REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 28 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MARK MUNGATHIA.....1ST ACCUSED

DAVID MAKENDA MURIIRA.....2ND ACCUSED

RULING

1. On 3rd July 2019, the prosecution sought to produce a statement recorded by a witness called Anjerica Kinya. The statement was marked as MFI 4. An objection was raised by Mrs. Ntarangwi, counsel for the accused. The learned counsel argued that the witness passed on and is not available for cross-examination. Thus, as evidence must be tested on its veracity, the statement should be disregarded. Furthermore, that the statement does not identify the accused.

2. Mr. Namiti, counsel for the prosecution told the court that **Section 33 of the Evidence Act** provides for statements of persons who cannot be found. As this matter is provided by the law, no prejudice will be suffered. According to him, the acceptance of the contents will be decided by the court.

Determination

3. The issue is whether a witness statement is admissible where the witness cannot be produced for reason of death?

4. Although it was not specifically stated, the objection herein hinges on right to fair hearing. **Article 50 (2) (k) of the Constitution** provides that every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence. In the case of **Ogeto v Republic [2004] 2 KLR 14** it was held:

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness, especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be mistaken".***

5. Generally hearsay evidence is inadmissible for the dangers related to its unreliability because it was not tested in the ordinary ways of adducing evidence. It is only in specific instances under **Section 33 of the Evidence Act** admissibility in evidence of statement by a deceased person or persons who cannot be found is permitted. According to **Section 33 of the Evidence Act**:

> **"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–**
>
> > **(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;**
> >
> > **..."**

6. Does this case bring itself within the exceptions in section 33 of the Evidence Act? In this case, the statement that seeks to be produced is said to have been written by Anjerica relating to the death of Michael Kirimunya. Certainly, the statement does not fit the exceptions under **Section 33** for it neither relates to the cause of death of its maker, Anjerica, nor to the circumstances of the transaction which resulted in her death.

7. Faced with a similar scenario, the Court of Appeal in the case of **Dickson Mbeya Marende alias Dickie & another v Republic [2017] eKLR** stated as follows:

> **"26. We do not think that Nyakairu's statement was admissible under section 33 of the Evidence Act. Neither did the statement relate to the cause of death of its maker, Nyakairu, nor did it relate to the circumstances of the transaction which resulted in Nyakairu's death as per section 33(a). Equally, it was not a dying declaration. It did not also purport to identify the killers of the deceased. We would therefore agree with the appellants' counsel's submissions that the trial court ought not to have admitted it under section 33(a) of the Evidence Act."**

8. I love what Ngugi J in similar circumstances stated in the case of **Republic v John Ng'ang'a Njeri [2018] eKLR** that:

> **"8. The exact same reasoning applies in this case. The situation here is not covered by any of the sub-sections of section 33 of the Evidence Act. It is not, therefore, one of the permissible scenarios where hearsay evidence is admitted as evidence despite the dangers as to its unreliability due to lack of an opportunity to confront the maker of the statement.**
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> **9. A different way of stating this is the following. For all scenarios where Parliament has not, by creating a statutory exception to the hearsay rule, it is assumed that admissibility of statements which will not be subjected to cross-examination or confrontation is per se prohibited as definitionally violative of Article 50(2)(k) of the Constitution."**

9. Accordingly, the law instructs me that, the statement which the prosecution seeks to be admitted in evidence must be excluded. It is not admissible in evidence. It is so ordered.

Dated, Signed and delivered in open court this 9th day of July 2019

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F. GIKONYO

JUDGE

In presence of

Namiti for state

Mrs. Ntarangwi for accused persons

Accused – present

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F. GIKONYO

JUDGE