



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO.37 OF 2011**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**DAVID WANJALA MATUBA.....ACCUSED**

**RULING**

***(On admissibility of the witness statements of the witnesses alleged to have left the Country)***

On 29/5/2018 the prosecution put PW4 No.45444 CPL Jackson Muindi in the witness box. In the course of his testimony he told the court that some of the witnesses who were allegedly with the deceased at the time the offence was committed, and who were foreigners had left the country and gone to Uganda. He said he had looked for them in vain. He described them as “a sister to the deceased, one Sarah, another lady and another man”.

Mr. Magoma counsel for the state made an application to have this witness produce the statements recorded by the said witnesses under Section 33 of the Evidence Act on the basis that the state could not trace the witnesses. He urged the court to allow the state produce the statements in evidence.

The application was vigorously opposed by Mr. Ndirangu, counsel for the accused person on the grounds that the accused faced a very serious offence, and the production of a statement by any other person except the maker ought to be considered with a lot of caution. This is because the defence would not have any opportunity to test the veracity of the said evidence under cross examination, there would be no way for the defence even to establish that the alleged statements were made by the persons alleged to have made them yet the evidence may be prejudicial to the accused person’s case.

In response Mr. Magoma submitted that the law was very clear. The witnesses were not Kenyans, they had left for their home countries. He urged the court to allow the investigating officer to produce their statements under Section 33 of the Evidence Act arguing that the family of the deceased also deserved justice and that by allowing the production of the said statement as evidence – justice would be guaranteed for the deceased’s family.

I have carefully considered the submissions by Mr. Magoma and Mr. Ndirangu.

The accused person was charged with murder contrary to Section 203 as read with 204 of the Penal Code. It was alleged that on 15<sup>th</sup> November 2011, at Kiandumba village Mucharage sub-location Nyeri South he murdered Kadogo Brukeria Mbavaswenichi.

The record shows that the problem with the witnesses began way back in 2013 and the matter has dragged all along till now.

Be that as it may – what does the law say?

The prosecution wishes to rely on Section 33 of the Evidence Act which has sections (a) to (h). The state does not specify which one they wish to rely on as each provides for a specific circumstance.

The section states: -

*Statements, written or oral or electronically recorded, 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 appear to the court unreasonable, are themselves admissible in the following cases—*

**(a) relating to cause of death**

*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. 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;*

**(b) made in the course of business**

*when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;*

**(c) against the interest of maker**

*when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;*

**(d) an opinion as to public right or custom**

*when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;*

**(e) relating to existence of relationship**

*when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;*

**(f) relating to family affairs**

*when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;*

**(g) relating to a transaction creating or asserting, etc., a custom**

*when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13(a);*

**(h) made by several persons and expressing feelings**

*when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.*

It has not been submitted that the alleged statements fall within any of the above categories. Since no authority was cited, I looked up at Kenya Law Reports.

In the Court of Appeal case of **Dickson Mbeya Marende alias Dickie & Another -vs- Republic (2017) eKLR** the High Court had allowed the statement of a deceased witness in the case for the prosecution under Section 33 (a) of the Evidence Act.

The witness had recorded the statement but passed away before testifying in court.

The Court of Appeal had this to say: -

***“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 purport to identify the killer of the deceased. We would therefore agree with appellants’ counsel’s submissions that the trial court ought not to have admitted it under Section 33(a) of the Evidence Act”.***

Clearly therefore the submissions by the state that the only ground for the request to allow the admission of the witness statements that the witnesses cannot be traced is not sufficient, and does not bring those statements into ambit of Section 33 (a) of Evidence Act.

In any event, one of the cardinal principles in our Constitution is the right to a fair hearing per Article 50 and to adduce and challenge evidence.

The accused person would definitely not have the opportunity to cross examine the witnesses or test the veracity of their evidence in the statements.

The state is of the view that admission of the statement will guarantee justice for the family of the deceased. Surely that cannot be the basis for the admission of evidence against the provisions of the law- the state was aware from the start it had foreign witnesses.

It had the obligation to have their evidence taken at the earliest to secure that evidence or to maintain sufficient contact with them to ensure that as state witnesses – they had nothing to fear so as to flee from the jurisdiction of the court. That failure/omission on the part of the state cannot now be visited on the accused person, who has been in custody all this time.

The application to have the witness statements produced is not tenable and it is disallowed.

**Dated, delivered and signed in open court at Nyeri this 7<sup>th</sup> Day of June 2018**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant: Atelu

Mr. Magoma for state

Accused person

Mr. H.K. Ndirangu for accused person