



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 28 OF 2015

FORMERLY MERU HCCRA NO. 10 OF 2014

FREDRICK KIRIMI MUGIRI.....APPELLANT

- VERSUS -

REPUBLIC.....PROSECUTOR

RULING

1. On 26th February, 2014 the state laid before this court information to the effect that on 15th November, 2012 at Ngotika sub-location of Tharaka Nithi County, Fredrick Kirimi Mugiri (“the Accused”) murdered Edward Kiberenge Stephen. The state presented seven (7) witnesses to prove the information then closed its case. On 22nd June, 2016, upon the court ruling that the accused had a case to answer, Mr. Ongige learned counsel for the state applied that the defence do supply the prosecution with defence witness statements. Mr Kijaru for the accused applied to be given more time to respond. The court directed that the application be argued on 18th July, 2016. Both counsels filed written submission which they ably highlighted on the said date.

2. Mr Ongige learned counsel for the prosecution submitted that, whilst Articles 49 and 50 of the Constitution of Kenya gives an accused various rights including one of remaining silent, the accused in this case had exercised his right and indicated voluntarily that he will adduce evidence; that Article 50 (1) of the Constitution provides for the right to a fair hearing which should apply both to the accused and complainant; that sub-article 9 of that article commands Parliament to enact a law providing for the rights of victims; that the said law was the Victim Protection Act No. 17 of 2014 which provides that a victim is entitled to be informed in advance the evidence the prosecution and the defence intends to rely on and have access thereto. Further, under Article 35 of the Constitution every person has the right to information to exercise a right. Counsel further relied on the case of **Republic V. IP. Veronicah Gitari and Anor MSA H.C Cr Case No. 41 of 2014 (VR)** wherein such an order was made. Counsel urged that the application be allowed.

3. Mr. Kijaru for the accused opposed the application. He submitted that both under Article 49 and 50 of Constitution, as well as section 311 of the Criminal Procedure Code (“C.P.C”), an accused has the right to remain silent and offer no evidence; that the Constitution specifically compels the prosecution to supply the defence with the evidence it will rely on at a criminal trial; that failure on the part of an accused to supply the prosecution with his evidence before hand cannot amount to unfair trial under Article 50 of the Constitution. Mr Kijaru further submitted that the principles in Civil Law where both parties are compelled by law to make disclosure of their cases is not applicable in Criminal Law. Counsel relied on the cases of **George Ngodhe Juma & others .v. Attorney General [2003] eKLR** and **Thomas Patrick Gilbert Cholmendeley .v. Republic [2008] eKLR** in support of his submissions. He urged that the

application be declined.

4. The court has carefully considered the submissions of counsel and the law. The issue before court is the competing interest of both the accused and the prosecution in a criminal trial. To put it in perspective, is the prosecution entitled to the same rights as those given to an accused in a criminal trial? Once an accused decides to defend himself by offering evidence, is he bound to disclose to the prosecution before hand the defence he is going to rely on? In order to answer these questions, it is important to examine the provisions of the law applicable which the parties relied on. The rights of an accused person are exhaustively enumerated, inter alia, in Article 50 (2) of the Constitution. Two of these rights are, the right to remain silent and not to testify in a criminal proceeding against him and the right to be informed of the evidence of the prosecution in advance and to have reasonable access thereto. To my mind, these two rights have their foundation on two principles; firstly the cardinal principal of the law of evidence that he who alleges **MUST** prove and secondly, the criminal law principle that an accused person is presumed to be innocent until proved guilty. It is the state which in its quest for self preservation that causes the arrest and subsequent prosecution of an individual. The primary purpose of a criminal prosecution is not to obtain a conviction, but to lay before a court of law all the relevant material that is considered to be credible to help the court ascertain whether or not a crime has been committed. Connected to this primary purpose of the criminal prosecution, is the quest to ensure that, no innocent individual loses his liberty or suffers the pain of punishment. It is for this reason that at all stages of a criminal trial, an accused is always presumed to be innocent until proved guilty.

5. Having so stated, will it amount to unfair trial if the prosecution is denied the same rights of disclosure granted to accused? As already stated, the rights of an accused person have been provided for positively by the law. Those rights in converse amount to obligations bestowed upon the state represented by the prosecution. These are expressed in positive terms in Article 50 of the Constitution and not by implication. To the contrary, no such rights have been provided for in favour of the prosecution. While considering the obligation of the prosecution to disclose its evidence to an accused under the 1969 Constitution in the case of **George Ngodhe Juma & others .v. Attorney General (supra)** a two Judge bench of this court held, inter alia, that:-

“The fruits of the investigation which are in the possession of the prosecution are not the property of the prosecution for use in securing a conviction: it is the property of the public to be used to ensure that justice is done. The public pays for the state to carry out the investigations. The accused, too, as a tax payer meets the expenses of the police investigations. In contrast, the accused has no obligation to assist the prosecution and is entitled to assume a purely adversarial rule towards the prosecution. He is presumed to be innocent in the first place. Why should he help in being investigated? The absence of a duty to disclose on his part can, therefore be justified as being consistent with his role and presumption of innocence.”

6. In the case of **Thomas Patrick Gilbert Cholmondeley .v. Republic (supra)** the Court of Appeal in overturning a decision of the High Court that had directed an accused to disclose his defence stated:-

“We would repeat these sentiments here to emphacise the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall lie and graze peaceably together with the lamb. But our recent history is too fresh in our minds and we in the courts must try to keep the lion away from the lamb. In other words, there is not and can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and state. No statute gives the state such privileges, and the Constitution wisely in our view does not give the prosecutors such powers.”

7. The two cases were decided under the auspices of the 1969 Constitution that was replaced by the 2010

Constitution. The rights of an individual in the said 1969 Constitution were provided for in negative terms. As held by the court of Appeal in the above case, if under that Constitution, the courts were prepared to keep the lion (state) at bay and restrain it from encroaching on the pasture (rights) of the lamb (individual) what should the courts do under the 2010 Constitution where the pasture (rights) of the lamb is declared in positive terms? I think the courts will vigorously cage and tether the lion as far away as possible and ensure that the pasture (rights) of the lamb (individual) is secure. The immediate past experience has shown that if given a chance, the state would not only trample upon the rights of the individual, but would do away with them altogether. Whilst the 2010 Constitution positively decrees the rights of the accused, and therefore the obligations of the state, there is no reciprocal provisions therein. The state has its own rights to arrest and prosecute the individual, once it suspects the commission of a crime but it must not expect to be accorded privileges accorded to an accused person which Kenyans did not find fit to accord it under the Constitution or any other law.

8. The prosecution relied on the case of **Republic .v. IP Veronicah Gitahi & Anor (supra)** which was decided under the 2010 Constitution. In that case which was decided in 2015, the court held that under section 9 of the Victims Protection Act No. 17 of 2014 and Article 35 (1) of the Constitution, the prosecution and the victims counsel were entitled to copies of witness statements from the defence. My view is that, the said decision is not applicable in this case. In that case, the court found that it had allowed the family of the victim to appear and be represented in the proceedings. In our present case, the victim has not been represented.

9. In any event, a serious Constitutional question arises as to whether the state can, through a statute, seek to obtain that which the Constitution has not given it. A further constitutional question arises as to whether, the Constitutional protection of an accused person to remain silent in a criminal trial can be superseded by section 19 of the said Act. In any event, I doubt whether Parliament was authorized under Article 50(9) of the Constitution to enact a law that would erode and water down the rights of an accused as set out in articles 49 and 50 of the Constitution. A further question would arise as to whether the rights and protection as provided for in Article 50 (9) of the Constitution, were to apply to the criminal trial of an accused or a trial for compensation or reparation. Since the application before me was not urged by or for and/or on behalf of the victim in this case, I restrain myself from venturing into considering the questions I have raised above *vis avis* the provisions of the said Act.

10. However, my view is and I so hold that, neither under the Constitution nor under the Victims Protection Act No. 17 of 2014 is the state or the prosecution entitled to disclosure of evidence of the defence before hand. Both the Constitution and the law are to be interpreted broadly to promote and protect the rights of an individual and not otherwise.

11. Accordingly, I find that the application is without merit and the same is hereby declined.

Dated and delivered at Chuka on 1st September, 2016

A.MABEYA

JUDGE