



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KILGORIS

CRIMINAL CASE NO. E005 OF 2021

(CORAM: F.M. GIKONYO J.)

REPUBLIC

VERSUS

DUNCAN NYONGESA WEKESA

RULING

[1] PW1 had barely started her testimony when she referred to a photo in her phone which she claimed the accused send her in a status stating: **'R.I.P my love Ann'**. Ann is the deceased in these proceedings and a cousin to PW1.

[2] Immediately thereafter, Ms. Nyambura, the prosecuting counsel, applied to stand down the witness and be allowed time to process and introduce the photo formally in evidence in the case. She gave her reasons: -

i) That the evidence the witness was speaking to was crucial evidence, yet, it had not been brought to the attention of the DPP when they were making the decision to charge the accused; and

ii) The witness had just shown the photo in her phone to the court in her examination-in-chief.

[3] PW1 stated that she gave this information to the police; that the accused sent her a status photo of her deceased cousin with the caption **'R.I.P MY LOVE ANN, I LOVE YOU'** the photo contains the deceased lying in bed.

[4] The prosecution counsel stated that it is also a photo of crime scene. It also contained a photo of the deceased folding a shirt. She stated that it is not an afterthought. It is simply new evidence. The DPP need it extracted from the witness phone as it is material and crucial to this case. No prejudice will be occasioned on accused persons as the evidence will be provided to the defence counsel.

[5] The Defence objected to any reference being made to the said photo since the same was not part of the evidence provided. Ms. Mireri contended that it is the duty of DPP to supply the defence with all documents and evidence they wish to rely upon before setting down case for hearing. During pre-trial DPP said they are set to go. The witness recorded a statement and did not mention this status photo. This photo is an afterthought to delay the process of justice. She urged the court to deny their request and proceeding with hearing of case. Accused is in custody and wishes the case to be prosecuted without delay. She urged the court to reject the DPP's request.

[6] Only the prosecution filed submissions. The defence did not file written submissions despite court's directions on 6/7/2021 that;

"The issue that has arisen is substantial in two senses. One, as a procedural etiquette issue. DPP wants to adduce further evidence. Two, as a substantive component; the persuasive and evidentiary substance of the photo. The evidence intended to be adduced is in the phone of a member of a victim family. Yet, the accused also has rights not to suffer prejudice. Accordingly, this matter requires full and properly researched input by counsels rather than leave it to the court's industry. In light thereof, I stand the witness down and direct DPP to file and serve comprehensive submissions supported with appropriate judicial and legal authorities on the request within 14 days of today. Upon service, the defence to file and serve comprehensive submissions duly anchored on appropriate judicial and legal authorities within 14 days of service.

This court reserves its ruling on the matter to 5/10/2021."

[7] Nevertheless, the two pertinent pieces of submission by the prosecution was; (i) that the evidence sought to be adduced was so crucial to the case; and (ii) introducing it as part of the evidence the prosecution intends to rely in the case will not occasion any prejudice to the

accused as the evidence will be provided to the accused, and he will be given adequate time to prepare and cross-examine PW1 on the photo. The prosecution prayed that they be allowed to introduce the photo as part of evidence. They cited Article 50(2) (j) of the Constitution, Article 14 (3) (b) of the International Covenant on Civil and Political Rights (ICCPR), **Dennis Edmond Apaa & 2 others v Ethics and Anti-Corruption Commission & Anor (2012) eKLR.**

ANALYSIS AND DETERMINATION

[8] If I understood the prosecution, they are seeking leave of court to include the photo in the phone of PW1 in the evidence the prosecution intends to rely on in this case. The request is not one of production or admissibility of evidence in the proceedings. Thus, the correct test is whether the move is prejudicial to the accused.

[9] Directly relevant to the request made is article 50(2)(j)(k) of the Constitution on the right of the accused:

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

(k) to adduce and challenge evidence;

[10] The right to be informed in advance of the evidence to be relied upon and to have reasonable access to that evidence as well as to adduce and challenge evidence, averts trial by ambush and gives fullest opportunity to the accused to know the case he is facing, prepare for trial and mount a defence. In this case, the witness had barely testified when she referred to the photo in issue. She was also the first and only witness who has partially testified for the prosecution. At such infancy of the proceedings, it is unlikely that the accused will be prejudiced if the photo is extracted and incorporated as part of the evidence the prosecution intends to rely upon in the case as long as the prosecution provides the evidence to the defence before the trial resumes. Of course, the witness will be cross-examined on the evidence. And, if necessary, the witness may begin her testimony *de novo*.

[11] If I push it a little further; the production and admissibility of the evidence will also have to meet the legal threshold for such evidence. See section 78 of the Evidence Act. Objection which there may be to its production or to its admissibility, shall be tried and determined by the Court. And the Court shall form its own opinion on any photographic report and credibility of the expert (see ***Muyezi v. Uganda*** (1971) EA 225 and ***Mutonyi v. R*** (1982) KLR 203). In addition, the Court will examine and weigh the whole evidence produced before it, (see ***Okethi Olale & Ors. v. R*** (1965) EA 555) in its overall impression of whether the offence has been proved beyond reasonable doubt.

[12] These safeguards are sufficient to prevent prejudice to the accused.

[13] Significantly, the witness stated that she brought the information to the attention of the police. Although I do not think there is suppression of evidence, I make notable reference to section 20 of the Victim Protection Act, 2014 states as follows;

“20. Right to submit information

(1) A victim has a right to submit any information for consideration to the;

(a) Police or prosecution on a decision whether or not to lay a charge or to appeal or withdrawal”

(2) Where a victim gives any information to a law enforcement officer, the officer shall inform the victim that —

(a) the information shall be ascertained for submission to the Court

[14] Nonetheless, in the circumstances of this case, protection of the rights of victims justifies the evidence to be part of the evidence the prosecution intends to rely upon in the case. But, of course, it will be subjected to all requirements of the law during production and admissibility stages.

[15] Out of the foregoing analysis, I find that the case has just barely started and PW1 is the first and the only witness who has testified. The evidence in question will be subjected to relevant evidentiary and procedural test, scrutiny and thresholds. The accused will cross examine the witness on the said piece of evidence. As such, there will be no prejudice suffered by the accused as long as the evidence is supplied to the accused in good time to allow him prepare adequately for his defence. In the circumstances, I allow the prosecution to extract the photo from the phone of PW1 and accordingly, provide the evidence to the defence in good time. In the interest of justice, PW1 will start her evidence *de novo*. It is so ordered.

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application This 2nd Day of November, 2021.

F. GIKONYO M.

JUDGE

In the Presence of:-

1. Court Assistant – Kasaso
2. Accused person - Present
3. Mr Ondimu Counsel for Republic- Present
4. Ms Mireri Counsel for Accused - Present