



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL CASE NO.E046 OF 2021**

STATE.....REPUBLIC

VERSUS

TITUS KIPCHIRCHIR.....ACCUSED

**R U L I N G**

1. This is a **Ruling** in respect of an objection raised by **Ms. Khamala**, counsel for the accused in respect of the prosecution seeking to rely on documents in the evidence that was collected by the **Independent Police Oversight Authority** (hereinafter referred to as “**IPOA**”).
2. According to **Ms. Khamala**, the **Independent Police Oversight Authority (IOPA)** was not a party to the suit as the same is between the State and the accused person. That as an oversight body, **Independent Police Oversight Authority (IOPA)** ought to give its input through the prosecution and the same ought to have been done prior to commencement of the trial, otherwise the accused persons stands to be prejudiced as it goes against the right to a fair trial as envisioned under **Article 50** of the **Constitution of Kenya, 2010**. She has also submitted that the accused person is required to know the evidence that is to be relied upon by the State before is trial begins. Further, that the witnesses who produce the documents are not the makers of the same as envisioned in the **Evidence Act**. **M/s Khamala** submitted that in understanding of the defence, it is the **DCI** who has the role of investigations and if **Independent Police Oversight Authority (IOPA)** has any input it should be through the **DCI**.
3. In response, **Ms. Maina** counsel for the prosecution submitted that **Section 6(a)** of the **Independent Police Oversight Authority (IOPA) Act** provides that the authority has the mandate to investigate any complaints related to disciplinary or criminal offences, committed by service members, whether on its own motion or on receipt of a complaint. She additionally submitted that **Section 7** of the same **Act**, gives the authority powers to investigate on its own motion or on receipt of a complaint from the public. **M/S Maina** also submitted that it is not unusual for **Independent Police Oversight Authority (IOPA)** to conduct investigations being that the matter involves an accused person who is a Police Officer and it is not the only matter to proceed with statements and documents form **Independent Police Oversight Authority (IOPA)**.
4. Further, on the issue of fair hearing, **M/S Maina** stated that **Article 50(2)** of the **Constitution of Kenya, 2010** provides that the right of an accused person to be ensured fair trial is that they should be informed in advance of the evidence the prosecution intends to rely on and have reasonable access to that evidence. She submitted that she had supplied the statements from **Independent Police Oversight Authority (IOPA)** together with their list of documents to the defence and they did not object to them. She submitted that although the accused person has the right to a fair hearing, the victim’s family also deserves the same right.
5. In rejoinder, **Ms. Khamala**, submitted that the court should take into account the spirit of **Article 50(2)(j)** of the **Constitution** which provides that the accused person should be informed of the evidence the prosecution will be relying on in advance. She submitted that she was supplied with a bundle of documents in the course of hearing and therefore her client did not get a chance to go through them. Further, that it was not until the documents were being marked and given in evidence during the hearing that she realized they were relying on the same documents yet she did not have them. She also submitted that, matters of procedure must be made subject to the law in that the law requires that to fully undertake investigations, hence the trial should proceed with evidence from the **DCI**. It was also her submissions that the prosecution had not supplied them with any handover report to show that **Independent Police Oversight Authority (IOPA)** took over investigations from the **DCI**.
6. I have considered the arguments that were advanced by the respective parties and find that two issue arise for determination;

***i. Whether the Office of the Director of Public Prosecution (ODPP) can prosecute the matter herein with evidence collected by the Independent Police Oversight Authority(IPOA)***

*ii. Whether the State is obliged to disclose its evidence upfront.*

7. On the issue of whether the Office of the Director of Public Prosecution (ODPP) can prosecute a case on evidence collected by the Independent Police Oversight Authority(IPOA), I start by restating the provisions under **Article 157(4) and (11)** of the **Constitution, 2010**, that:

**(4) Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**

**(11) In exercising the powers conferred by this Article the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

8. Ms. Maina, counsel for the State submitted that **Section 7** of the **Independent Policing Oversight Authority Act, 2011**, gives Independent Police Oversight Authority, the authority to carry out investigations against any police officer who may be accused of causing any death or any other offence. The relevant provision of law provides thus:

**(1) The Authority shall have all the powers necessary for the execution of its functions under this Act, and without prejudice to the generality of the foregoing, the Authority shall have the power—**

**(a) To investigate the Service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by—**

**(ix) Recommending to the Director of Public person for any offence;**

**(x) Investigating any death or serious injury occurring or suspected of having occurred as a result of police action.**

**(b) To take over on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;**

9. In the instant case, it is not clear as to what prompted the Independent Police Oversight Authority(IPOA) to act by collecting evidence from witnesses when the DCI was already seized of the matter. What is evident is the fact of death in issue, which was alleged to have occurred as a result of an act by a police officer in service, hence part of the mandate of the Independent Police Oversight Authority (IPOA) to investigate.

10. In the case of **Chibungu Sanga –vs- Republic (2017)eKLR**, the Court stated as follows:

**“The office of the Director of Public Prosecutions (ODPP) once it receives the recommendations from any investigating body and after examining the evidence is at liberty and has the discretion to choose the best evidence that can lead to a conviction provided that this discretion is exercised legally and is not motivated by ill will or ill motive....”**

11. Thus, it is clear that, it is the duty and responsibility of the Director of Public Prosecution to decide which evidence is best for them to use, in prosecuting its cases so as to achieve its desired results which in its case is to procure a conviction. The court can therefore not control or direct the Director of Public Prosecutions on this aspect unless there is evidence that the same is motivated by ill-will or ill-motive or is against public interest and policy.

12. In objecting to the use of the evidence that was recorded by Independent Police Oversight Authority(IPOA) in this case, the defence has not brought or shown any evidence to this court of any illegality, irregularity, ill-will and or ill-motive in the evidence that was recorded by Independent Police Oversight Authority(IPOA). They even did not dispute the contention by the prosecution’s counsel that the statement recorded by Independent Police Oversight Authority and those filed by the DCI for the preparation of this case have all been availed to her. I only find that the statement by Independent Police Oversight Authority (IPOS) were supplied to the defence, on the day the case was set for hearing and the matter proceeded before the defence counsel court go through them. It was also the duty and responsibility of the defence counsel to bring out that issue and request that they be given time to go through the said statements so as to prepare their defence and avoid a situation where the accused person will be prejudiced.

13. On the issue of whether State is obliged to disclose evidence it wishes to rely on in its case, **M/S Maina** for the prosecution submitted that they had supplied the defence with the bundle of documents from the DCI and on the date of hearing supplied the statements and list of documents emanating from the Independent Police Oversight Authority. This was not contested by the defence counsel whose contention is that they were not informed in advance that they intended to rely on the statements and list of documents from Independent Police Oversight Authority(IPOA) which is in violation of the accused person’s right to fair trial as provided under **Article 50(2)(j)** of the **Constitution**. The said **Article 50(2)** provides as follows:-

**2) Every accused person has the right to a fair trial, which includes the right—**

**(a) to be presumed innocent until the contrary is proved;**

**(b) to be informed of the charge, with sufficient detail to answer it;**

....

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

14. In view of the aforesaid provisions, it is the duty of the prosecution to disclose to the accused person the evidence it intends to rely on in advance and allow the accused reasonable access to it. In reading this provision, I do not find any provision with regard to time within which the same should be provided, as the words of **Article 50(2)(j)** that guarantee the right “to be informed in advance” cannot be res restrictively to mean in advance of the trial. This provision should be read together with that under **Article 50(2)(c)** which guarantees the accused person the right to “have adequate facilities to prepare a defence”. I presume that in the absence of such provision, the duty and responsibility of disclosure of evidence by the prosecution is continuous in the course of a trial, as long as it is observed that when disclosure is done during trial as in the present case, the trial court should ensure that the accused is given sufficient time to prepare for his defence.

15. In the case of **R –vs- Ward [1993]2 ALL ER 557**, the Court of Appeal in England was unanimous that,

***“The prosecution’s duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses...”***

16. I find that there was nothing irregular in the prosecution having supplied the defence with the statements and list of documents from the **Independent Police Oversight Authority(IPOA)** on the date of trial. All that the defence needed to do was to point this out to court so that they are granted an opportunity to go through them and prepare for their defence.

17. In the circumstanced, the objection by the defence counsel to the prosecution’s reliance on the statements, evidence and documents emanating from the Independent Police Oversight Authority(IPOA) is dismissed.

18. Subsequently, the defence (accused) person is granted time to go through the bundle of statements and documents from the Independent Police Oversight Authority(IPOA) and prepare for their defence hearing.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF DECEMBER 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**IN THE PRESENCE OF**

**M/S MAINA COUNSEL FOR THE STATE**

**MR. MBUGE COUNSEL HOLDING BRIEF FOR MR. E. MBANGA COUNSEL FOR VICTOM**

**ACCUSED - PRESENT**

**QUINTUS - COURT ASSISTANT**