



**Republic v Hassan (Criminal Case E070 of 2023)
[2024] KEHC 11684 (KLR) (3 October 2024) (Ruling)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL CASE E070 OF 2023
DR KAVEDZA, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SGT AHMED RASHID HASSAN ACCUSED

Guidelines to be followed where counsel for victims wish to cross-examine prosecution witnesses

In the instant case counsel for the victim sought to cross-examine the prosecution witness. The court reiterated the guidelines governing a trial court on the participation of a victim in criminal proceedings. The court held that the participation of victims in criminal proceedings must be laid down during the pre-trial conference. The court further issued the guidelines to be followed where counsel for victims wished to cross-examine prosecution witnesses.

Reported by Kakai Toili

Criminal Procedure – criminal proceedings - participants in criminal proceedings – counsel for victims – cross-examination of prosecution witnesses by counsel for victims - whether allowing counsel for victims to cross-examine prosecution witnesses without any limitation violated the accused’s persons right to fair trial - what were the guidelines to be followed where counsel for victims wished to cross-examine prosecution witnesses.

Criminal Procedure – criminal proceedings - participants in criminal proceedings - victims – counsel for victims – stage at which the participation of victims should be laid down - what were the guidelines governing a trial court on the participation of a victim in criminal proceedings.

Brief facts

When the matter came up for hearing, counsel for the victims rose to cross-examine one of the prosecution’s witnesses (PW3). Counsel for the accused person objected to the cross-examination arguing that only the defence should cross-examine prosecution witnesses and further, that the victims’ counsel only had the right to re-examine. That view was shared by the Director of Public Prosecution (DPP) who equally argued that the Supreme Court had settled the law on the victim’s participation in proceedings and the role was restricted.



Counsel for the victim stated that nothing in the law prevented him from cross-examining a State witness since the Evidence Act provided for only two modes of examination; examination in chief and cross-examination, and therefore, the state having led evidence in chief, the victims' counsel could only cross-examine the witness.

Issues

- i. What were the guidelines to be followed where counsel for victims wished to cross-examine prosecution witnesses?
- ii. Whether allowing counsel for victims to cross-examine prosecution witnesses without any limitation violated the accused's persons right to fair trial.
- iii. What were the guidelines governing a trial court on the participation of a victim in a criminal proceeding?
- iv. At what stage in criminal proceedings should the participation of victims be laid down?

Relevant provisions of the Law

Victim Protection Act (cap 79A)

Section 9 - Rights during the trial process

(1) A victim has a right to—

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.

(2) Where the personal interests of a victim have been affected, the Court shall—

(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and

(b) ensure that the victim's views and concerns are presented in a manner which is not—

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

Held

1. The Constitution recognized the rights of the victims of offences. Article 50(9) of the Constitution provided that Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences. In addition to that constitutional underpinning, the Victim Protection Act was enacted in 2014 to give effect to article 50(9). Thus, the rights of victims in a criminal trial had statutory underpinning.
2. Section 2 of the Victim Protection Act defined a victim as any natural person who suffered injury, loss or damage as a consequence of an offence. The object and purpose of the Victim Protection Act as stipulated under section 3 was to recognize and give effect to the rights of victims of crime. Section 4 set out the general principles that guided the court in dealing with the question of the rights and welfare of a victim. Section 4(2)(b) provided that a court must ensure that every victim was, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her was



- taken. Section 9 of the Victim Protection Act provided for the participation of a victim in criminal proceedings.
3. A victim had a role to play in criminal proceedings. Notwithstanding the adversarial nature of Kenya's criminal judicial system, criminal proceedings no longer reflected only two common components, that was, prosecution and the accused person. In the post 2010 constitutional dispensation, criminal proceedings must adopt a tripartite version just like the three African cooking stones. If one stone was removed, the remaining two could not hold the pot. Similarly, criminal proceedings must involve the prosecution, the accused person and the victim. However, the participation of victims must be determined by the trial court and at correct stages.
 4. Kenyan law did not recognise an auxiliary prosecutor like in Brazil and Argentina. In Kenya, counsel for the victim was only an intervenor and could not wear the hat of a secondary prosecutor. Although the dimension had changed, a trial court must and retained the authority to determine to what extent counsel for the victims could participate.
 5. The Supreme Court in *Joseph Lendrix Waswa v Republic* had issued the guidelines to govern a trial court on the participation of a victim in a criminal proceeding.
 1. The applicant must be a direct victim or such victim's legal representative in the case being tried by the court;
 2. the court should examine each case according to its special nature to determine if participation was appropriate, at the stage participation was applied for;
 3. the trial court must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;
 4. the victim's presentation should be strictly limited to the views and concerns of the victim in the matter who was granted participation;
 5. victim participation must not be prejudicial to or inconsistent with the rights of the accused;
 6. the trial court may allow the victim or his legal representative to pose questions to a witness or expert who was giving evidence before the court that had not been posed by the prosecutor;
 7. the court had control over the right to ask questions and should ensure that neither the victim nor the accused were not subjected to unsuitable treatment or questions that were irrelevant to the trial;
 8. the trial court should ensure that the victim or the victim's legal representative understood that prosecutorial duties remained solely with the DPP;
 9. while the victim's views and concerns may be persuasive; and in the public interest that they were acknowledged, those views and concerns were not to be equated with the public interest;
 10. the court may hold proceedings in camera where necessary to protect the privacy of the victim; and
 11. while the court had a duty to consider the victim's views and concerns, the court had no obligation to follow the victim's preference of punishment.
 6. The Supreme Court did not give an absolute right to counsel for the victim to participate. The participation was limited severally.
 1. It was for the trial court to control the extent of participation.
 2. Participation could only be allowed if it was not prejudicial to the accused person.
 3. A counsel for the victim must realise that there was a prosecutor on record and the prosecutorial role remained with the DPP.
 7. *Republic v Antony Kilonzo Sammy* was distinguishable as the court was dealing with a very different scenario from the instant case. The victim in that case had adduced evidence as per section 13 of the Victim Protection Act.
 8. The court did not know the questions that the victim's counsel intended to pose to the witness. Should the court allow the application, it could not unhear, discard or ignore the questions posed, since



- the questions would have arisen during cross-examination. It would be difficult to regulate counsel's questions since he would have wide latitude during cross-examination.
9. *Leonard Maina Mwangi v DPP and 2 others* [2017] eKLR was distinguishable on one single point; the application to cross-examine was made at the pre-trial conference and not at the hearing.
 10. The participation of victims in criminal proceedings must be laid down during the pre-trial conference. It could not and should not be by ambush at the hearing stage like in the instant case. If that was to be allowed, it would defeat the purpose of good practices in criminal trials such as pre-trial conferences and active case management.
 11. It was only through an application at the pre-trial conference stage that the court could gauge if the participation would not violate the right to a fair trial or was prejudicial to the rights of the accused person. A departure from that general rule was when unforeseen circumstances had arisen in the course of the trial or new evidence not disclosed at the pre-trial stage had been introduced by the witness, that was prejudicial to the victims, that the victim's counsel could apply to question a witness at the trial stage.
 12. To safeguard the important principle and right to a fair trial, the court must lay down guidelines to govern the questioning of witnesses by the victims' counsel. In criminal jurisprudence, the accused was placed in a somewhat advantageous position. The criminal justice administration system in Kenya placed the right to a fair trial on a much higher pedestal. The court was the custodian of the law and ought to ensure that that constitutional safeguard was jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious and must ensure compliance with the basic rule of law. At no point should prejudice be caused to the accused person.
 13. To allow the counsel for the victims to cross-examine the prosecution witnesses without any limitation; to allow the victims' counsel to cross-examine all witnesses just like the prosecution or defence would do without an application or request, that was not disclosed at the pre-trial conference and; to allow the counsel for the victim to pose questions whose content were unknown and would meet everyone by surprise, that approach would not only be prejudicial to the accused person, but, it would also deal a great dent on the right to fair trial. It would violate the long-known custom that under no circumstances could a person's right to a fair trial be jeopardized.
 14. A crime was an injury not only against the affected individual(s) but also against society. Offences were prosecuted by the State, which in so doing protected the social rights of all citizens. The DPP was the custodian of prosecutorial power as established under article 157 of the Constitution. The counsel for the victim should have at the very least shown that the questions that he wanted to pose to the witness had not been raised by the prosecutor willingly or designedly. The court thus laid down the following guidelines:
 1. The counsel for the victims must make an application before or during the pre-trial conference indicating the desire to examine witnesses.
 2. The application shall disclose the specific areas that counsel would like to pursue with the witnesses.
 3. The application shall state how the intended questions were relevant.
 4. If allowed by the court, the questions shall be shared with the other parties before examining the witnesses.
 5. If there were any objections, parties shall raise the objections before the witness testified.
 6. Counsel shall limit the examination to the identified areas.

The above guidelines had been introduced in the instant case by the court following the objections raised by the defence and prosecution counsel. It would not therefore be in the interests of justice to apply them retroactively.

Application partly allowed.



Orders

- i. *The victims' application to cross-examine prosecution witnesses was allowed in the following terms:*
 1. *Counsel to file the set of questions that he would like to pose to the witness (PW3);*
 2. *since all witness statements and evidence had been supplied in advance, counsel to file the set of questions that he anticipated to pose to the remaining witnesses;*
 3. *questions not anticipated from the witness statements, shall be limited to new evidence, information or questions not posed by the prosecutor;*
 4. *counsel should demonstrate the relevance of the questions to the interest of the victims;*
 5. *the questions shall be shared with all parties at least 7 days before the hearing date;*
 6. *should the parties have an objection, the objection should be filed at least three days before the hearing date; and*
 7. *the court would issue a ruling on the hearing date.*

Citations

Cases

Kenya

1. *Independent Electoral and Boundaries Commission & 4 others v Ndi & 312 others; Kenya Human Rights Commission & 4 others (Amicus Curiae) Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021 (Consolidated); [2021] KECA 363 (KLR) - (Explained)*
2. *Maina, Leonard Mwangi v Director of Public Prosecutions & 2 others Criminal Case 57 of 2016; [2017] KEHC 9669 (KLR) - (Explained)*
3. *Republic v Anthony Kilonzo Sammy Criminal Case 36 of 2019; [2020] KEHC 6132 (KLR) - (Explained)*
4. *Republic v David Muchiri Mwangi Criminal Case 46 of 2017; [2018] KEHC 9016 (KLR) - (Explained)*
5. *Republic v Zacharia Okoth Obado Criminal Case 46 of 2018; [2018] KEHC 4109 (KLR) - (Mentioned)*
6. *Waswa v Republic Petition 23 of 2019; [2020] KESC 23 (KLR) - (Explained)*

Democratic Republic of Congo

1. *Prosecutor v Jean-Pierre Bemba Gombo ICC-01/05-01/08 - (Explained)*
2. *Prosecutor v Bosco Ntaganda ICC-01/04-02/06 - (Explained)*
3. *Prosecutor v Germain Katanga And Mathieu Ngudjolo Chui ICC-01/04-01/07 OA 8 - (Explained)*

South Sudan

Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ICC-02/05-01/20 - (Explained)

India

Sathyavani Ponrani vs Samuel RAJ CRL OP (MD) No 5474 of 2010 - (Explained)

Statutes

Kenya

1. *Constitution of Kenya articles 50(9); 157(11)- (Interpreted)*
2. *Criminal Procedure Code Act (cap 75) section 302 - (Interpreted)*
3. *Evidence Act (cap 80) section 145 - (Interpreted)*
4. *Victim Protection Act (cap 79A) sections 2, 3, 4, 9, 13 - (Interpreted)*

Advocates

Ms. Maina h/b for Gichuhi for the state

Ms. Martina h/b for Mr. Omari for the accused

Mr. Ongoya for the victims



RULING

1. On 12th of June 2024 when this matter came up for hearing, counsel for the victims, Mr Ongoya, rose to cross-examine one of the prosecution's witnesses, Lucas Ongaya (PW3). Mr Nyaberi and Dunstan Omari (for the accused person) objected to the cross-examination by Mr Ongoya arguing that only the defence should cross-examine prosecution witnesses and further, that the victims' counsel only has the right to re-examine. This view was shared by Ms Gichohi for the Director of Public Prosecution (DPP) who equally argued that the Supreme Court has settled the law on the victim's participation in proceedings and the role is restricted.
2. Mr Ongoya however was emphatic that nothing in the law prevents him from cross-examining a State witness since the [Evidence Act](#) provides for only two modes of examination; examination in chief and cross-examination, and therefore, the state having led evidence in chief, the victims' counsel could only cross-examine the witness. This court adjourned the hearing and directed the parties to file submissions on this question to enable the court to deliver a ruling on the same.

Issues for Determination

3. This court is called upon to answer only one question: whether counsel for the victims has a right to cross-examine a state witness after the prosecution has examined the Witness in chief?

Submissions by parties

Submissions by Victims' Counsel

4. Vide the submissions dated 17th June 2024, Mr Ongoya submitted that victims have a right to cross-examine witnesses on at least 7 grounds. The grounds in support of this position can be summarised as follows:
 - i. That it is the prevailing law and jurisprudence that a victim has a right to cross-examine a prosecution witness, which position is affirmed by the [Victim Protection Act](#) and the binding decision of the Supreme Court in [Joseph Lendrix Waswa v Republic](#).
 - ii. The victim's right to participate in a criminal trial can only be limited if the nature of the participation sought encroaches on the exclusive roles of the prosecutor; is prejudicial to the rights of the accused or when the contribution is not relevant
 - iii. The scope of participation by a victim is under the discretion of the trial court which discretion should be exercised judiciously.
 - iv. Cross-examination by the victims' advocate of a prosecution witness does not encroach on the exclusive roles of the prosecution and is not prejudicial to any rights of the accused.
 - v. The questions posed to the witness in this matter are not only relevant but are also crucial for the enabling of a fair hearing, a right to which both the victim and the accused are entitled.
 - vi. Courts have applied the Supreme Court decision in [Joseph Lendrix Waswa \(supra\)](#) to allow cross-examination of witnesses by Victims' advocates.



- vii. Counsel relies on the following decisions; *Republic v Antony Kilonzo Sammy*, delivered on 15th March 2022 and *Republic v Zachariah Okoth Obado & 2 others*, delivered on 20 July 2023.
5. In summary, Mr Ongoya submitted that both the defence and prosecution did not demonstrate how his cross-examination of the witness on his statement would either prejudice the rights of the accused or encroach on the mandate of the prosecution. Counsel asked this court to be guided by the decision of Justice Lesiit in *Leonard Maina Mwangi v DPP and 2 others* [2017]eKLR.

Submissions by the Prosecution

6. Ms Gichohi for the state, vide the submissions dated July 16, 2024 vehemently opposed the victim's submissions. Counsel argued that section 145 of the *Evidence Act* and section 302 of the *Criminal Procedure Code* provide for the order of cross-examination. Although the victim has a right to participate in criminal proceedings, the questions put to the witness should not be adversarial. Further, that the *Victim Protection Act* is not supreme to the other pieces of legislation. She relied on *Republic v David Muchiri Mwangi* [2018]eKLR where the court held that the participation of the victims is limited to situations where the court is determining issues that affect them directly. Similarly, counsel relied on the *Lendrix Waswa* decision (*supra*).
7. Second, while relying on article 157(11) of the *Constitution* and the Waswa decision as well as the Indian decision *Sathyavani Ponrani vs Samuel RAJ* CRL OP (MD) No 5474 of 2010, counsel submitted that the victims should only ask questions where it is shown that the prosecution has failed in its role. In this case, the victim has not shown that the prosecution failed in its mandate or prosecution left out some questions.
8. Third, the participation of the victim must be compatible with the rights of the accused. In this case, if the victim is allowed to cross-examine witnesses, the same will be prejudicial to the trial since some witnesses had already been stood down. Additionally, she argued that the *Constitution*, the *Evidence Act* and the Criminal Procedure Code do not give victims the right to challenge prosecution evidence, and, that victims can only channel their issues through the prosecutor who is mandated to conduct prosecution under article 157 of the Prosecution.

Submissions by Independent Policing Oversight Authority(IPOA)

9. Vide submissions dated 16th July 2024, the IPOA while extensively relying on the Lendrix Waswa decision submitted that the decision of the Supreme Court is binding on this court. That, the apex court has already clarified the distinct roles of the two parties; the prosecution and the victim's counsel. That according to the guidelines issued by the apex court, the role of the victim is not limited and a court may allow the victim's counsel to pose questions. Consequently, nothing stops a trial court from allowing the victim's counsel to cross-examine a prosecution witness.
10. Second, it is the role of the prosecution to examine in chief while the victim's counsel can only cross-examine. Counsel further submitted that nothing in the *Evidence Act* stops the victim's counsel from cross-examining a witness. Additionally, that the accused person will not be prejudiced in any way by the said cross-examination. Counsel relied on *Republic vs Antony Kilonzo Sammy*, *Republic v Zachariah Okoth Obado & 2 others* and *Leonard Maina Mwangi vs DPP & 2 others* (2017) eKLR.

Analysis and determination

11. To my mind, one issue calls for determination; Whether counsel for victims can be allowed to cross-examine the prosecution's witnesses?



12. Put differently, does Kenyan law identify an auxiliary prosecutor like Brazil and Argentina, where the victim's representative often has extensive rights to provide opening and/or closing statements, request or adduce new evidence, request the examination of witnesses, question or cross-examine witnesses, propose amendment to charges, raise objections, participate in oral debates on points of fact and law, and file Interlocutory appeals or, does Kenyan law adopt the intervener role where the court shall permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court (in such a way that is not prejudicial to the rights of the accused and a fair and impartial trial)?

i. Whether Kenyan Law provides for an auxiliary prosecutor or an intervenor?

13. The answer to this question is apparent in our law; the Constitution, and the Victim Protection Act and the jurisprudence from the superior courts. Counsel for the victims submitted that the decision in Lendrix Waswa has changed the dimension of the participation of victims in proceedings together with the other decisions of the High Court. Let me begin with the law:

14. the Constitution recognizes the rights of the victims of offences. Article 50(9) of the Constitution provides:

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

15. In addition to this constitutional underpinning, the Victim Protection Act (herein VPA) was enacted in 2014 to give effect to article 50(9) of the Constitution. Thus, the rights of victims in a criminal trial have statutory underpinning.

16. Section 2 of the VPA defines a victim as ‘any natural person who suffers injury, loss or damage as a consequence of an offence’. The object and purpose of the VPA as stipulated under section 3 is to recognize and give effect to the rights of victims of crime. Section 4 sets out the general principles that guide the court in dealing with the question of the rights and welfare of a victim. Section 4(2)(b) provides that a court must ensure that ‘every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken’.

17. Important for the matter at hand is section 9 of the VPA which provides for the participation of a victim in criminal proceedings. It provides for the how as follows:

9.(1)A victim has a right to-

- (a) be present at their trial either in person or through a representative of their choice;
- (b) have the trial begin and conclude without unreasonable delay;
- (c) give their views in any plea bargaining;
- (d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;
- (e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;
- (f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and
- (g) be informed of the charge which the offender is facing in sufficient details.



- (2) Where the personal interests of a victim have been affected, the Court shall-
 - (a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court; and
 - (b) ensure that the victim's views and concerns are presented in a manner which is not-
 - (i) prejudicial to the rights of the accused; or
 - (ii) inconsistent with a fair and impartial trial.
- (3) The victim's views and concerns referred to in subsection

(2) may be presented by the legal representative acting on their behalf.

18. A reading of the provisions above leads to the absolute conclusion that a victim has a role to play in criminal proceedings. Notwithstanding the adversarial nature of our criminal judicial system, criminal proceedings no longer reflect only two common components i.e. prosecution and the accused person. In the post 2010 constitutional dispensation, criminal proceedings must adopt a tripartite version just like the three African cooking stones. If one stone is removed, the remaining two cannot hold the pot. Similarly, criminal proceedings must involve the Prosecution, the accused person and the victim. However, as cautioned by the Supreme Court in *Lendrix Waswa* and as the [Victim Protection Act](#) resoundingly states, the participation of Victims must be determined by the trial court and at correct stages.
19. The foregoing therefore answers the question that I had posed above; that Kenyan law does not recognise an auxiliary prosecutor like in Brazil and Argentina. In Kenya, counsel for the victim is only an intervenor and cannot wear the hat of a secondary prosecutor as the Supreme Court stated in [Lendrix Waswa](#). It is important to reproduce what the Apex Court stated:
- “75. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the trial judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.
76. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account.” (emphasis mine)
20. My reading of [Lendrix Waswa](#) is that we do not have a secondary prosecutor in Kenyan Law. It is not true as counsel for the Victims suggests that there is an expansive role. Although the dimension has changed, a trial court must and retains the authority to determine to what extent counsel for the victims can participate.



ii. To what extent can counsel for the victim participate in criminal proceedings?

21. The Supreme Court in *Lendrix Waswa* has issued the guidelines to govern a trial court on the participation of a victim in a criminal proceeding. The court rendered itself thus:

77.

- a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the court;
- 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.

22. From the above holding, it is without a doubt that the Supreme Court did not give an absolute right to counsel for the victim to participate. The participation is limited severally. Firstly, it is for the trial court to control the extent of participation. Secondly, participation can only be allowed if it is not prejudicial to the accused person. Thirdly, a counsel for the victim must realise that there is a prosecutor on record and the prosecutorial role remains with the DPP.

23. With this background, I will examine the question that is pending determination.

iii. Whether the victim's counsel has a right to cross-examine the prosecution witnesses?

24. The cross-examination of the witness by counsel for the victims is opposed primarily on two grounds. First, the role of prosecution is solely vested in the DPP under article 157 of the *Constitution*. Second cross-examination if allowed, would be prejudicial to the accused persons and violate the right to a fair trial. Counsel for the victims relied on persuasive authorities from the High Court where cross-



examination was allowed. However, it is worth noting that none of the authorities cited are from the Court of Appeal or the Supreme Court.

25. In *Kilonzo Sammy* relied upon by counsel for the victims, the court was confronted with a situation where the victim had adduced evidence and the court allowed the victim to ask questions. The court stated that :

17. In balancing the rights of the Victim *vis a vis* that of the Accused person and also taking into account the role of the DPP, should the Victim advocate be allowed to go beyond raising concerns and views and go ahead to adduce evidence as per section 13 of the Victim's Protection Act, 2014 then in line with fair trial principles and the right of reply accorded to the accused person, then he should have a chance to further question the witness as is the case here.

Republic v Sammy (Criminal Case 36 of 2019) [2022] KEHC 195 (KLR) (15 March 2022) (Ruling)

26. It is clear that the aforesaid decision is distinguishable as the court was dealing with a very different scenario from this case. The victim in that case had adduced evidence as per section 13 of the VPA. The court proceeded to caution itself as follows:

“ 18. However, taking into consideration the time factor, it would be advisable to make such applications at the pre-trial stage to avoid delays during the trial so that directions can be taken on how to proceed.

19. The role of the Victim's advocate as has been stated by this court should not be parallel to that of the prosecutor as it is this court's assumption that in line with his rights, the victim was given access to all the evidence the prosecution intends to rely on and also had a chance to converse with the DPP so that if the Victim's advocate were to make an application at the trial stage, it would be on new evidence or information that was left out at which point then and also depending on the circumstances, the Accused person would have a chance to further cross-examine the witness.

24. The dilemma is practically the court cannot anticipate or speculate what the victim's Advocate may state upon the court granting the applicant the opportunity to raise views and concerns of the victim.

25. Further, matters are complicated by the fact once the victim's lawyer states its position, views and concerns the court and parties/counsel cannot unhear, discard or ignore what has been said”

27. Indeed, this is the same dilemma that this court is faced with. This court does not know the questions that the victim's counsel intends to pose to the witness. Should the court allow the application, it cannot unhear, discard or ignore the questions posed, since the questions would have arisen during cross-examination. It is my view that it would be difficult to regulate counsel's questions since he would have wide latitude during cross-examination.

28. Counsel further relied on Leonard Maina Mwangi to advance the argument that the victim has a right to cross-examine the prosecution witness. The case is also distinguishable on one single point; the



application to cross-examine was made at the pre-trial conference and not at the hearing. My Sister Justice Lesiit (as she then was) clearly states as follows:

53. The applicant has challenged the manner in which the victims' were participating in these proceedings. Firstly, it must be pointed out that the question of victims' participation arose early on in these proceedings. During the pre-trial Conference, advocates for the victims expressed their intention to participate by cross-examination of some witnesses as the need may be. This position was agreed to by all parties without any reservations at the time I took over this case at PW3. No issues arose until the time the court was in the process of taking the evidence of the 26th prosecution witness.
54. Regarding this agreement, the counsel for the accused argued that although parties had agreed on the modalities of their participation, the same was subject to the specifications of procedural law, the Constitution and the VPA. In effect the defence was acknowledging that there was a consideration of the participation of Victims in these proceedings very early at the beginning of the proceedings.
55. I do not wish to dwell on the issue of Pre-trial Conference except to add that it is in use through Active Case Management Guidelines which were gazetted by the Chief Justice (RTD) Dr Mutunga, but was first rolled out in Pilot Court Stations. It will eventually be adopted in all court stations and in all case types.
59. What I learn from this is that the trial court should exercise its discretion and determine the level of participation by the victims or their representatives subject to safeguarding the rights of the accused to ensure that the exercise of rights by the victim is not prejudicial to the rights of the accused person or be inconsistent with a fair and impartial trial.

29. My Sister Justice Lesiit then proceeded to state as follows:

- “66. All these rights are precursors to active participation by victim, subject to courts direction in court's discretion, depending with the nature of the case. In the instant case, the court was assisted by all counsels to the parties in this case, at the Pre-trial Conference. The terms are on record. As stated the question of participation of the victims was raised and addressed during the Pre-trial Conference where parties agreed that victims would be allowed to ask questions to witnesses whenever they found it necessary. This was of course subject to court's direction and intervention where necessary, which power the court exercises throughout the trial both in regard to examination of witnesses by the prosecution and the defence.
68. In regard to cross examination I must put a rider. The need for having a focused prosecution as opposed to a parallel or competitive one must be guarded jealously. It is important that whatever cross examination that takes place must be within what is contained in the evidence provided by the defence and prosecution as the one they intend to rely on. That way the accused persons will not be taken by surprise or ambushed. A failure to observe this rule would be highly prejudicial to the accused person and may compromise a fair trial.”



30. I have attempted to reproduce the aforementioned decisions relied upon by parties at length to show the position that, the decisions did not only allow the cross-examination but also laid down some guidelines that I agree with to wit; The participation of victims in criminal proceedings must be laid down during the pre-trial conference. It cannot and should not be by ambush at the hearing stage like in this case. If this was to be allowed, it would defeat the purpose of good practices in criminal trials such as pre-trial conferences and active case management.
31. It is only through an application at the pre-trial conference stage that the court can gauge if the participation will not violate the right to a fair trial or is prejudicial to the rights of the accused person. In my view, a departure from this general rule is when unforeseen circumstances have arisen in the course of the trial or new evidence not disclosed at the pre-trial stage has been introduced by the witness, that is prejudicial to the victims, that the victim's counsel can apply to question a witness at the trial stage.
32. Even if I am wrong, my position is fortified by the position adopted by other renowned criminal courts such as the International Criminal Court (ICC). This court appreciates the value of cross-pollination of ideas in the adjudication of disputes. Justice Kiage has appreciated in *Independent Electoral and Boundaries Commission & 4 others v Ndi & 312 others* [2021] eKLR (Court of Appeal) at para 51 that, 'We live in a globalized world and courts will always be part of a continuing conversation on comparative constitutional law and practice....[W]e are part of a global community of courts, and we definitely can and do benefit from a cross-pollination of ideas.' This court can therefore benefit from foreign jurisprudence especially where the apex courts have not rendered themselves on the position.
33. The International Criminal Court in *Prosecutor vs Bosco Ntaganda* ICC-01/04-02/06 addressed the question that is the subject of this ruling. The court held:
- “ 22. Should a Legal Representative wish to examine a witness, he or she is directed to file an application in accordance with the procedure set out at paragraph 64 below. Where leave is granted to examine witnesses called by the Prosecution, the Legal Representative may ask questions after the Prosecution has finished its examination-in-chief.
34. The ICC proceeded to lay down the procedure as follows:
- 2) Examination of witnesses
64. Should a Legal Representative wish to put questions to a witness called by the prosecution or the defence, he or she is to file a motivated request no later than four days before the beginning of the witness's examination-in-chief. The request shall identify the specific areas that the Legal Representative wishes to explore with the witness. After the Prosecution has finished its questioning, the Legal Representative shall inform the chamber whether he or she maintains the request to examine the witness. Objections to the request, if any, shall be made orally at that time, without the witness being present.
65. If permission is granted to question the witness concerned, the legal representative shall stay within the confines of the areas identified in the request. Unless authorised by the chamber, the legal representative will not ask leading questions
66. Objections to specific questions by the legal representative shall be made in accordance with the procedure set out in paragraph 24 above.



68. Should the legal representative wish to show any documents or other material to the witness, he or she shall state so, identifying the material in question, in the request. If the materials are not already in evidence or disclosed by one of the parties, copies shall be attached to the request.

35. The Trial chamber in the case of *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 also laid guidelines regarding the participation of victims in proceedings. The court started by underscoring that the participation of victims including the presentation of evidence is not an unfettered right. It must be overseen and regulated by the chamber, with due regard to the rights of the accused and the fairness of the trial. The court noted that the participation must be preceded by an application detailing the nature of participation, the type of evidence being adduced or questions posed to the witnesses.

36. The trial chamber in the *Prosecutor v Germain Katanga And Mathieu Ngudjolo Chui* in its decision on the Modalities of Victim Participation at Trial answered the question of whether a legal counsel for the victims can examine witnesses. The court held, ‘Lastly, rule 91(3)(a) grants legal representatives the possibility of questioning witnesses, experts or the accused with prior leave of the chamber and subject to conditions set by the chamber.’ The court reviewed the jurisprudence of the court and held that:

“46...In light of article 69(3) of the Statute and rule 91(3) of the rules, trial chamber found that the victims participating in the proceedings could be permitted to call and question witnesses “if in the view of the chamber it will assist it in the determination of the truth, and if in this sense the court has ‘requested’ the evidence”. Moreover, it stated that, for the foregoing reasons, it would not restrict questioning by victims to reparations issues but, rather, would allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration”

37. The chamber proceeded to hold that:

72. Under rule 91(3)(a) of the rules, when a legal representative wishes to question a witness, an expert or the accused, he or she must make an application to the chamber. The chamber may order that the questions be formulated in writing and communicated to the prosecutor and, if appropriate, the defence, for their observations.

73. Pursuant to rule 91(3)(b) of the rules, the chamber shall 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”. In accordance with the chamber’s powers under article 64 of the Statute, the ruling may include directions on the manner and order of the questions and the production of documents. The chamber may, if it considers it appropriate, put questions to a witness, expert or accused on behalf of the legal representative.

74. Questioning of witnesses pursuant to rule 91(3) of the rules constitutes one of the ways in which the legal representatives of victims may present their “views and concerns” within the meaning of article 68 of the Statute. Accordingly, they may put questions to the witnesses called by one of the parties to the trial, provided, however, that this is not prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial.

75. The chamber recalls that such questioning must have as its main aim the ascertainment of the truth, since the victims are not parties to the trial and have no role to support the case of the prosecutor. However, their intervention may potentially enable the chamber to better understand some of the matters at issue, given their local knowledge and social and cultural background



76. Given the lack of any relevant provisions in the statute, the chamber specified in the Decision on rule 140 the order in which the parties and participants will question witnesses, any experts, or the accused. It also laid down the precise procedures for any questioning undertaken by the legal representatives of the victims.
77. Thus they will have an opportunity to question witnesses after the prosecution's examination-in-chief or after its cross-examination of a defence witness. Any application for this purpose must state how the intended question is relevant and must comply with the procedure defined by the chamber in the decision on rule 140, whether for questions under article 75 of the Statute, anticipated questions or unanticipated questions.
78. The questions which the legal representatives may put must essentially relate to points to clarify or supplement evidence already given by the witness. Accordingly, a neutral style of questioning should be adopted.
38. The ICC Appeals Chamber in the case of *Prosecutor vs Germain Katanga And Mathieu Ngudjolo Chui* (supra) considered whether a victim can be allowed to produce evidence. The chamber emphasised that the main test for courts to consider is on the right to fair trial. The chamber held that 'in particular the right to have adequate time and facilities to prepare his defence (article 67(1)(b) of the Statute), and a fair and impartial trial'
39. The ICC Trial Chamber in the case of *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb') on December 15, 2022 while issuing guidelines on the participation of the victims in the proceedings laid down the controlling test as follows:
19. The chamber has an obligation to guarantee a fair and expeditious trial. It is therefore necessary to strike a balance between multiple factors. The chamber acknowledges the accused's right to have adequate time and facilities for the preparation of his defence. The accused also has the right to be tried without undue delay. Moreover, the chamber must also bear in mind the interests of justice. In particular, participating victims also have an interest in achieving justice."
40. I have reproduced the jurisprudence of the ICC at length to show how the court has handled this question that we are facing today. The position that I have adopted in my analysis above is in line with the jurisprudence of the ICC. To safeguard the important principle and right to a fair trial, this court must lay down guidelines to govern the questioning of witnesses by the victims' counsel.
41. In criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial on a much higher pedestal. This court is the custodian of the law and ought to ensure that this constitutional safeguard is jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious and must ensure compliance with the basic rule of law. Finally, at no point should prejudice be caused to the accused person.
42. The prosecution and the defence submitted that cross-examination would be prejudicial to the right to a fair trial as it would cause unnecessary delay. The Supreme Court cautioned in Waswa as follows:
- "80. The right to have a trial commence and conclude without unreasonable delay is an accused person's constitutional guarantee under article 50(2) (e) of the *Constitution*. A victim also has the right to have the trial begin and conclude without unreasonable delay under section 9(1)(b) of the VPA. In addition, article 159(2)(b) obligates courts not to delay justice.



92. Therefore, although criminal trials are not timebound like election petitions, there is need to have them determined expeditiously in line with the constitutional prescriptions. In the election petition of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC Application No 16 of 2014; [2014] eKLR (*Nick Salat* case), we affirmed the significance of time as a component in the dispensation of justice, hence the maxim: Justice delayed is justice denied. We emphasized that it is a litigant's legitimate expectation that when they seek justice that the same will be dispensed timeously."

43. This caution rings true today. To allow the counsel for the victims to cross-examine the prosecution witnesses without any limitation; to allow the victims' counsel to cross-examine all witnesses just like the prosecution or defence would do without an application or request, that was not disclosed at the pre-trial conference and; to allow the counsel for the victim to pose questions whose content are unknown and would meet everyone by surprise, I am convinced that this approach would not only be prejudicial to the accused person, but, it will also deal a great dent on the right to fair trial. It would violate the long-known custom that under no circumstances can a person's right to a fair trial be jeopardized.
44. Further, a crime is an injury not only against the affected individual(s) but also against society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. The DPP is the custodian of prosecutorial power as established under article 157 of the Constitution. The counsel for the victim should have at the very least shown that the questions that he wanted to pose to the witness had not been raised by the prosecutor willingly or designedly. The High Court of India in *Sathyawani Ponrani* observed that:
36. It is the sole prerogative of the public prosecutor to pick, choose and examine a prosecution witness. However, if the public prosecutor fails in the above-mentioned duty either accidentally or designedly in the opinion of the court, then in such a circumstance it can permit a victim's lawyer even to examine a witness. Such a power can also be exercised by the court for the purpose of conducting a free and fair trial and in the interest of justice."
45. Based on the foregoing, I wish to lay down the following guidelines:
- i. The counsel for the victims must make an application before or during the pre-trial conference indicating the desire to examine witnesses.
 - ii. The application shall disclose the specific areas that counsel would like to pursue with the witnesses.
 - iii. The application shall state how the intended questions are relevant.
 - iv. If allowed by the court, the questions shall be shared with the other parties before examining the witnesses.
 - v. If there are any objections, parties shall raise the objections before the witness testifies.
 - vi. Counsel shall limit the examination to the identified areas.
46. I hasten to state that the above guidelines have been introduced in this case by the court following the objections raised by the defence and prosecution counsel. It will not therefore be in the interests of justice to apply them retroactively.



47. In the upshot the victims' application to cross-examine prosecution witnesses is hereby allowed in the following terms:
- a. Counsel to file the set of questions that he would like to pose to the witness (PW3);
 - b. Since all witness statements and evidence have been supplied in advance, counsel to file the set of questions that he anticipates to pose to the remaining witnesses;
 - c. Questions not anticipated from the witness statements, shall be limited to new evidence, information or questions not posed by the prosecutor;
 - d. Counsel should demonstrate the relevance of the questions to the interest of the victims;
 - e. The questions shall be shared with all parties at least 7 days before the hearing date.
 - f. Should the parties have an objection, the objection should be filed at least three days before the hearing date.
 - g. The court will issue a ruling on the hearing date.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 3RD DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Maina h/b for Gichuhi for the state

Ms. Martina h/b for Mr. Omari for the accused

Mr. Ongoya for the victims

Achode Court Assistant.

