



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCR NO. E002 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

EDDY KARIUKI NGARI.....1ST ACCUSED

RAPHAEL WACHIRA KARIUKI.....2ND ACCUSED

RULING

Brief Facts

1. Mr. Mahugu was counsel representing the 1st accused person before his demise. The counsel orally applied to the court to come on record for the victims namely Elijah Kinini Wangondu and David Muoria Wang'ondou. The application was opposed by the prosecution counsel on grounds that Mr. Mahugu's representation of the victims would cause conflict of interest. Mr Mahugu in response said that no laws preclude him from representing the victims. In any case, since the 1st accused person is deceased, he sees no conflict of interest.

2. The prosecuting counsel further contends that though every person has a right to legal representation by virtue of Article 50(2)(g) of the Constitution 2010, this right is not absolute. He adds that by Mr. Mahugu representing the victims, a conflict of interest arises as he was representing the 1st accused person before he passed on. He relies on the case of **Maina Njenga vs Republic (2017) eKLR** and submits that courts have a duty to ensure that criminal trials are conducted within the ethical standards of the profession. He further relied on the case of **Delphis Bank Ltd vs Chatt & 6 Others [2005] 1 KLR** to support his contention that a litigant's right to legal representation by an advocate of his choice is not absolute especially in instances where a conflict of interest may arise which shall endanger the fiduciary relationship by the client. The prosecutor further relied on the case of **Uganda vs Patricia Ojangole Criminal Case No. 1 of 2014 Uganda** where the court stated that the accused's right to counsel of his choice cannot be upheld in an instance where there is a conflict of interest and breach of fiduciary relationship.

3. In response to the prosecutor's submissions, Mr Mahugu stated that unlike the case of **Maina Njenga** cited, he is not likely to be called as a witness in this case, his role is purely that of an advocate. He adds that in this case, the 1st accused is deceased as opposed to the accused in **Maina Njenga** case. He added that he has not interfered with any of the witnesses and he is ready to cooperate with the investigators including recording a statement.

Issues for determination

4. After hearing oral arguments by the parties, the main issue for determination is as follows:-

- a) Whether the counsel Mr. Mahugu ought to be barred from acting for the victims in the matter herein.

The Law

Whether Mr. Mahugu should be barred from acting for the victims in the matter herein.

5. The right to legal representation is universally accepted as one of the fundamental human rights and freedom. It has been recognized as one of the basic principles under the Universal Declaration on Human Rights, and has been codified in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) which instruments now form part of the laws of Kenya by virtue of Article 2(5) of the Constitution.

6. **Article 10 of the Universal Declaration on Human Rights** defined the right as follows:-

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

7. **Article 14(3)(d) of the ICCPR** Provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

8. The importance of the right of legal representation was enunciated by the Court of Appeal in the case of **David Njoroge Macharia vs Republic Criminal Appeal No. 497 of 2007 [2011] eKLR** as follows:-

“The right to legal representation is universally acknowledged as a fundamental right. Trials in many jurisdictions are considered unfair and fatally irregular if the presiding judge or magistrate fails to inform the accused person of his or her right to be assisted by counsel; if he or she denies the accused his right to appoint counsel of his or her choosing; if he or she fails to facilitate the effective and full participation of a counsel or if he or she does anything that would impede the counsel of the performance of his duty. (See Vandki P.K. “Examining the Right to Legal Representation: A Reflection on the case of the Inspector General vs Steven Harvey Perez & Others).

9. **Article 50 (2) of the Constitution** provides the minimum guarantees that constitute a fair hearing which provide:-

Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly. .

10. It is not in dispute that victims are guaranteed the right to be represented by counsel of their own choice. The issue herein is whether this is an absolute right and whether there is a conflict of interest. The Court of Appeal in **Delphis Bank Ltd vs Chatt & 6 Others [2005] 1 KLR** held that a litigant’s right to legal representation by an advocate of his choice is not absolute. The Court held as follows:-

11. **The right to a legal representative or advocate of his choice is a most valued constitutional right to a litigant. In some cases, however particularly civil cases, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness.**

There is no general rule that an advocate cannot act for a party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human possibility result.

12. Similarly in the case of **Maina Njenga vs Republic [2017] eKLR** where the court was faced with a similar situation. The court stated:

“Determination of this question ultimately goes back to the question whether, representation by an advocate of one’s choice would be in advancement or violation of the course of a fair hearing. If not, whether justifiable reasons would exist to disqualify an advocate from representing [Victims] without subverting a fair trial.”

13. In the case persuasive case of **Zachariah Okoth Obado & 2 Others vs George Luchirinaj Wajackoyah [2019] eKLR** where the court was faced with a similar situation was guided by the Supreme Court in South Africa in **Halgryn vs S [2002] 4 ALL SA 157**, the court held that:-

“Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations (**R v Speid (1983) 7 CRR 39 at 41**). It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer and, furthermore, that the lawyer is readily available to perform the mandate, having due regard to the court’s organization and the prompt dispatch of the business of the court. An accused cannot, through the choice of any particular counsel, ignore all other considerations (**D’Anos v Heylon Court (Pty) Ltd 1950 (1) SA 324 (C) 335 in fine, 1950 (2) SA 40 (C), Lombard en ‘n ander v Esterhuizen en ‘n ander 1993 (2) SACR 566 (W) at 571 I-572b**), and the convenience of counsel is not overriding (**cf Gentiruco AG v Firestone (SA) Ltd 1969 (3) SA 318 (T)**).”

14. From the foregoing, the right to legal representation is not an absolute right. A counsel of a party may be impeached if he is an impediment to the process of a fair trial. What then would constitute a conflict of interest? **The Law Society of Kenya’s Code of Standards of Professional Practice and Ethical Conduct (Gazette Notice 5212 of 26th May, 2017)** lays out Conflict of Interest and Advocate-client confidentiality as some of its Overriding Principles. **Article 6** states:

“The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflict of interest, unless he/she makes adequate disclosures to the client(s) and obtains the client’s consent.”

15. Article 7 provides:

“Communication between the Advocate and client is protected by the rule of confidentiality of Advocate-client communication. The Advocate has a duty to keep confidential the information received from and advice given to a client. Unauthorized disclosure of client confidential information is professional misconduct. At the same time the Advocate has a duty to safeguard against abuse of Advocate-client confidentiality to perpetrate illegal activities.”

16. The Code goes ahead to define what amounts to a conflicting interest at paragraph 93, thus:

17. “A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interest or by the Advocate’s duties to another current client, former client or a third person.”

18. Having said that, in the instant case counsel, Mr. Mahugu was acting for the 1st accused before his demise and currently is seeking to come on record for the victims. Bearing in mind fiduciary relation between an advocate and his client, I am of the view that although the facts of this case are distinguishable from those of the **Maina Njenga** case, it is evident that the victim and the accused are on opposite sides in a criminal case. The counsel Mr. Mahugu was fully instructed by the 1st accused to represent him in this case. He was also supplied with statements of witnesses and documentary evidence in this case by the prosecution. The counsel has already prosecuted the bail application in favour of the accused. There are constitutional petitions Mr. Mahugu has been acting for the 1st accused regarding matters that had aggrieved his client before he passed on. Various orders and directions have been given in favour or against the 1st accused. Having conducted the defence in the preliminary applications, Mr. Mahugu and his law firm are in possession of a lot of material and information that cannot favour the victims he wishes to represent in this murder trial.

19. The issue that arises is whether the “victims” in the real sense of the word are likely to get fair representation from a counsel who has already represented an accused person to some extent in this trial. In my considered view the said representation of the 1st accused has already placed Mr. Mahugu on the opposite side of the victims’ interest in this trial.

20. The prosecution have also extensively dealt with the counsel extensively in the exchange of evidential material and in the hearing of the preliminary applications. This being the situation, I am of the view the prosecution is likely to experience some kind of discomfort in the trial with Mr. Mahugu as the counsel for the victims.

21. I am convinced that in the interests of justice, Mr. Mahugu or any other counsel in the said law firm ought to be impeached from representing the two named victims in this case.

22. I hereby grant orders in favour of the prosecution that Mr. Mahugu and his law firm shall not represent the victims in this trial.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF JUNE 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 16th day of June 2021