



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Njagi & another (Criminal Case 8 of 2019)
[2023] KEHC 19933 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 8 OF 2019
LM NJUGUNA, J
JULY 12, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

PUEL GEORGE NJAGI 1ST ACCUSED

ZACHARY MURIITHI NJAGI 2ND ACCUSED

RULING

1. The accused persons herein were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, the particulars of the offence being that on the night of 28.02.2019 at Kiangungi Sub Location of Runyenjes Sub County within Embu County, jointly with others not before court, murdered Ibrahim Mwaniki Njeru.
2. When the accused were arraigned in court they pleaded not guilty to the charge and a plea of not guilty was entered and hence the case proceeded to a full hearing with the prosecution calling a total of six (6) witnesses.
3. The prosecution proceeded to close its case and in a ruling delivered on 09.11.2022, the accused persons were put on their defence upon the court finding that the prosecution had established a prima facie case.
4. DW1, Puel George Njagi while testifying, sought to produce some documents which he was relying on but the same were objected to by Ms. Gakuo, the learned prosecutor for the reasons inter alia that the said documents had not been served upon them prior. Miss Gakuo argued that the right to a fair trial applies to both the accused and the complainant. Mr. Momanyi, the learned counsel representing the 2nd accused person was also in agreement with Ms. Gakuo that the said documents had not been marked for identification to help the parties prepare for their case and therefore, allowing the same would be akin to trial by ambush.



5. The court directed that the parties file and exchange written submissions on the said objection.
6. The accused submitted that the matter herein touches on article 50 of the Constitution and that he is bound by law to disclose his defence.
7. In this case, what falls for determination is whether the defence is obliged to disclose its statements and/or documentary evidence upfront. Article 50 is silent on whether the prosecution also ought to be supplied with the documents the accused person wishes to rely on before trial. In his submissions the accused person relied on the case of Thomas Patrick Gilbert Cholmondely v republic [2008] eKLR. It was reiterated that the said right cannot be stretched to confer upon the prosecution the right to be informed in advance of the evidence the accused person intends to rely on. That those rights must not be allowed to be diluted by purported exercise of inherent provisions by judicial officers by allowing the state to claim reciprocal privileges. This court was therefore urged to allow the application as prayed because if the same is declined, then the rights of the accused person shall be irreparably breached.
8. Article 50 of the Constitution provides as hereunder:
 - (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved;
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (d) to a public trial before a court established under this Constitution;
 - (e) to have the trial begin and conclude without unreasonable delay;
 - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (i) to remain silent, and not to testify during the proceedings;
 - (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;
 - (l) to refuse to give self-incriminating evidence;
 - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;



- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
 - (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law. Information shall be given in language that the person understands.
- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
- (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
- (5) An accused person—
- (o) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and
 - (p) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.
- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—
- (q) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - (r) new and compelling evidence has become available.
- (7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
- (8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.



(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

9. It is therefore clear that the right provided for in article 50(2) only applies to the accused person. Accordingly, article 50(2) of the Constitution which provides for right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence can only inure to the benefit of the accused. The prosecution cannot therefore rely on the said Article as a basis for seeking that it be informed in advance of the evidence the accused intends to rely on and to have access to the same. In Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR, the Court of Appeal held that:

“We start from the point that in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere whose grandson the appellant is said to be. So if at the beginning of the trial, the Constitution obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko’s position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by the Constitution. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced...Muga Apondi, J, appreciated that Parliament had not conferred on the prosecution the same rights as those conferred on accused persons. He, therefore, resorted to his inherent jurisdiction as a court and since he thought it would be convenient for the prosecution to have the same privileges as those of the accused person, the learned Judge would himself confer such powers on the prosecution through the exercise of his inherent jurisdiction. That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association... It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by sections 70 to 82 inclusive of the Constitution... We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges... In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute



gives the state such privileges, and the Constitution, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court.

10. It is, therefore, clear that under the above article the right to disclosure is only exercisable in favour of the accused. Whereas article 50(1) of the Constitution provides for fair hearing generally, as the Court of Appeal appreciated that the said right cannot be stretched to confer upon the prosecution the right to be informed in advance of the evidence the accused intends to rely on, and to have reasonable access to that evidence or reciprocity of statements.
11. The Court of Appeal in Thomas Patrick Gilbert Cholmondeley v Republic (*supra*) was clear in its mind that since there is a presumption of innocence that the Constitution bestows upon an accused person, as such, he cannot be expected to disclose in advance.
12. I therefore agree with Kimaru, J in Patrick Mugambi v Republic that:

“Where the exercise of right to fair trial by the accused conflicts with that of the victim, then the right of the accused shall take precedence or shall prevail...[The] accused person, 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 [as]...this would be in breach of his constitutionally guaranteed right to fair trial as provided by article 50(2) of the Constitution.”

[Also See Mabeya J in the case of Fredrick Kirime Mugiri v R (*supra*) and Joseph Nduvi Mbuvi v Republic [2019] eKLR].

13. In view of the foregoing, I hereby dismiss the objection by the prosecution.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

