



**Republic v Kipchumba & 10 others (Miscellaneous Criminal Case E364 of 2023)  
[2023] KEHC 22450 (KLR) (Crim) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL CASE E364 OF 2023  
DR KAVEDZA, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**AMOS KIPCHUMBA ..... 1<sup>ST</sup> RESPONDENT  
CAREN CHEBET ..... 2<sup>ND</sup> RESPONDENT  
DANIEL MBERIA ..... 3<sup>RD</sup> RESPONDENT  
HAMISI ZAUNGA ..... 4<sup>TH</sup> RESPONDENT  
PURITY MSHOI VIOLET ..... 5<sup>TH</sup> RESPONDENT  
SAMMY CHAHAYO ..... 6<sup>TH</sup> RESPONDENT  
MIRIAM MUTHUI ..... 7<sup>TH</sup> RESPONDENT  
KAREN JEPKEMOI ..... 8<sup>TH</sup> RESPONDENT  
ERIC RONO ..... 9<sup>TH</sup> RESPONDENT  
NICODEMUS OSIEMO ..... 10<sup>TH</sup> RESPONDENT  
NTOINYA MOSES ..... 11<sup>TH</sup> RESPONDENT**

**RULING**

1. The Notice of Motion Application before me is dated September 22, 2023 and is premised on article 24, 50(8), 159(1), 2(a) (b) (d) (e) of the Constitution, section 4 (1), 2(c), 8 of the Victim Protection Act, section 15, 16(a) and (b) of the Witness Protection Act (WPA). The Application has been made by the Director of Public Prosecution (DPP) on the grounds that the witnesses in the case are members



of staff of the National Intelligence Service (NIS), both retired and serving, and private contractors contracted by NIS.

2. The application is supported by the affidavit of No. 235051 CI Kipkemboi Rop- DCI HQ of Serious Crimes Unit, sworn on 22<sup>nd</sup> September 2023. In his Affidavit, he states that he is one of the Investigating Officers currently conducting ongoing investigations into the loss of Kshs. 166,549,379.99/= at Njiwa Sacco. He added that the members and contributors to Njiwa Sacco are both serving and retired officers of the National Intelligence Service (NIS). He further stated that by virtue of their duties, the respondents are in possession of critical information. He therefore prays that this court be pleased to grant protection orders for the prosecution witnesses. Additionally, that disclosure of their identities and evidence shall jeopardize their security, ongoing active investigations and their respective undercover duties. He further stated that, due to the status of the witnesses and their association with NIS, they may have come across very sensitive information which is likely to pose a serious security challenge if the trial against the respondents is not heard in camera. Finally, he prays that the media be restricted during the trial of the case.
3. The applicant therefore seeks the following orders;
  - “(i) That this application be certified urgent and be heard ex-parte at the first instance.
  - (ii) That the witness statements be redacted (all identifying information) before being given to the respondents and that they be allowed to use pseudonyms and other witness protection measures during trial;
  - (iii) That the criminal case against the Respondents be heard in camera and the press be restricted.”
4. I have considered the Notice of Motion application and the averments of the applicant. Article 50(1) of the Constitution provides for the right to a fair hearing. Article 50(2)(d) provides for the right to a public trial. However, article 50(9) provides for the protection of victims of crime and witnesses, more so, vulnerable witnesses.
5. The protection of witnesses is specifically provided for under section 16 of the Witness Protection Act which states as follows;
  - “(a) The person named in the Application as a witness;
    - i. was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence or
    - ii. is a person who because of his relationship to or association with a person to whom sub paragraph (i) applies may require protection or other assistance under this Act.
  - (b) The life or safety of the person may be endangered as a result of his being a witness.
  - (c) A memorandum of understanding has been entered into by the witness in accordance with section 7 of the Act, and;
  - (d) The person is likely to comply with the Memorandum of understanding.”



6. From the affidavit evidence before me, it is clear that the witnesses perfectly fall within the ambit of section 16 of the Act. The nature and duties of the witnesses, which is mainly undercover, makes them vulnerable. The need to protect the witnesses is as important as the protection of the non-derogable right of the respondents to a fair trial. In criminal cases, without witnesses there can be no case. Placing both the competing rights on the scale of justice, I find that the respondents will not suffer any prejudice if the trial is held in camera or in closed session.
7. In his affidavit, CI Kipkemboi also sought orders that media reporting be restricted. Certainly, there's no gainsaying that the media plays a significant role in disseminating information to the public, especially in cases of public interest. Media is the production of electronic and print media for circulation to the public. The public have a right of access to information and the media acts as an agent for the public by reporting matters of general public importance. However, article 50(8) provides for exclusion of the press or other members of the public from any proceedings if the exclusion is necessary. In the instant case, I find that due to the sensitive nature of the duties performed by the witnesses, exposing them to the press, both print and electronic, and social media, would definitely endanger their lives.
8. The applicant has also sought for orders that the witness statements be redacted before being given to the Respondents and that the witnesses should use pseudonyms during the trial.
9. In the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR, the Court of Appeal was asked to analyse the duty on the part of the prosecution to supply the accused with all the relevant material in its possession and to do so in advance of the trial to enable the accused to prepare his defence. The court succinctly stated that:-
 

“Of course in some cases, the prosecution may claim public interest immunity and the courts in Kenya will have to consider the provisions of the newly enacted *Witness Protection Act*, No. 16 of 2006. In certain circumstances, the courts in Kenya may well hold that it would not be in the interest of justice to disclose the names, address and occupation of a particular witness or witnesses. But their evidence would have to be disclosed for we cannot imagine a situation in which an accused person can be ambushed with totally new evidence and convicted thereon.”
10. Similarly, in this case I hold that the respondents will ultimately have the evidence to be adduced at the trial availed to them before the witnesses are called to testify. The redacting of Witness Statements to exclude the witnesses' personal details such as witnesses' names, addresses and other personal particulars, and the use of pseudonyms does not therefore amount to a contravention of the provisions of article 50(2)(j), as this is one of the tenets accorded to witnesses under the *Witness Protection Act*.
11. Having so stated it is my view that the applicants should be accorded extra-protective measures not included in the application in order to prevent real harm to the witnesses.
12. It is not in doubt that one of the tenets of the right to a fair trial is for the accused person to confront his accuser by cross-examination, and this case is no exception. However, there are times when principles such as the right to confront an accuser in open court can be a barrier to justice. This includes situations where potential witnesses fear their physical identities being exposed. It is not a secret that NIS officers conduct their duties undercover, hence faceless to the public. Their physical exposure to the respondents or their associates or the wider public may endanger their lives or their families.
13. It is therefore in the interest of justice and the public, that orders be issued to protect the witnesses. I accordingly, allow the application and grant ex parte orders in the following terms:



- a. The witnesses, both retired and serving members of the NIS shall testify in camera or in closed session.
- b. The Statements of the said witnesses to be redacted before being supplied to the Respondents.
- c. The witnesses shall use pseudonyms to be decided upon by the DPP during testimony.
- d. The trial court, the prosecutors and the media to agree during pre-trial on the modalities of media reporting without jeopardizing the safety of the witnesses.
- e. The witnesses to use a separate entrance and exit from the court premises, as well as a separate door to access the court room.
- f. The Court Administrator to provide a separate sitting area for the witnesses other than that used by members of public and respondents.
- g. The witnesses to be allowed to disguise themselves in the manner the DPP shall deem fit.
- h. Voice distortion equipment to be availed to the witnesses.
- i. The trial court, the DPP and the defence counsel to agree during pre-trial whether members of public will be restricted to access the court room during the trial.
- j. The witnesses are at liberty to testify from a separate room within the court premises but their evidence to be transmitted audibly in open court.
- k. This file shall be kept under lock and key as shall be directed by the Head of Station Kahawa Law Courts.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY IN ABSENCE OF THE PARTIES THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. KAVEDZA**

**JUDGE**

