



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 106 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH WERU MATHENGE.....ACCUSED

RULING

The proceedings in this case are at the defence stage. The court has determined and ruled that the accused has a case to answer and has placed the accused on his defence. The accused is facing a murder charge brought under Section 203 as read with Section 204 of the Penal Code. The offence is alleged to have been committed on 4th November 2013 at Lenana Estate in Dagoretti District within Nairobi County. The victim is Rosemary Njoki Nyaga.

In the course of these proceedings and after the court delivered its ruling for a case to answer, Mr. Gachau counsel for the accused informed the court that the accused will testify under oath and will not be calling any witness. This means that the accused will be the only witness for the defence. Counsel further informed the court that the accused is not able to communicate verbally because he has lost his power of speech while in custody after suffering from meningitis contracted while he was in custody awaiting trial of this case. Given the challenges posed by this development it became necessary to call for a medical report to confirm this information and to guide this court in determining the procedure to be adopted in receiving the defence evidence. The said report, prepared by Dr. Eunice Mugweru of Gatundu District Hospital, was filed in court on 13th December 2016. I have read the report. It shows that the accused started complaining of ill health way back on 5th July 2014 while in Nairobi Remand. He has been attended to medically at the Nairobi Remand and Kenyatta National Hospital. After examining the accused, the doctor stated that **“He has expressive aphasia. He is unable to talk. However, he is able to follow instructions and express himself in writing.”** The doctor concluded that **“He has psychogenic conversion disorder with aphonia.”**

The definition of “aphonia” from the online Medical Dictionary is **“Loss of the voice resulting from disease, injury to the vocal cords, or various psychological causes, such as hysteria.”** The **Thesaurus** calls it **“a disorder of the vocal organs that results in the loss of voice”**. Simply understood then “aphonia” is speechlessness resulting from a disease or other causes.

With the information from the doctor that the accused has lost his power of speech, he is in my view a person with disability. The law, starting with **Article 260 of the Constitution** defines “disability” in the following manner:

“disability” includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a

substantial or long term effect on an individual's ability to carry out ordinary day-to-day activities.

The Persons with Disabilities Act (Act 14 of 2003) of Kenya defines "disability" to mean a **physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.**

The law under the **Evidence Act (Cap. 80)** recognizes a witness with speech disability as a competent witness. **Section 126 of the Evidence Act** provides that:

"(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open court.

(2) Evidence so given shall be deemed to be oral evidence."

Although it can be stated that the procedure for dealing with witnesses with disabilities like this one (speech) is not defined, case law shows that courts have handled witnesses with disabilities and have used appropriate methods of taking down their evidence. A case in point is **Hamisi s/o Salum v. R. (1959) EACA 217** in which a sister of a deaf and dumb witness acted as an interpreter to the witness who spoke through signs and noises. The sister who interpreted was sworn before she started to interpret. The reason for this is that is to lay the basis of her ability to interpret what the disabled witness is telling the court. **In David Muchiri Njue v Republic, HC Criminal Appeal No. 8 of 2014 (reported in [2016] eKLR)** the Judge was dealing with a case in which the complainant was mentally retarded and had to testify through her grandmother. The Judge stated as follows:

"It is equally important to point out that the complainant is mentally retarded. She was able to speak through E R (PW.2) who is her grandmother. PW.2 stated that: "*I am speaking on behalf of the complainant because she is mentally retarded and not able to testify.*" It therefore follows that P.W.2 should have been sworn as she was the witness through whom PW.1 testified."

Another procedure in facilitating special categories of persons with disabilities to participate in proceedings is the use of intermediaries. **Article 50 (7) of the Constitution of Kenya** states that a court: **"may allow an intermediary to assist a complainant or an accused person to communicate with the court."** The **Sexual Offences Act** defines an "intermediary" as **"a person authorized by the court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, Children's Officer or Social Worker."** In **M. M v Republic Criminal Appeal No. 41 of 2013 reported in [2014] eKLR**, the court recognized that the role of the intermediary is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the witness to the person asking the questions, and to explain such questions or answers, so far as necessary. The court in that case was of the view that the evidence presented in such a case is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary.

Courts can also admit statements or pre-recorded evidence. For instance under the **Sexual Offences Rules of the Court 2014** vulnerable witnesses can be examined by, *inter alia*, admitting in evidence a recorded statement made by the witness as evidence in chief or as part of the evidence in chief, or by holding a special sitting for the purpose of examining, in full or in part, the vulnerable witness.

The **Indian Evidence Act, 1972**, provides modifications on the taking down of such evidence and allows the court to use recorded statement taken with assistance of an interpreter or special educator. **Section 119 of the Indian Evidence Act** reads:

"A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made

in open court. Evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be video graphed.”

In the case of **State of Rajasthan v. Darshan Singh @ Darshan Lal Criminal Appeal No 870 of 2007** the Court was of the view that:

“..... When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath, on being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs not the interpretation of signs.

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In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods of head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

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Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.

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To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her; it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surroundings but should not have any interest in the case and he should be administered oath.”

I think the examples of other cases bearing some similarity with this case cited here have given this court some guidance on how to proceed. The case before me is unique. The accused person, being the subject under discussion, was not born with current speech disability nor did he come to court with that disability. It developed while awaiting this trial. Indeed the record shows that he was possessed of the ability to speak and after the charges were read out to him during the plea he verbally responded and denied the charges. He even addressed the court on 18th June 2014 when he informed the court that his advocate would attend court at a certain time of the day. However, he is able to express himself in writing and he can read.

After due consideration of the law, the cases cited and the circumstances of this case, it is my view that the underlying requirement in handling a case with a witness with disability is to adopt appropriate measures that adequately facilitate that witness to tender intelligible evidence without compromising the

accused person's fair trial.

I have considered the options of communication in situations where the witness cannot speak. It is my considered view that the option that best suits the situation this court finds itself in is one where the accused is able to convey himself through a combination of methods including the recording of his own statement in answer to pre-prepared questions in examination-in-chief by his counsel and in cross-examination by the prosecutor; by signs and gestures like nodding his head in affirmation to an question and shaking his head in negation to a questions put to him by his counsel in examination-in-chief or in cross-examination by the prosecutor. The condition of the accused is new as it developed while he was in custody. However if he is able to get an intermediary who does not have any interest in his case and who is able to understand his method of communication then this court will also allow the use of that intermediary.

To assist the court to administer the oath to the accused before he testifies, since he has opted to give a sworn statement of defence, this court shall prepare a special written oath which shall be administered by the Court Assistant by reading the same to the accused and the court shall require of the accused to give his affirmation of the oath by nodding his head. To enable this court to expeditiously take down the defence of the accused without interfering with the proceedings in other cases listed before this court, a special sitting of this court shall be scheduled for the defence in this case in order to accommodate taking of the evidence of the accused person.

In arriving at this conclusion, this court has taken into account the provisions of Articles 54 (d) of the Constitution which guarantees the rights of a person with speech disability to be facilitated to use Sign language, Braille or other appropriate means of communication and Article 50 (c) of the Constitution which guarantees an accused person the right to have adequate time and facilities to prepare his defence.

Orders shall issue accordingly.

Dated, signed and delivered this 17th day of January 2017.

S. N. Mutuku

Judge