



REPUBLIC OF KENYA



**Republic v Obado & 2 others (Criminal Case 46 of 2018)
[2023] KEHC 20849 (KLR) (Crim) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 46 OF 2018
CW GITHUA, J
JULY 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ZACHARIA OKOTH OBADO 1ST ACCUSED

MICHAEL JUMA OYAMO 2ND ACCUSED

CASPER OJWANG OBIERO 3RD ACCUSED

RULING

1. This ruling is in respect of the objection made by Mr. Ongoya, learned counsel representing the 3rd accused to the approach taken by learned counsel representing the victim's family in cross-examining the prosecution's 28th witness and the application made by Mr. Sagana, learned counsel for the 1st accused seeking variation or review of the pre-trial directions issued by this court on February 27, 2020. For good order, I will first address the objection raised by learned counsel Mr. Ongoya.
2. I wish to point out at the outset that the said objection was raised soon after the victim's learned counsel Mr. Owuor expressed his intention to show PW 28 a portion of the statement he recorded with the police in the course of investigations into the matters subject of the trial in this case. It was Mr. Ongoya's contention that Mr. Owuor's approach of seeking to have PW 28 read to the court a portion of his witness statement violated the pre-trial directions issued by this court regarding the scope of the victims' representative's participation in the trial; that those directions were still in force and were binding on all the parties as they have never been reviewed and were not appealed against.
3. Further, making reference to the scope limited by the court for the victim's counsel's participation in the trial which I will advert to later, Mr. Ongoya submitted that this court having ruled that the



prosecutor could not give PW 28 his witness statement to read, it was not open for the victims' counsel to do so. Counsel urged me to allow the objection and expunge PW 28's evidence arising from cross-examination by the victims' counsel as the same was, in his view, extracted in violation of the courts pre-trial directions.

4. Mr. Ongoya's objection was supported by learned counsel for the 1st and 2nd accused who associated themselves with his submissions in support of the objection. In addition, Mr. Sagana submitted that PW 28 was a prosecution witness and that the victim's counsel cannot lay a basis for declaring him a hostile witness which is what counsel was attempting to do by referring the witness to his statement.
5. On his part, Mr. Oganda besides supporting Mr. Ongaya's submissions contended that the witness had disowned his entire statement not portions of it as submitted by counsel for the first and second accused and that therefore, he cannot be asked to refer to the same statement; that the trajectory the victim's counsel had taken showed that there were two prosecutors conducting the trial, that is, the prosecution counsel and the victim's counsel which goes against case law on the subject and the pre-trial directions issued by the court.
6. On her part, learned prosecution counsel Ms. Gikui in her submissions made reference to the Willie Kimani and Joseph Lendrix Waswa's case in support of her contention that the roles and mandates of a prosecutor and a victim's counsel were different and that the victim's counsel in this case was not a co-prosecutor as alleged by Mr. Oganda. In response to the prayer for expunction of PW 28's evidence in cross-examination by Mr. Owuor, Ms. Gikui submitted that the evidence was within the scope limited by the court in the pre-trial directions and should not be expunged.
7. Further, Counsel submitted that the defence was presuming what information the victim's counsel wanted to bring out from the witness and that denying the victim's counsel an opportunity to pursue his intended line of cross-examination would amount to denial of the victims' rights which were protected by the law.
8. In countering the objection, Mr. Owuor submitted that the objection was based on speculation since the defence did not know what questions he wanted to put to the witness; that his only interest was to bring out information contained in PW 28's witness statement which was disclosed to the victim by the DPP in advance as required by section 9 (I) of the [Victims Protection Act](#) (VPA) but which was left out in the witnesses' testimony.
9. Moreover, Counsel confirmed that he was not a co-prosecutor and PW 28 was not his witness and he could not therefore seek to have him declared hostile but he should be allowed to raise the victims concerns with him. Regarding expunction of the evidence of PW 28 arising from cross-examination, counsel asserted that the evidence was put on record lawfully in accordance with the victim's statutory rights and the court's pre-trial directions and should not be expunged.
10. In his riposte, Mr. Ongoya denied that the objection was based on speculation and asserted that the defence knew what question the victims counsel was about to pose to the witness; that the witness would have been asked to read the statement since he had already been referred to it.
11. I have carefully considered the objection and the rival oral submissions made by all three learned counsel in the defence team in support of the objection and those made by learned prosecution counsel Ms. Gikui and the victims counsel Mr. Owuor in opposition thereto.
12. I wish to start my consideration of the objection by noting that unlike in the past where victims of offences played a passive role in criminal trials since they were perceived to be only prosecution witnesses, the [Constitution](#) of Kenya 2010 brought in a paradigm shift by specifically recognising at



article 50 (9) that victims of offences had rights which required to be protected through legislation. Article 50 (9) provides as follows;

“Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences”.

Pursuant to this constitutional provision, the Victims Protection Act (VPA) was enacted in the year 2014 whose sole objective was to recognize and to give effect to the rights of victims of crime.

13. Section 9 (I) and 9 (2) of the [VPA](#) provides for victims’ rights during the trial process and section 9 (2) expressly enjoins the court to permit victims views and concerns to be presented and considered at stages of the proceedings deemed appropriate by the court provided that this was done in a manner that was not prejudicial to the rights of the accused person and was not inconsistent with a fair and impartial trial.
14. The Supreme Court in [Joseph Lendrix Waswa –v- Republic](#) (2020) eKLR dealt extensively with the issue of victims participatory rights in the trial process. The court determined, inter alia, that once a victim or his legal representative applied to participate in a trial, the trial court had discretion to decide the extent and manner in which the victim or his representative would participate in the trial.
15. In this case, this court (Ngenye-Macharia, J as she then was) after hearing brief submissions by the victim’s counsel, the prosecution and counsel representing each of the accused persons exercised its discretion and gave directions on the scope of the victims’ participation during the trial. In the case of the prosecution case, the court allowed the victims counsel to cross examine prosecution witnesses after they had been cross-examined by the defence but directed that such cross examination was limited to bringing out any evidence that may not have been cross examined on by the defence or brought out by the prosecution. It is instructive to note that none of the parties has contested the terms of the aforesaid pre-trial directions.
16. Given the background set out above, is the objection valid or well founded?

As stated earlier, the objection was raised immediately after Mr. Owuor expressed his intention to show PW28 a portion of his statement. He had not actually shown the statement to the witness and had not asked any question or said anything else in reference to it. With much respect to learned counsel Mr. Ongoya, how he knew that the victim’s counsel wanted to ask the witness to read a portion of his statement and that if this was done it would violate the courts pre-trial directions limiting the scope of the victim’s participation in the trial is to say the least, baffling. In my view, it was not possible for anyone to know what Mr. Owuor wanted to ask the witness before any question was posed to him.

In the premises, I have no hesitation in concurring with Ms. Gikui and Mr. Owuor that the objection was premature and was based on speculation.
17. Secondly, the record shows that the witness disowned portions of his statement and not the entire statement as submitted by Mr. Oganda. The argument that showing the witness his statement or asking him to refer to it was akin to laying a basis for the victim’s counsel to have him declared hostile is in my view misplaced. I say so because as correctly submitted by Ms. Gikui and Mr. Owuor, the roles and mandates of the prosecutor and a victim’s counsel participating in a criminal trial are distinct and completely different. This was emphasized by the Supreme Court in the [Joseph Lendrix Waswa Case \(supra\)](#) . The victims counsel cannot take over the role of a prosecutor nor can he become a co-prosecutor. Prosecution witnesses are called by the prosecution and are not the victim’s witnesses.



Consequently, there is no way that a victim's counsel can seek to have a prosecution witness declared as a hostile witness.

18. Besides, the victims counsel in this case was mandated by the court in the pre-trial directions to cross-examine as opposed to just examining witnesses after the defence team had finished their cross-examination. This in my opinion means that the rules of cross examination which allows a defence counsel to refer a prosecution witness to his or her statement and to ask questions based on that statement when defending an accused person's interests also applies to the victim's counsel when cross-examining prosecution witnesses to put across the victim's views and concerns subject to the limitation imposed by the court in the pre-trial directions.

19. Turning now to the prayer seeking expunction of PW 28's evidence arising from cross-examination by the victim's counsel, I find that although Mr. Ongoya claimed that the evidence should be expunged as it violated the court's pre-trial directions, he did not demonstrate how that evidence violated those pre-trial directions. In my assessment, the evidence sought to be expunged covered matters which had not been dealt with by PW28 in his evidence in chief and did not therefore violate the pre-trial directions on the victim's participation in this case.

It is consequently my finding that no good basis has been laid to justify expunction of the said evidence as sought.

20. For the above reasons, I am satisfied that the objection raised by learned counsel Mr. Ongoya lacks merit and it is hereby overruled.

21. Regarding Mr. Sagana's application, counsel urged this court to review the aforesaid pre-trial directions on terms that the victim's counsel be required to cross-examine prosecution witnesses right after their examination in chief so that the defence could thereafter cross-examine the witnesses in totality on the evidence resulting from both examinations in chief and cross-examination by the victim's counsel. The application was based on grounds that if new evidence arose during cross examination by the victim's counsel, the defence will not have a chance to test the veracity of that evidence through cross examination.

22. I must state that the reasons advanced in support of the application are very persuasive. It must however be remembered that these directions have regulated the proceedings in this case since they were issued on July 22, 2020 and have been applied to the 28 witnesses who have so far testified. When all these witnesses testified, the defence did not at any time complain that the application of the pre-trial directions had caused the accused persons any prejudice.

23. In addition, my perusal of the court record reveals that a similar application was made on December 6, 2021 by Senior Counsel Mr. Kilukumi who also represents the 1st accused. I will do no more than to adopt my ruling delivered pursuant to that application in which I held that the application of the existing pre-trial directions was unlikely to occasion prejudice to the accused persons because if new evidence arose in the course of cross-examination by the victim's counsel which adversely affected the accused persons, this court had power under section 146 (4) of the *Evidence Act* to grant the defence team leave to further cross-examine witnesses.

This is a power that this court will readily exercise when necessary to ensure that the accused persons fair trial rights guaranteed by article 50 of the *Constitution* are protected and safe guarded throughout the trial.

24. In view of the foregoing, I am not satisfied that sufficient cause has been established to justify review of the pre-trial directions issued on July 22, 2020 as sought. It is thus my finding that the application is devoid of merit and it is accordingly dismissed.



25. The upshot of this ruling is that the objection taken by learned counsel Mr. Ongaya is overruled and application made by learned counsel Mr. Sagana is dismissed for lack of merit.

26. It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **NAIROBI** this 20th day of July 2023.

In the presence of:

Mr. Rodgers Sagana for the 1st Accused

Mr. Oganda Messo and Ms. Msando for the 2nd Accused

Mr. Elisha Ongoya for the 3rd Accused

Ms. Gikui Gichuhi/ Ms. Betsy Gikonyo/ Mr. Allen Mulama for the State

Mr. Kinyua Court Assistant

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