



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 20 OF 2019

REPUBLIC DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

PATRICK OITA NYAPARA.....ACCUSED

RULING

1. This ruling arises from an objection that Dr. Malala, the advocate watching brief for the family of the victim, raised to a line of cross-examination that Mr. Ikapel, the advocate for the accused person, had adopted.
2. Mr. Ikapel was cross-examining the witness, PW1, Evans Sylvester Sewe, on the statements that he had recorded for the purpose of the prosecution. It transpired that he had recorded two statements, one on 15th March 2019 and the other on 28th March 2019. The first statement was recorded at the Navakholo Police Station, with the Directorate of Criminal Investigations (DCI) branch there; while the second one was recorded with the Independent Police Oversight Authority (IPOA), at their Kakamega branch. It was at the point when Mr. Ikapel began to cross-examine PW1 on the first statement that Dr. Malala protested.
3. According to Dr. Malala, there were two investigations, one by the Directorate of Criminal Investigations and the other by Independent Police Oversight Authority. He submitted that the prosecution was being mounted on the basis of the Independent Police Oversight Authority investigation, and not the one by the Directorate of Criminal Investigations, and any cross-examination of PW1, and, indeed, of all the other witnesses, ought to be limited to the statements in the Independent Police Oversight Authority bundle of documents. He also submitted that Mr. Ikapel should confine himself to the questions raised by the prosecution.
4. The position taken by Dr. Malala was supported by Mrs. Mbogua, the advocate on record as watching brief for Independent Police Oversight Authority, who stated that Mr. Ikapel ought to limit himself to the Independent Police Oversight Authority file, which was the primary file for the purpose of the instant prosecution. Mr. Mutua, the prosecuting counsel from the Office of the Director of Public Prosecutions (ODPP), and who is the prosecutor for the purpose of this prosecution, expressed the same opinion, but indicated that he stood guided by the directions that the court shall give in the matter.
5. Mr. Ikapel, in his reply, submitted that the rights of a party at cross-examination were very wide and could not be restricted in the manner suggested by the prosecution and the victim's family. He asserted that restricting the same in that manner would amount to a violation of rights. Secondly, he submitted that cross-examination was not limited to what was recorded, it could go to the character of the witness. Thirdly, he said that he was served with bundles of statements and exhibits, and when the supplementary record from Independent Police Oversight Authority was served, the original documents from the investigation by the Directorate of Criminal Investigations were not withdrawn. He stated that he was yet to come across a law that restricted the right of an accused person, to cross-examine, to just the statements and other documents in the police file that was being used for the purpose of the prosecution.
6. In his rejoinder, Dr. Malala asserted that cross-examination was not a free for all, and it could not be used to introduce matters that had not been used in examination in chief. He asserted further that the Independent Police Oversight Authority file was never a supplementary file, for it was the file to be used for the purpose of the prosecution, since it was introduced to replace the Directorate of Criminal Investigations file. According to him, it would be bizarre to have two investigation files in the same case, and it would amount to turning the trial into a circus should the court allow the trial to be founded on an investigation file that had been substituted. He invited the court to direct that the Independent Police Oversight Authority file be the only one to be used in the proceedings.
7. The manner of examination of witnesses in a trial is regulated by the Evidence Act, Cap 80, Laws of Kenya. The relevant provisions, for the purpose of this ruling, are in sections 153 and 154, of the said Act, which state as follows:

“153. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

154. When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(a) to test his accuracy, veracity or credibility;

(b) to discover who he is and what is his position in life;

(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.”

8. The courts have variously considered these provisions and amplified them. I shall cite just two of such decisions.

9. In *Republic vs. Thomas Patrick Gilbert Cholmondeley* [2006] eKLR, the court stated, with respect to cross-examination, and section 154 of the Evidence Act, as follows:

“... as far as the cross-examination is concerned the law relating to the same has been clearly outlined by the Court. Specifically, Sec. 154 of the Evidence Act provides all the parameters. These relate to the accuracy, veracity, credibility, position in life and character of a witness. My considered view is that in an adversarial system of law, that section has to be interpreted widely and liberally to test the evidence being adduced.”

10. In *Republic vs. Hillary Mugo Mwendu & 2 others* [2019] eKLR, it was said, with regard to cross-examination, section 153 of the Evidence Act and previous statements, that:

“7. Cross-examination of a witness whether for the defence or for the prosecution is meant to test the credibility of the witness. That is why cross-examination is wide and a witness can be asked leading questions and questions need not only be confined to the testimony even in the evidence in chief or in previously recorded statements. Cross-examination is a useful tool for use in trials and in administration of justice whereby it is used by prosecution against its witnesses who become hostile in order to expose what was previously recorded by them and shake their credibility. This must apply to both the prosecution and defence. Section 153 of the Evidence Act answers the question why cross-examination on previous statements. That is, to contradict a witness on what he states and what he had previously recorded. It goes to test his credibility, discover who he is and shake his credit.

8. ... Section 145 (2) of the Evidence Act defines cross-examination as examination of a witness by the adverse party. Section 146(2) of the Evidence Act provides that cross-examination need not be confined to the facts to which the witness testified in his Examination in Chief. It is therefore true to hold that cross-examination of a witness cannot be limited.

9. For these reasons I find that the Evidence Act provides that a witness can be cross-examined on a previous recorded statement. It matters not that the statement was a confession. The key word under Section 153 of the Evidence Act is that he may be cross-examined as to “previous statements made by him in writing or reduced into writing.””

11. My contemporaries have aptly captured the purport of the law in that regard, and I need not expound it any further. From the foregoing, it should be clear that a witness may be cross-examined on any previous statement made by them, with a view to test their character, veracity and credibility; and that the said cross-examination is unlimited. It should also be clear that the scope of questions put forth during cross-examination is not limited to the issues raised during examination-in-chief. Cross-examination ought to be as wide and liberal as possible, as this assists the court to test, and make a just determination, on the veracity and credibility of witnesses and the evidence being adduced.

12. The upshot is that cross-examination cannot be limited and the defence, in the instant case, is, therefore, free to cross-examine on the previously recorded statement by PW1, and, as such, the objection by Dr. Malala, is accordingly overruled.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS14th DAY OF ...October..... 2020

W MUSYOKA

JUDGE