



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 78 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**TITUS NGAMAU MUSILA KATITU .....ACCUSED**

**RULING**

**INTRODUCTION**

1. In the course of this trial and in specific on 25<sup>th</sup> May, 2016 Miss Mwaniki for the State informed the court after the evidence of **PW15 PETRONILA KAVETA ANDALO** had been taken that she was remaining with only three short witnesses to call before closing the prosecution case, upon which Miss Gikonyo Advocate watching brief for the family of the deceased informed the court that there were two members of the family of the deceased namely **PURITY WANJIKU MWANGI** mother and **STELLA W. MWANGI** sister respectively who are or were allegedly based in Norway and wanted to testify through video link.

2. Miss Mwaniki for the State responded that the said witnesses were not eye witnesses and could only testify on the identification of the body. She brought to the court's attention the attendant cost of the video link which submissions were supported by Mr. Ombete for the Accused person who submitted that no foundation had been laid on why the said witnesses could not avail themselves to testify in court.

3. Since the State had not closed its case, I reserved giving directions thereon to the close of the prosecution case and on 11<sup>th</sup> October, 2016 the prosecution called as their last witness PW18 the Investigating Officer after which Miss Mwaniki submitted that that was the close of the prosecution case and further stated that the two witnesses who were allegedly outside the country should have come forward so as to be placed under witness protection to enable them testify.

**ORAL APPLICATION**

4. Miss Gikonyo for the family of the victim then renewed her oral application for an order that the said two witnesses being ready and willing to testify be allowed to do so through video link since they feared for their lives as one of their sons had allegedly been shot dead by the accused after the death of the victim herein.

5. Mr. Ombete for the defence submitted that those witnesses had all along known that their alleged fears were not founded since they had not applied for witness protection. He submitted that the victim's family

can only be heard on the issue of bail and sentencing.

6. Miss Mwaniki for the State in reply submitted that the said witnesses had all along been informed of the hearing dates and the consequences of failure to attend. She submitted further that they should have availed themselves to be placed under witness protection where the Agency would have confirmed whether they were vulnerable. She submitted that the nature of their intended evidence had been covered by that of PW15 and that she was unable to submit their recorded statement in court since they did not fall within Section 33 of the Evidence Act. She submitted that the cost of securing and establishing video link had not been factored in the prosecution budget and that the gadgets to enable the link were not available. It was her contention that in the interest of justice the prosecution case ought to come to an end at this stage.

### **ANALYSIS AND DETERMINATION**

7. Whereas Miss Gikonyo did not lay the foundation upon which her oral application was based, from the tenor thereof I formed the opinion that it was based largely on the following provisions of Victim Protection Act, 2014:-

(i) Section 4(2) (b) which provides that subject to subsection (1) a court, Administrative Authority or person performing functions under this Act shall ensure that

(b) Every victim is so far as possible given an opportunity to be heard and respond before any decision affecting him or her is taken.

(k) The victim is not discriminated.

(l) The victim is protected from victimization of any sort.

(ii) Section 5(3) no victim shall be denied the rights or welfare of victim under this Act by reason only **that similar protection measures are available under any other written law.**(Emphasis added)

(iii) Section 9(2) where the personal interest of a victim have been affected, the court shall:-

(a) Permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court.

(b) Ensure that the victim's views and concerns are presented in a manner which is not

(i) Prejudicial to the right of accused or

(ii) Inconsistent with a fair and impartial trial.

3. The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

8. I have taken the liberty to extensively quote the said sections of the law for clarity purposes noting that this is part of the legislations enacted by parliament to facilitate the right to fair hearing under Article 50(a) of the Constitution of Kenya 2010 for Protection of Rights and Welfare of victims of offences.

9. From the submissions before me I have identified the following issues for determination:-

a) Whether the rights of the victim can limit the DPP's control of prosecution including to stop the same for closing its case before they testify.

b) Whether the court can direct the OPDD to provide video link through which the victim's family

can testify.

c) Whether the victim's family have made up a case for grant of orders sought.

10. The Constitution of Kenya 2010 under Article 157 establishes the Office of the Director of Public Prosecutions who under subsection (6) thereof have the following powers and functions

*"157(6). The Director of Public Prosecution shall exercise state policies of prosecution and may:-*

*a) Institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed.*

*b) Take over and continue any criminal proceedings commenced in any court.....*

*c) Subject to clause (7) and (8) discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b).....*

*(8) The DPP may not discontinue prosecution without the permission of the court.....*

*(10) The DPP shall not require the consent of any person or authority for commencement of criminal proceedings and **in exercise of his/her powers or function shall not be under the directions or control of any person or authority** (emphasis added)*

*(11) In exercising the powers conferred by this Article, the DPP shall have regard to the public interest, **the interest of the administration of justice and need to prevent and avoid abuse of the legal process.**" (Emphasis added)*

11. It is clear from a reading of the above section of the Constitution that The DPP has the powers to institute and continue prosecutions which means that the DPP which shall determine the nature of evidence to bring before the court including the number of witnesses to call since this constitutional provisions is to enable the DPP to carry out its mandate without interference from any person or organ and can only be limited by the court if it goes against the express provisions of Article 157(11).

12. The rights and interest of the victims in a proceeding of criminal nature under the provisions of the victim protections Act 2014 stated herein are only limited to situations where the court is making determination in issue that affect them directly and has been stated well by Justice Abida Ali in the case of **REPUBLIC v JOSEPH LENTRIX WASWA Bungoma High Court Criminal Case No. 54 of 2014** thus:-

*"(24) As indicated earlier the subject is moot and there are conflicting High Court decisions on the subject as seen from authorities cited.*

*(25) **In I.P Veronica Gitahi & P.C Issa Mzee Vs Republic Criminal Appeal No. 23 of 2016 the Court of Appeal sitting in Mombasa considered the subject and the decision of the trial court with approval where Muya J had stated;***

*'... will allow interventions only on matters of law at appropriate stages of the proceedings where and if necessary ... I will also allow submissions as need be. The victim while granted reasonable access the prosecution file is not allowed (sic) to add any point of fact or any evidence. In the present case file (sic) or to question witnesses.'*

*(26) The Court of Appeal did not interfere with the decision of the trial court and went further to consider the effects of the provisions of Article 2 (5), 50(7) and 9 of the Constitution 2010 and had this to say;*

***‘Articles 2 (5) and 50 (7) and (9) of the Constitution, 2010 heralded a new dawn apart from enjoining the courts to apply general rules of international law, the Constitution mandates the courts, in the interest of Justice to allow an intermediary to assist a complainant (or an accused) to communicate with the court, ...’***

***(28) The rationale behind the emerging jurisprudence in line with the provision of the Constitution 2010 is well captured In the case of Sathyavani Ponrani Vs. Samuel Raj(supra) The issue before court was whether a victim is entitled to be heard and take part in a criminal trial or not. The Court considered the role of the prosecutor and that of the victim at length and made the following observations:-***

***‘The public prosecution conducts the prosecution whereas a victim ventilates his grievance. A public prosecutor conducts the case with a sense of detachment whereas the victim is attached to the case. A decision made in a case does not impact a public prosecutor which is not the case with the victim who is the affected party.’***

**13.** It is clear to my mind that the Victims Protection Act only allows the victim to give their views and concerns at the time of the release of an accused person on bond, during plea bargain and sentencing but not as to whether they must testify in the trial where the prosecution does not see any evidential value in their testimony. I therefore find and hold that there is no material placed before the court to enable me hold that if the State is allowed to close its case at this stage would amount to violation of the victim’s rights to be heard under the provisions of Victim’s Protection Act or the constitutional mandate of the DPP under Article 157(ii).

**14.** Whereas Section 13(1) of Victim Protection Act gives the complainant the right to adduce evidence that has been left out, the same is subject to the provision of Evidence Act. It is not for the court to at this stage evaluate the evidence of the intended witnesses having taken into account the submissions by Miss Mwaniki that they were not eye witnesses and therefore the omissions of their evidence will not prejudice the prosecution case in any manner. It must also be balance with the accused person’s right to speedy and fair trial.

**15.** The final issue which I wish to address is whether the court can allow use of video link to take the evidence of the victim’s family? This issue has been answered by Ochieng J in Criminal Revision No. 88 of 2011 NAIROBI where the application was made by the prosecution which was a revision from a decision of the magistrate to exclude use of video link as follows:-

***“In contrast the issue of admissibility as determined by the trial court goes to the question of whether or not the witnesses can give evidence through video conferencing.***

***If as the applicant believes the evidence of the two witnesses was crucial to the prosecution it would mean that the prosecution would fail to prove the case against the accused if the evidence of the two witnesses was excluded.***

***..... if the prosecution was forced to close its case without calling the two witnesses that would seriously prejudice the public interest having all evidence laid before the court, so as to enable the court arrive at the just decision.***

***On the other end if the two witnesses are allowed to give their evidence the respondent would not be prejudiced at all because he would still retain his right to cross-examine the said witnesses.***

***The receipt of the evidence through video conferencing would not, of itself, necessarily result in the conviction of the (applicant) (sic) the court may still end up acquitting him.”***

**16.** I am in total agreement with the holding by Ochieng J herein and state further that if the family of the victim had laid a basis as to why their evidence is fundamental to the end of justice herein or if this application had been made by the prosecution, the court would have ordered that they give their evidence

through video-link the cost thereon notwithstanding as we must be ready to pay a price for justice.

17. However having taken into account the submission by Miss Mwaniki who is in charge of the prosecution herein and who is best placed to decide on the evidential value of the intended testimony I hereby decline to allow the victim's family members to testify vide video-link and unless their evidence is required by the prosecution to prove its case, the prosecution is hereby allowed to close its case. This does not limit the victim's family rights to file submissions and or affidavits and or to bring in additional evidence under the provision of Section 13 of the Victims Protections Act if they fall under the definition of a complainant under the said Act.

DATED, SIGNED and DELIVERED at Nairobi this 3<sup>rd</sup> day of November, 2016.

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of :-**

*Mr. Mwenda for Mwaniki for the State*

*Miss Kali for Ombeta the Accused*

*Miss Gikonyo for Mbugua for the family of the deceased*

*Accused present*

*Court clerk Tabitha*