



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL(MURDER) CASE NO. 38 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BENSON GICHUKI.....1ST ACCUSED

NELSON SONGMAY.....2ND ACCUSED

RULING

1. During the testimony of pw8 Number 232119 Assistant Superintendent of police, Paul Sangok, the Prosecution has sought to produce in evidence reports of identification parades conducted at Butere Police station on 26.03.2013, according to the evidence PW6, George Maulid Oketi was the identifying witness.

2. The defence objects to the production of the said reports on grounds that;

- a. This is the very first time during the hearing of this case that the issue of identification parades is coming up;
- b. Copies of the said reports were never supplied to the defence when the statements and post mortem report were being supplied personally to defence counsel.
- c. Production of such documents at this moment in the history of this case will fly in the face of the provisions of article 50 of the Constitution of Kenya, 2010. Counsel made special mention of article 50(6) but on cross checking the Constitution, this court finds that the sub- article is not applicable to the issue before us now
- d. Admitting such evidence would amount to an ambush of the defence by the state.

3. In reply Mr. Ng'etich for the state submits that since PW8 talked of the ID parades at the second last paragraph of his statement to police, a copy of which the defence was supplied with, the defence ought to have been aware and anticipated that evidence on the ID parade would be given. He also submits that if the defence was not served then they should have made a complaint to that effect and, perhaps, made an application to be supplied. Mr. Ng'etich disagreed with defence counsel that the ID Parade reports were fished out of PW8s pocket and not removed from the police file.

4. Article 50 of the Constitution of Kenya 2010 guarantees every accused person a fair hearing which includes inter alia, “to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.” In the instant case, Mr. Ng’etich avers that since he was not the officer handling the matter when statements were supplied to the defence, he could not say whether or not copies of the ID reports were supplied to the defence. Mr. Shifwoka submits the same were not supplied and contends that if the ID reports were to be introduced in evidence and produced as exhibits, the accused person would be gravely prejudiced.

5. After carefully considering all the above material, I have no hesitation in making, a finding that the evidence sought to be adduced through the ID parade reports is an ambush to the defence. The said evidence was not given to the defence in advance so as to prepare to challenge the same. This is clearly in contravention of article 50(2)(i) and (c). Article 50(2) (c) provides that an accused person has the right to have adequate time and facilities to prepare a defence.

6. In this regard, I rely on the decision by Mativo J (which is persuasive) in the case of **John Ndungu Kagiri – vs- Republic [2016] eKLR** in which the learned Judge cited the case of **Thomas Patrick Gilbert Cholmondeley – vs – Republic[2005] eKLR** in which the court of appeal expressed itself thus on the right to fair trial;-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed underour Constitution. The prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify and the trial, Copies of documentary exhibits to be produced at the trial and such like items.” Authorities are now legion that the sole purpose for ensuring compliance with article 50(2)(j) is to allow an accused person sufficient time and facilities to prepare his defence. It is the duty of the state to provide these documents and items. It is not the duty of the defence to point out that such and such a statement or document has not been provided. The case for the prosecution belongs to the state and not the defence. For this court to interpret the provisions of article 50 of the Constitution would be to cause a miscarriage of justice.

7. In the Indian Supreme court case of **Natasha Singh – vs – CB [2013] 5 SCC 741, also cited by Mativo J in the Joseph Ndungu Kagiri** case, the supreme court of India held as follows;-

“Fair trial is the main object of Criminal Procedure and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore fair trial includes the grant of fair and proper opportunities to the person concerned and the same must be ensured as this is a constitutional as well as a human right. Thus, under no circumstances can a person’s right to a fair trial be jeopardized.”

8. In the instant case, the prosecution has had more than adequate time to put its evidence together and to avail copies of all that evidence to the defence, regardless of whether such evidence weakened or strengthened its case, and whether or not the defence makes a specific request for disclosure of such evidence.

9. In light of the above, I uphold the objection raised by the defence and order that the ID Parade reports concerning the parades conducted at Butere Police Station by PW8 on 26.03.2013 shall not be produced in evidence.

Orders accordingly,

Ruling delivered dated and signed in open court this...14th day ofFebruary2017

RUTH N. SITATI

JUDGE

In the presence;

Mr. Ng'etich.....for state

Mr. Shifwokafor both accused persons.

Mr. Polycap – Court Assistant.