



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 46 OF 2018

REPUBLIC APPLICANT

VERSUS

ZACHARIA OKOTH OBADO 1ST RESPONDENT

MICHAEL JUMA OYAMO..... 2ND RESPONDENT

CASPER OJWANG OBIERO 3RD RESPONDENT

RULING

1. The trial in this case commenced on 12th July 2021. Hearing proceeded on a day today basis until 15th July 2021 when it was adjourned to the 4th to 7th October 2021. When hearing resumed on 4th October 2021 and after two prosecution witnesses testified, the prosecution through learned prosecuting counsel, *Ms Mwaniki* applied to have the court cleared of members of the public and the media to pave way for the testimony of a protected witness who was waiting in an office within the court building but could not testify in public since his safety required concealment of his identity.

2. In her application, *Ms Mwaniki* relied on an order issued by this court (*Hon. Kimaru J*) in *Misc Criminal Application No. 146 of 2019*. The order shows that after hearing an *ex parte* application filed by the Witness Protection Agency under *Article 50* of the *Constitution*; *Section 4 (3) (a), (b) and (c)* and *Section 16* of the *Witness Protection Act (WPA)*, *Kimaru J* ordered as follows:

- a) *That, the statement of the witnesses to be redacted before being supplied to the accused persons.*
- b) *That, witnesses to use pseudonyms during hearing.*
- c) *That, protected witnesses to testify in-camera or closed session.*
- d) *That, protected witnesses to testify in a witness protection box.*
- e) *That, miscellaneous application file germane to this application to be kept under lock and key.*
- f) *That, file is ordered closed.*

3. It is *Ms. Mwaniki's* contention that the above orders were made with reference to the two protected witnesses in this case and that therefore, this court should adopt the said orders and allow the application. She further submitted that the constitutional right of the accused persons to a public hearing is qualified or limited by *Article 50 (8)* which allows exclusion of members of the public in a criminal trial in appropriate cases.

4. In addition, counsel argued that if the application was allowed, the accused persons will not suffer any prejudice since they have had ample time to study the witness statements and they will have an opportunity to cross examine the witness; that the witness is in fear of his life for agreeing to co-operate with the police and the court should balance his right to life and the right of the accused persons to a fair trial. She invited me to make orders that will allow the witness to testify in an environment free from fear or intimidation.

5. The application is opposed by counsel on record for each of the accused persons. *SC Mr. Kilukumi* on behalf of the 1st accused started his submissions by admitting that the defence team has always been aware that there are two protected witnesses who would testify in this case; that he was opposed to the application since in his view, hearing the witness in a closed session will violate the accused persons' right to a fair trial given that under *Article 50* of the *Constitution*, the accused persons have a right to a public trial; that under *Article 25* of the *Constitution*, the right to a fair trial cannot be qualified.

6. Further, learned counsel invited this court to note that on the face of it, the order issued by *Kimaru J* did not state to which case it applied and it was his submission that the order had no connection to this case. He urged me not to follow the directions given in the said order arguing that being the trial court, this court was the one mandated to give directions in its discretion on how the protected witness should testify and should not be micromanaged by another court of co-ordinate jurisdiction on how it should conduct the current proceedings. Counsel further invited me to note that the first accused was not heard before the order was issued and that *Section 16* of the *WPA* does not provide for an *ex parte* hearing.

7. Though admitting that *Article 50 (8)* of the *Constitution* limits the exercise of the right to a public trial enshrined in *Article 50 (2) (b)*, *Mr. Kilukumi* submitted that in determining the application, the court should be guided by *Article 20 (3) (a) and (b)* of the *Constitution* which obligates it to adopt an interpretation which most favours the enforcement of fundamental rights and freedoms. He urged me to determine the application by settling for a less restrictive way of achieving the purpose of the application like for example, requiring the witness to testify through video link.

8. On his part, *Mr. Oganda* for the 2nd accused associated himself with *Mr. Kilukumi's* submissions. He further submitted that the defence already knew the protected witness since his name had been disclosed in the witness statements served on them; that in the circumstances, complying with Order No. (d) which required the protected witness to testify in a witness protection box would not serve any practical purpose; that instead, it may give rise to a possibility of having a different person testify in the box other than the protected witness. Learned counsel invited me to set aside the orders issued by *Kimaru J*.

9. On behalf of the 3rd accused, learned counsel *Mr. Ongoya* submitted that the hallmark of due process was that the means used to arrive at a decision are as important as the decision itself and that the wrong means resulted in a wrong decision. He agreed with *Mr. Kilukumi's* submissions that the orders issued by *Kimaru J* did not indicate that they were issued in respect of the present case. Learned counsel referred to *Article 24* of the *Constitution* and submitted that a constitutional right can only be limited if there are no less restrictive means of achieving the desired end. He suggested that the witness could testify through video link but have his face and voice distorted.

10. *Mr. Ongoya* also invited me to interpret *Section 16* of the *WPA* and set a precedent by deciding whether the provision takes away the right guaranteed under *Article 47* of the *Constitution* which requires a person directly affected by a decision to be heard and to be given written reason for the decision.

11. In his submissions in support of the prosecution's application, *Mr. Njoroge*, learned counsel representing the victim's family invited me to contextualize the circumstances in which the *Ex parte* application was made. He submitted that the Witness Protection Agency which has the mandate of determining who qualified to be a protected witness could not have made the application before this court since it was not a party to the proceedings. In his opinion, the proceedings before *Kimaru, J* were proper since there was nothing wrong with the application being made without involving the accused persons. He urged me not to accept the invitation to vary a valid court order by giving different directions.

12. According to *Mr. Njoroge*, the defence has always been aware of the existence of the protected witnesses and they should have raised the issue of how their evidence was going to be taken during the pre-trial conference; that the court should decline to set a precedent to the effect that accused persons should be heard in an application made under *Section 16* of the *WPA*.

13. To counter the submissions made by the defence team, *Ms. Mwaniki* in her reply contended that involving the accused persons in the hearing of applications made under *Section 16* of the *WPA* would defeat the purpose of making such applications given that in the course of the hearing, the identity of the witnesses would be disclosed to the accused persons; that the omission to state the case to which the order applied did not make it irregular.

14. Regarding the complaint that a different witness may testify in place of the protected witness if the court were to order that the witness testifies in a witness protection box, *Ms Mwaniki* opined that in order not to compromise the accused person's right to a fair hearing, the protected witness can testify in a closed session but have his identity camouflaged.

15. I have carefully considered the application and the rival submissions as summarized hereinabove made by the learned prosecuting counsel and learned counsel on record for each of the accused persons as well as those made in support of the application by *Mr. Njoroge* representing the victim's family.

16. The defence team has invited me to interpret *Section 16* of the *WPA* and determine which court ought to hear applications for witness protection; whether failure to give the accused persons the right to be heard in such an application or to give them reasons for the decision arrived at after hearing the application *Ex parte* violated their right to fair administrative action guaranteed in *Article 47* of the *Constitution*. *Mr. Oganda* and *Mr. Ongoya* were of the view that the order made by *Kimaru J* on 1st April 2019 violated the accused persons right to fair administrative action and asked me to set it aside.

17. With utmost respect, I decline to accept the above invitation simply because the issues on the strength of which the invitation was extended cannot be determined in the context of the application under consideration. The issues raised are substantive and ought to be canvassed in either a constitutional petition or in an application made under *Section 16* of the *WPA* which is not what is before me.

18. In my view, making a determination such as the one requested by *Mr. Oganda* and *Mr. Ongoya* or setting aside the aforesaid orders would be tantamount to challenging the legality of orders made by a court of co-ordinate jurisdiction or sitting on appeal over such orders which is not permissible in law. I can however safely say that the *Witness Protection Act* and *Section 16* in particular is silent on the procedure that should be used in hearing applications under the Act, that is, whether they should be heard *ex parte* or inter parties. It however clearly provides that the applications should be heard by the High Court which means that they can be heard by the High court whether or not sitting as the trial court.

19. Having resolved that preliminary issue, let me now turn to the crux of the application which requires me to determine whether the prosecution's protected witness should testify in camera or in a closed session on the basis of protection orders issued by *Kimaru J* on 1st April, 2021.

20. I would like to start by observing that upon examining the said order, I agree with the learned defence counsel's submissions that on the face of it, the order does not disclose the case in respect of which it was issued. I have perused the court record and I have not seen any reference to that order even during pre-trial proceedings. There's therefore nothing on record or in the order to confirm the prosecution's claim that the order was issued in respect of this case and not any other case.

21. Even if I were to accept the prosecution's claim that the order related to this case, the order having been made by a court of co-ordinate jurisdiction is not binding on this court. It only has persuasive authority. Such an order cannot disentitle this court being the trial court of its discretion to decide whether to fully adopt the protection measures given in the order or vary some of them depending on the facts and circumstances pertaining to this case and what in this court's view would meet the ends of justice in this case.

22. The accused persons through their learned counsel have strongly objected to a closed hearing on grounds that such a hearing would violate their constitutional right to a public hearing. The right to a public hearing is stipulated in *Article 50 (1)* of the *Constitution* which states that:

“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.”

23. The right to a fair trial is guaranteed under *Article 50 (2) (a) to (q)* which enumerates rights accorded to an accused person that form the tenets of a fair trial. *Article 50 (2) (d)* specifically gives an accused person the right to a public trial before a court established under the *Constitution*.

24. However, as conceded by the defence team, the right to a public hearing is limited by *Article 50 (8)* of the *Constitution* which states as follows:

“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.”

25. From the above constitutional provisions as well as *Section 4 (3)* and *Section 16* of the *WPA*, it is clear that protection of persons whose safety is compromised by virtue of being witnesses has both constitutional and statutory foundations. Under *Section 4 (3)* of the *WPA*, the protection measures which a court can order to protect witnesses include the following:

- “ (a) holding proceedings in camera or closed sessions;
- (b) allowing the use of pseudonyms;
- (c) ordering reduction of identifying information;
- (d) use of video link; or
- (e) employing measures to obscure or distort the identity of the witness.”

26. As was held by *Lenaola J (as he then was)* in the ***Matter of Application for Orders for Witness Protection, [2014] eKLR***, the need to protect the lives of witnesses is important as much as the right of an accused person to a fair public trial. I hasten to add that witness protection is important not only because it ensures the safety of persons whose lives are threatened one way or the other by virtue of being witnesses but also because it is an important pillar in the proper administration of justice. If persons who fear for their lives because they are called upon to support administration of justice by being witnesses are not assured of their safety either during or after the trial, they are likely to refuse to testify in cases pending before courts which would definitely undermine the cause of justice. It is therefore paramount that in determining applications such as the one before me, the court must balance the rights of an accused person against the rights of a protected witness and where possible, make orders that do not prejudice any of them.

27. The prosecution has maintained that concealing the identity of the protected witness from the accused persons and members of the public is necessary in order to guarantee his safety. This has not been disputed by the defence. In my view, given the importance of witness protection as noted earlier, protecting the identity of the protected witness in this case is necessary in a free and democratic society like Kenya which believes in and is governed by the rule of law.

28. That said, I find that in this case, it is not necessary to order a closed hearing given *Ms. Mwaniki's* assertion that even if the court were to order for a closed session, the witness would still need to have his identity concealed. Considering the dictates of *Article 20 (3) (b)* of the *Constitution* and the protection measures stipulated under *Section 4 (3)* of the *WPA*, I think there is a way in which the safety of the protected witness can be guaranteed without compromising the right of the accused persons to a public hearing. This can be achieved by having the witness testify through video link considering that there's a TV screen already available in court and the court can issue orders that would ensure that the witness's identity is obscured.

29. Having found as I have above, I decline to allow the application as sought by the prosecution. I instead order that the protected witness

will testify through video link but will have his face obscured and voice distorted. He will also use a pseudonym during the hearing. This order shall apply in equal measure to the second protected witness in this case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mwaniki/ Wangui Gichuhi/Bessy Gikonyo for the State

Mr. Kilukumi SC/ Mr. Sagana for the 1st Accused

Mr. Oganda for the 2nd Accused

Mr. Ongoya for the 3rd Accused

Mr. Njoroge/Awour for the Victim's family

Ms Karwitha: Court Assistant