



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL CASE NO. 16 OF 2016**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**EMILIO NJOKA MWANIKI.....ACCUSED**

**RULING**

1. On 21/01/2021 after PW5 testified, the state applied for an adjournment to call the investigating officer one Mr. Kariuki and the officer from the scene of crime.
2. The application was opposed by Ms. Muriuki for the accused on the grounds that she did not have witness statements for the said witnesses. She further submitted that this court had on previous occasions made rulings that no other witness statements should be served on the defence and as such this court ought not to go against the said ruling when no sufficient reasons had been provided.
3. Ms. Mati for the state acknowledged the existence of the said orders but submitted that the circumstances herein are peculiar in that she had the police file but the investigating officer's statement (Mr. Kariuki) wasn't in the said file and as such, she had not written the said statement. She relied on Article 50(2)(g) of the Constitution to the effect that documents are supposed to be served well in advance so as to enable preparation for the trial but submitted that failure by the said Investigating Officer to record his statement is a professional ethics issue and ought not to occasion injustice to the victim who died in a bizarre manner. She relied on **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** to the effect that discovery is continuous. She further submitted that the earlier order by the court did not make reference to Mr. Kariuki's statement as he had not made the same.
4. Ms. Muriuki in a rejoinder reiterated her earlier submissions and further submitted that the rulings of this court had not been appealed against and further that the issue at hand is a professional issue which should not be visited on the accused as he is innocent until proven guilty.
5. I have considered the application before me, the response by the defence and the rejoinder by the state and it is my view that the issue I am invited to determine is whether the application for adjournment was merited and whether the investigating officer and the officers from the scene of crime ought to be called as witnesses.
6. As I have already stated, the prosecution in applying for adjournment submitted that though they had intended that PW5 be the last witness, nonetheless due to the nature of her evidence, it was important to call the Investigating Officer and the Scene of Crime officers. Ms. Muriuki in opposition of the same submitted that they had not been served with the witness statements for the said witnesses despite the matter having gone for pre-trial and further despite there being in existence two earlier rulings on the issue of late filing of witness statements.
7. It is trite that whether or not to grant an adjournment is discretionary and the same ought to be allowed where reasonable grounds have been advanced and in doing so, the court has to bear in mind that it has a duty to do justice to the parties by giving a reasonable opportunity to the complainant to present his/her case and for the accused person to do likewise. (See **Republic –vs- Paul Mutuku Magado [2019] eKLR**).
8. Article 50(2) (j) of the Constitution guarantees the right to have information and evidence to be relied upon by the prosecution disclosed to the accused person in advance. In **Dennis Edmond Akaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR** the court held that: -

***“The words of Article 50(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate***

**facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received.”**

9. It is thus my considered view that as long as the defence is not forced to immediately proceed with the hearing of a case upon being served with a witness statement or a document and the court allows an adjournment so as to give the accused opportunity to prepare their defence, no prejudice is occasioned to the accused. In this case, the prosecution indeed sought an adjournment so that they could call the remaining witnesses. The mere fact that they had no witness statements for the said witnesses was not sufficient reason to shut out those witnesses from testifying.

10. However, I note that the defence also raised the issue to the effect that the court had on previous occasions made rulings that no other witness statements should be served on the defense and as such this court ought not to go against the said ruling.

11. I have perused the court record and noted that on 31/10/2018 two witnesses testified after which Ms. Mati for the State applied for adjournment on the grounds that she had not supplied the defence with witness statements. The said application was opposed by the defence on the grounds that the accused herein had been charged two years earlier and that being served with the said statement at that stage was tantamount to violation of the accused's right to a fair hearing under Article 50(2) as the prosecution was introducing evidence late in the trial. The court (Muchemi J) in overruling the objection found that there will be no violation of Article 50 as the defence would have time to prepare. The judge directed that the statements be served.

12. When the matter came up for hearing again on 7/05/2019, Ms. Mati applied for adjournment on the grounds that she had not served witness statements and which application the defense vehemently opposed on the basis that the court had earlier allowed introduction of witness statements but limited to George Nyaga, Ephantus Muriithi Njue and Christopher Kinyua Muriithi. The court in declining the application to serve statements upon the defence held that the application before it was res judicata as the same had been made earlier and that the ruling of 31/08/2018 still stood. The court directed that the prosecution was at liberty to call the three witnesses whose statements were accepted by the court.

13. The records further indicate that on the same day, Ms. Mati made an application to call the remaining witnesses and who are; PC. Ann Thuku, Dr. Onyuma of Kenyatta National Hospital, Dr. Thuo of Embu Level 5 Hospital and PC Kariuki of Manyata CID. The defence opposed the application on the grounds that they did not have the statement by the said PC Kariuki. Ms. Mati replied to the same and undertook to take it up with the DCI Manyata. The court while noting the laxity of the investigators in fulfilling their obligations allowed the adjournment as the last adjournment for the 4 witnesses to be called.

14. It is my view that even though the court had initially barred service of witness statements which had not been served before pre-trial, the witness whom the prosecution wishes to call (that is Mr. Kariuki) was one of which the court made a ruling allowing service of his witness statement vide the orders of 7/05/2019. As such, his witness statement was exempted from the earlier ruling of the court and which orders the defence did not oppose.

15. It is trite that the criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal and the court is expected to play a balanced role in the trial of an accused person as it is the custodian of the law. The court further ought to ensure that the constitutional safe guards are jealously protected and upheld at all times and should be judicious, fair, transparent and expeditious and further must ensure compliance with the basic rule of law. The court has a duty to balance between the rights of the accused person to have time and materials to prepare for the case facing him and the right of the victims to have justice delivered.

16. Right to a fair trial is available to both the accused person and the victim of the offence and is not one of those rights that can be limited under Article 24 of the Constitution. I appreciate that the accused person has a right to have trial concluded within a reasonable time. However, as the court held in **Kamau Mbugua v Republic, Criminal Appeal 50 of 2008 [2010] eKLR** this right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions and that the general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obligated to consider all the relevant factors within the context of the whole proceedings.

17. I note that the accused person faces offence of murder which is a felony and wherein a life was lost. This court therefore has a higher duty to ensure that justice is delivered to both the accused and the victim's family. For that to happen, the court has a duty to ensure that all the relevant evidence is tendered in court so that the prosecution can prove its case to the required standards and equally ensure that the defense is allowed time to counter the said evidence.

18. It is my view as thus that the application by the prosecution to call one Mr. Kariuki and the officers from the scene of crime ought to be allowed as the defence will have time to prepare for the same. The prosecution should serve the said witness statements forthwith and before the next hearing date.

19. It is so ordered.

**Delivered, dated and signed at Embu this 3<sup>rd</sup> day of March, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the Prosecution