



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO.168 OF 2016

PATRICK MUGAMBI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Patrick Mugambi was aggrieved by the Ruling of the trial court (J. Gandani (Mrs.) – SPM) made on 5th February 2016 in **Milimani Chief Magistrate’s Court Criminal Case No.56 of 2015 Republic –Vs- Patrick Mugambi** in which the trial court allowed the prosecution’s application which sought to compel the Applicant to supply the victim with the evidence that he intended to rely on in his defence before the commencement of the hearing of the defence’s case. At the material part of the Ruling, the trial court held thus:

“So far, the defence have (sic) indicated that they will call several witnesses. In terms of Section 9(1)(e), the victim is entitled to the defence evidence in advance. Though it has been claimed that the prosecution has no reciprocal right to disclose as the Constitution is silent on the same it is my finding that the Constitution is not the sole source of law with regard to criminal trials in Kenya as there is the Criminal Procedure Code, Evidence Act et al that are relevant. My interpretation of the Section 9(1)(e) that despite the silence of a reciprocal duty of disclosure by the defence in Constitution this statute now gives the victim through the prosecution a right to demand disclosure. I do not see any prejudice that the defence will suffer from the disclosure as in the same way they get the evidence of the prosecution in advance so are able to test the veracity and credibility of the prosecution witnesses testimony after preparing well, then a fair trial as envisaged under Article 50 would dictate that the prosecution/victim gets their evidence in advance to prepare for the case. In conclusion, I allow the application by the prosecution that the defence do supply the victim here through the prosecutor the following

- names of one (sic) witnesses the intent (sic) to call*
- statement detailing the evidence the witnesses will testify on.”*

The Applicant contends that if it were to comply with the order of the court, then it would be in breach of the Applicant’s constitutionally guaranteed right to be presumed innocent throughout the trial until proven guilty. In that regard, the Applicant relied on **Article 50(2)(a)** of the **Constitution**. The Applicant further argued that the **Constitution** protects him from compulsion to adduce evidence against himself. He relied on **Article 50 (2)(i)** and **(j)** of the **Constitution** and **Section 127(2)** of the **Evidence Act**. The Applicant was aggrieved that the Ruling did not take into consideration that the Applicant, as an accused, had

certain rights guaranteed by the **Constitution** which includes the right to fair trial which right protects to a larger extent an accused person as compared to the right of the victim. It was on these grounds and others that appear in the application that the Applicant sought the intervention of this court under **Section 362** of the **Criminal Procedure Code** to call to this court the particular Ruling for the purposes of examining its legality and propriety and thereby quash the same.

During the hearing of the application, this court heard the rival submission made by Mr. Nyaribo for the Applicant and Mr. Ondimu for the State. Mr. Nyaribo essentially reiterated the contents of the application for revision. Mr. Ondimu opposed the application. He submitted that the order issued by the trial court compelling the Applicant to supply evidence to the victim was not unconstitutional neither did it breach the Applicant's right to fair trial. He submitted that under **Section 9(1)(e)** of the **Victim Protection Act** the Applicant was required to provide to the victim access to the evidence that he will rely on during his defence unless the Applicant establish that he would be prejudiced or that his right to fair trial will be infringed. In the present application, the Applicant had not placed any evidence on record to support his contention that he would be prejudiced if he disclosed to the victim the evidence that he seeks to rely on in his defence. He urged the court to disallow the application.

This court has carefully considered this application for revision. **Article 50(2)** of the **Constitution** protects the right of an accused person to fair trial. That right includes the right to be presumed innocent until the contrary is proved (a); the right to remain silent, and not testify during the proceedings (i); the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence (j); the right to adduce and challenge evidence (k); the right not to give self-incriminating evidence. **Article 50(9)** of the **Constitution** required Parliament to enact legislation to provide for the protection, rights and welfare of victims of offences. Pursuant to that command, Parliament enacted the **Victim Protection Act 2014**. **Section 3** of the Act provides as follows:

“The objects and purposes of this Act are to-

(a) recognize and give effect to the rights of victims of crime;

(b) protect the dignity of victims through-

(i) provision of better information, support services, reparations and compensation from the offender, in accordance with this Act;

(ii) establishment of programs to assist vulnerable victims;

(iii) supporting reconciliation in appropriate cases by means of a restorative justice response;

(iv) establishment of programmes to prevent victimization by all levels of government;

(v) preventing re-victimization in the justice process; and

(c) promote co-operation between all government departments and other organizations and agencies involved in working with victims of crime.”

Section 9(1) of the Act states as follows:

“A victim has a right to-

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

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

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.”

That this court has jurisdiction to hear and determine the issues raised in this application is not in doubt. **Article 165(6) and (7) of the Constitution** grants this court supervisory jurisdiction over subordinate courts and for that purpose it may call the record of the proceedings before that court and make any order or give any direction it considers appropriate to ensure the fair administration of justice. **Section 362 of the Criminal Procedure Code** adds flesh to this constitutional and imperative. It grants this court powers to call for and examine the record of any criminal proceedings before a subordinate court for the purposes of *“satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such subordinate court.”*

The Applicant complained that he is being asked to provide evidence in advance that he will rely on in his defence, including the list of the witnesses. The Applicant submits that his right to fair trial as guaranteed by the **Constitution** will be infringed if he is compelled to do so. The Respondent, not surprisingly, is of a contrary view. This court upon evaluation of the rival arguments made in this application for revision is of the considered view that the Applicant has a case when he complains that his right to fair trial will be breached if he is compelled to provide evidence in advance that he will rely on in his defence to the victim. **Article 50(2)(i) and (l) of the Constitution** is clear in that regard. The Applicant has the constitutional right to remain silent and refuse to give self-incriminating evidence during the trial. That right, as it were, is cast in stone. A victim cannot, under **Section 9(1) of the Victim Protection Act** demand that he or she be placed in the same position as the accused in a criminal trial.

The plain reading of **Article 50(2)** of the **Constitution** clearly shows that it is the accused’s right to fair trial in criminal proceedings that is being protected. Where the exercise of that right to fair trial by accused conflicts with that of the victim, then the right of the accused shall take precedence or shall prevail. In my considered opinion, **Section 9(1)(e) of the Victim Protection Act** cannot be read or considered disjunctive to the other subsections of **Section 9(1)**. The side note to **Section 9** provides that **Section 9** deals with rights of victims *“during the trial process”*. This court is of the view that the trial court erred when it elevated the rights of a victim during the criminal trial process to that of equal status to the accused person. The fact that the **Constitution** under **Article 50(2)** does not specifically recognize the rights of victims in the trial process, in the considered view of this court, is deliberate. It is a clear indication that the rights of an accused person to fair trial during the criminal trial process assumes primacy because of the likelihood that his right to fair trial may most likely than not be infringed if it is not specifically protected. The silence in recognition of a victim’s right in the **Constitution** in the same trial process clearly points to the fact that the right to fair trial of an accused person in a criminal trial is superior to that of the victim. That is why the right to fair trial of an accused person is provided in the **Constitution** while that of the victim is provided by statute.

This court therefore agrees with the Applicant that as an accused person, he cannot be compelled to disclose to the victim or for that matter the prosecution, the evidence that he may or may not adduce in his defence. This would be in breach of his constitutionally guaranteed right to fair trial as provided by **Article 50(2)** of the **Constitution**. For the above reasons, the order issued by the trial court on 5th February 2016 is hereby called to this court by an order of revision under **Section 362** of the **Criminal Procedure Code** and the same is hereby set aside. It is substituted by an order of this court dismissing the victim’s application to be supplied in advance with the evidence that the Applicant may or may not adduce during his defence. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2017

L. KIMARU

JUDGE