The applicant further argues that the accused, having chosen to give sworn testimony has essentially waived his rights under Article 50(i) and (k): the rights to remain silent and not to give self-incriminating evidence, in that the accused as a witness will be treated like any other witness as to circumstances connecting him to the crime and will be cross-examined with the same latitude as any other witness. in addition, that once the accused gives his evidence, the issue of self-incrimination does not arise in that his testimony will have been offered voluntarily, and the court can still protect his rights, during cross examination, against self-incrimination.

16. In addition the applicant argues that the Supreme Court in *Joseph Lendrix Waswa R* [2019]eKLR noted with approval the practice in international criminal law whereby the statements and evidence of the accused are availed to the victims under the rule of evidence that a victim had a right to be fully informed about the case. They assert that the such victim right does not infringe on the accused's right to silence or to right against self-incrimination.

17. the applicant additionally submits that the accused gives his evidence as a voluntary statement in a manner he voluntarily chooses, and is always free to assert his right against self-incrimination at any time during examination in chief, cross examination or re-examination. when the accused asserts that right the court is obliged to uphold it.

18. The applicant anticipated the accused's reliance on the case of *Joseph Mbuvi v Rep* [2019] eKLR where Odunga J (as he then was) held that Sec 9(1)(e) was unconstitutional for the reason that it violated the accused's presumption of innocence. In response, the applicant submits: that the reasoning in Joseph Mbuvi upends the trend of global jurisprudence that gives the victim due process rights; that Article 27 of *the Constitution* provides protection and equal benefit of the law rights equally to victims; that the finding of unconstitutionality in Joseph Mbuvi does not bind this court as it is a court of similar status;

that the Supreme Court in the Joseph Lendrix case specifically held that Article 27 of *the Constitution* and section9(1)(e) VPA read together:

> "affirm that victims have rights in the Kenya Criminal Justice system. These rights are stipulated in section 9 of the *VPA*.....[and] both *the Constitution* and the VPA seek to ensure the fairness of justice procedures applied to both the victims and accused, particularly on the right to a fair hearing...."

Accused/Respondent Submissions

19. The respondents Counsel commenced by pointing out that the victim's application is stated to be brought under, inter alia, section 50 of the Civil Procedure Rules and Article 50(a) of *the Constitution*. He, correctly, argues that the *Civil Procedure Act* and Rules have no application in a criminal trial, and that Article 50(a) of *the Constitution* is a non-existent provision.

20. The respondent submits that Section 9(1)(e) of the *Victim Protection Act*, which the application is purportedly anchored upon, is inoperative and no longer law. He argues that the same was declared unconstitutional, null and void in the case of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR for being inconsistent and in violation of the rights of an accused. To the extent therefore that section 9(l)(e) of the *Victim Protection Act* expects that an accused will in advance inform the victim of the evidence he intends to rely on, and to have reasonable access to that evidence, those provisions clearly contravene both the spirit and the letter of *the Constitution* and to that extent it is null and void as provided in the Joseph Nduvi case.

21. As such, counsel argued, the effect of the declaration of unconstitutionality is that section 9(1)(e) is no longer operative. He cites the Court of Appeal case of *Otieno & Another & Council of Legal Education* [2019]KECA 349(KLR)KLR for this proposition, where that Court, commenting on the nullification of sections 12 ans 13 of the *Law Society of Kenya Act*, held that appellants relying on nullified provisions of law face insurmountable problems stating:

> "This is because the decision of this court in the case of the *Law Society of Kenya v Attorney General & 2 Ors* [2019] eKLR nullified the amended sections 12 and 13 of the *Advocates Act*...This decision has not to date been appealed against or set aside and therefore the unconstitutionality of the amended sections 12 and 13 remains the situation to this day.....
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> 47. Consequently, it is explicit that a court having declared a piece of legislation or a section of an Act unconstitutional, that Act or law becomes a nullity from the date of inception or enactment and not from the date of judgment. But it will not be applicable to actions already crystallised whilst the expunged law was in force"

22. Counsel's position is thus that in the absence of an appeal against the Joseph Mbuvi case, section 9(1)(e) of the *VPA* remains invalid and null, and cannot be relied upon as the foundation of this application.

23. Counsel argued that the accused has not recorded any witness statement that can be availed, and that that would in any event contravene his non-derogable right of presumption of innocence throughout the trial. He urges that Articles 49(1)(a)(ii)(iii),(b),(d) and 25(c) read together guarantee the accused an absolute right to remain silent and not to be compelled to make any extra-judicial statement, and to refuse to give self-incriminating evidence.

24. With regard to the applicant's submission that the Supreme Court in *Joseph Lendrix Waswa* case affirmed the constitutionality of Section 9(1)(e) of the *VPA*, counsel argues that: First, the Supreme

Court was not invited to sit on appeal upon the earlier decided case of *Joseph Mbuvi*; Second, that despite the Joseph Mbuvi case having been rendered earlier, the Supreme Court did not make reference to it; third that the Supreme Court in deciding *Joseph Lendrix Waswa* was not seised of the specific issue as to whether section 9(1)(e) of the *VPA* obliged an accused person to supply a victim in advance with an extra judicial written witness statement.

25. He submitted that all that the Supreme Court did in the Joseph Lendrix case was to note that victim participation was a novel area of law, and that there were minimum guidelines in victim participation, one of which was that victim participation must not be prejudicial to or inconsistent with the rights of the accused.

Issues for Determination

1. Whether there is a requirement in law for an accused person who wishes to testify to reduce their testimony into writing;

2. Whether section 9(1)(e) of the *VPA* is constitutional in that it gives a victim the same rights to information as an accused person, including advance access to their witness evidence;

Analysis and Determination

26. The applicant's case is essentially that the accused has been put on his defence, and has elected to give a sworn defence, and will call one witness. By so electing he has forfeited his right to decline to provide his witness statement. Hence, the prosecution and the victims are entitled to be supplied with the accused statement and his witnesses statements in advance.

27. The accused's position is essentially that *the Constitution* and the law only obliges him to give sworn oral evidence/statement from the witness box in Court and be cross-examined by the prosecution and counsel for the victim; and that there is no obligation for him to make a prior written extrajudicial witness statement.

Whether there is a requirement in law for an accused person who wishes to testify to reduce their testimony into writing;

28. An accused person who has been put on his defence is required to make a selection as to whether he will give evidence – sworn or unsworn – or remain silent. There is no indication in the *Civil Procedure Code* or *Evidence Act* as to whether such evidence must be tendered orally, in writing or otherwise.

29. In practice, if he opts to give evidence, the accused has customarily tendered it viva vice, orally, in open court. in some jurisdictions, there is the option of tendering it as prior recorded evidence, either written, audio or video. It was suggested by the applicant that many jurisdictions are progressively moving to a situation where the accused's evidence is recorded in advance.

30. In the International Criminal Court, for example, the Rules of Procedure and Evidence (Rules 67and 68) allow for live testimony by audio or video link. Even then, there are strictures on how it is availed. Rule 68 requires that prior recorded testimony may be introduced, but only after an application, made to the Pre-trial chamber, is heard and allowed.

31. As for participation rights of victims under the *Rome Statute*, they are contained in Article 68 which provides for "Protection of the victims and witnesses and their participation in the proceedings" as follows:

> 1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
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> 2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
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> 3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
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> 4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6. *34 Rome Statute of the International Criminal Court*
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> 5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
>
> 6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information."

32. Clearly, the rights of victims are set out in fairly general terms above, and nothing in them requires that a witness reduce his evidence into writing, or that the victim is entitled to a copy of the accused's

statement. The Rome Statute is applicable in Kenya under limited circumstances under the provisions of the *International Crimes Act* No 16 of 2008.

33. Rules 90 and 91 of the *Rules of Procedure and Evidence* under the *Rome Statute* also provide for participation of victims through their legal representatives. In particular Rule 91 provides:

> 2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.
>
> 3.
>
> (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.
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> The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.
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> 4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

34. Similarly, under those *Rules of Procedure and Evidence* there are substantial strictures in the participation of victims in criminal trials at the International Criminal Court, an example being under Rule 91.3 highlighted above

35. I have set out these provisions of the Rome State and its Rules of Procedure and Evidence to demonstrate that international criminal practice is not as liberal as is sometimes suggested.

36. Back locally, section 306(3) and 307 of the *CPC* provide for how the accused is to be treated at the close of the prosecution case and the opening of the defence case:

> " [306] (3). If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence"

> 307(1). The accused person or his advocate may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution; the accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case

37. These provisions are clear. Section 306(3) *CPC* obliges the court to call upon the accused to make his defence immediately, if he selects to give evidence, call a witness or make an unsworn statement. The word used is the mandatory "shall". This suggests that the accused could straight-away begin to testify or call a witness or avail his unsworn evidence. The question of writing out his testimony does not arise, and perhaps this is the genesis of the practice that the accused has traditionally offered oral testimony in court.

38. Section 307 *CPC* is clear that the accused may launch ahead and open his case immediately, comment on the evidence given by the prosecution, and then he may proceed to give evidence and examine his witness(es). It is his discretion. Up to this point no room is given, procedurally for any party to intervene. Again, this suggests that the accused will give evidence in whatever legal fashion he chooses. The discretion is vested in the accused.

39. It appears to me that the discretion vested in a witness entitles him to decide whether to give oral evidence or a written statement, or combination of them. If he has a poor memory or is unsettled by the anxiety or the environment he is in, he may opt for a written statement which will help get the facts of his story in focus . But if he has a good memory and is articulate and unperturbed by his environment, he may opt to give his entire evidence orally. He may also opt to give a combination of oral and written testimony, whereby he gives key facts in writing so as not to forget of get confused and elaborates the details orally.

40. The key to the accused's discretion is founded, I think, in the fact that he is presumed innocent, that he can opt to remain silent – all of which are his fundamental constitutional rights. I believe he is entitled to select an option of making his defence, and can at the last minute change it, upon consideration.

41. Ultimately, there is nothing in our law to suggest that an accused is, or can be required to write out his evidence, other than under section 9(1)(e) of the *Victim Protection Act*.

Whether section 9(1)(e) of the VPA is constitutional in that it gives a victim the same rights to information as an accused person, including advance access to their witness evidence;

42. I turn to the question whether that section is constitutional.

43. In the *Joseph Nduvi Mbuvi* case (*supra*) the issue for determination before Odunga, J (as he then was) in the High Court revision case is set out in paragraph 14, namely: whether the defence is obliged to disclose its statements and documentary evidence upfront"

44. The learned Judge found that Article 50(2)(e) on the right to be informed in advance of the evidence the accused intends to rely on, and to have reasonable access to that evidence can only ensure to the benefit of the accused, and that the prosecution cannot rely on that provision to achieve access to the accused's evidence. Disclosure is only exerciseable in favour of the accused.

45. The prosecution in Mbuvi's case, had relied on Section 9(1)(e) *VPA* to access the accused's information, an action the court denigrated and decline. Citing the case of *Thomas Patrick Gilbert Cholmondeley v R*[2008]eKLR, where it had been held by the Court of Appeal that an accused is

presumed innocent and that there can never be a theory of a level playing field as between the accused and the prosecution, the learned Judge equally held that given the presumption of the innocence of the accused, he held in Mbuvi's case:

> " ...there is no case that an accused person can be expected to disclose in advance. To the extent therefore that section 9(1)(e) of the *Victim Protection Act* expects that an accused will in advance inform the victim of the evidence he intends to rely on, and to have reasonable access to that evidence, those provisions clearly contravene both the spirit and the letter of *the Constitution* and to that extent it is null and void"

46. Having been declared as a null and void provision for contravention of *the constitution* by the High Court, Section 9(1)(e) *VPA* ceased to have any effect, ab initio, and remains a nullity unless successfully appealed. The learned Judge cited, and agreed with, the case of *Patrick Mugambi v R* [2017]eKLR where Kimaru J (as he then was) also opined that where the right to fair trial of the accused was in conflict with the right of the victim, the accused's right prevails. In Patrick Mugambi the relevant holding was as follows:

> " In my considered opinion, Section 9(1)(e) of the *Victim Protection Act* cannot be read or considered disjunctive to the other subsections of Section 9(1). The side note to Section 9 provides that Section 9 deals with rights of victims "during the trial process". This court is of the view that the trial court erred when it elevated the rights of a victim during the criminal trial process to that of equal status to the accused person. The fact that *the Constitution* under Article 50(2) does not specifically recognize the rights of victims in the trial process, in the considered view of this court, is deliberate. It is a clear indication that the rights of an accused person to fair trial during the criminal trial process assumes primacy because of the likelihood that his right to fair trial may most likely than not be infringed if it is not specifically protected.
>
> .....
>
> This court therefore agrees with the Applicant that as an accused person, he cannot be compelled to disclose to the victim or for that matter the prosecution, the evidence that he may or may not adduce in his defence. This would be in breach of his constitutionally guaranteed right to fair trial as provided by Article 50(2) of *the Constitution*."

47. Having carefully considered the position and having found that there is no legal requirement for an accused to reduce his evidence into a statement, and being persuaded by the reasoning in Mbuvi, Cholmondeley and Mugambi cases, I agree that Section 9 (1) (e) of the *Victim Protection Act* contravenes *the Constitution*.

48. With regard to the effect of a declaration of nullity, as earlier pointed out the Court of Appeal in *Otieno & Another v Council of Legal Education* (supra) was dealing with the issue: When did a piece of legislation declared unconstitutional by a court become a nullity? The Court held that:

> " ...it is explicit that a court having declared a piece of legislation or a section of an Act to be unconstitutional, that Act or law becomes a nullity from the date of inception or enactment and not from the date of the judgment"

49. The question before me as to the constitutionality of section 9(1)(e) is therefore settled by precedent, and this court is bound by such precedent.

50. Does this stance contradict the Supreme Court position in the Lendrix case? The relevant issue which the Supreme Court was addressing in the *Lendrix* case was: What is the extent of a victim's participation in a criminal matter? The Court answered that question as follows:

> "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:
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> a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the Court;
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> 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."

51. Nowhere did the Supreme Court deal with the victim's right under section 9(1)(e) of the *Victim's Protection Act*.

52. In light of the foregoing, the question that naturally arises is whether there are any safeguards in the law upon which the prosecution or a victim can cling once the defence commences and they have had no access to the defence evidence?

53. There are several provisions in which inhere safeguards after the accused is put on his deefence in a criminal case.

54. The prosecution has a right to interrogate new evidence which he could not have foreseen. This is in Section 212 *CPC* which provides that:

> " If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."

55. A similar provision is found in section 309 *CPC*, which provides:

> " If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

56. Section 150 of the *CPC* enables a court to summon or recall a witness, including an accused or his witnesses at any stage of the trial. The section provides:

> " 150. Power to summon witnesses, or examine person present A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

57. The *Evidence Act* at Section 146 (2) provides for cross examination unlimited to the matters testified to by the accused; whilst section146(4) entitles the Court to permit a witness, including the accused, to be recalled for further examination in chief or further cross examination. The provisions are as follows:

> " (2) Subject to the following provisions of this *Act*, the examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. (3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter. (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

58. Section 151 *Evidence Act* allows for the accused to be asked leading questions to be asked in cross examination

> " 151. Leading questions may be asked in cross-examination."

59. Section 156 *Evidence Act* allows for

> " 156. Cross-examination of accused person A person charged with an offence and called as a witness for the defence may be asked any question in cross-examination notwithstanding that the answer may tend to incriminate him as to the offence charged."

60. There is no doubt therefore that the laws on criminal procedure and evidence allow a wide latitude to the prosecutor in respect of eliciting and verifying information from or given by an accused person. There is nothing to prevent the victim, in proper cases, to be similarly engaged as part of his rights of participation in the trial.

Conclusions and disposition

61. I conclude by revisiting the issues for determination, and answering them.

62. Accordingly, the accused is not obliged to supply the prosecution the victims and the prosecution his written statement of evidence and that of his witness.

63. The application therefore fails and is hereby dismissed.

64. Orders accordingly.

SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA ON THE 21ST DAY FOR JULY 2023

R. MWONGO

JUDGE

In the presence of:

1. Atika for DPP
2. Mbugua for the Accused
3. Owuor for the victim's family together with Ngunjiri
4. Nick Korir - Accused
5. Jesca Mutua & Ann - family members
6. Q. Ogutu, Court Assistant