



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 132 OF 2016

BETWEEN

JOSEPH LENDRIX WASWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Bungoma, (Ali-Aroni, J.) dated 17th August, 2016

in

H.C.CR.C. NO. 34 OF 2014)

JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the High Court of Kenya (**Ali-Aroni, J.**) dated 17th August, 2017, in the High Court at Bungoma, **Criminal Case No. 34 of 2014**, permitting the counsel engaged by the victim of crime to participate in the trial of the appellant on specified terms.

[2] The appellant is charged in the said criminal case with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge allege that on 30th August, 2013, at Kimilili sub-location, the appellant murdered **Mitch Barasa Kibiti**. The deceased was a student aged about 22 years. The appellant pleaded not guilty to the offence and was released on bail pending trial.

The appellant is represented at the trial by three counsel. The father of the deceased, **David Kibiti Barasa** and his family were also represented by two counsel at the trial.

[3] After nine witnesses for the prosecution had testified, **George Marunga**, learned counsel for the family of the deceased made an oral application for leave to actively participate in the proceedings. The trial judge directed that written submissions be filed by the respective counsel on the oral application which directive was complied with. In his submission at the trial, Mr. Murunga relied on **Articles 2 (5); 25 (c), 50 (1), 50 (7), 50 (9)** of the Constitution; provisions of the Victim Protection Act, 2014 (VPA) and case law.

In summary he submitted, *inter alia*, that: prior to the promulgation of the Constitution of Kenya, 2010, the law was silent on the participation of a complainant, victim or his counsel; the Constitution now recognizes the rights of victims of offences and Parliament enacted the VPA to give effect to the provisions of **Article 50 (9)**; the VPA gives a guide on how a victim, or complainant can participate in criminal proceedings; this ensures that the parties are accorded a fair hearing and that all the views of the affected parties to a trial are taken into account before a decision is made by the court.

[4] **Mr. Amollo**, the appellant's counsel submitted at the trial, among other things, that; the role of a counsel watching brief in a criminal trial is limited to just observing the proceedings or addressing the court through the prosecutor except in exceptional circumstances; **sections 213, 306 and 311** of the Criminal Procedure Code bars a counsel watching brief from actively participating in the trial process; the criminal justice system is focused upon the rights of an accused person and the victim's rights are not the primary focus.

[5] **Mr. Jesse Kamau**, the prosecuting counsel on behalf of the Director of Public Prosecutions (*DPP*) submitted at the trial that under **Article 157** of the Constitution, the DPP is not under the direction and control of any person; a counsel watching brief has no right of audience and can only actively participate in a public trial with the permission of DPP or the court, under **section 9 (2)** of the VPA, the views and concerns of a victim can be presented at the victim's impact assessment stage and that a watching-brief counsel can only be an assistant to the public prosecutor to liaise with him in a gentleman's agreement on how best to bring out the truth.

[6] The learned judge considered the relevant provisions of the Constitution; the VPA, the case law including the Indian case of **Sathyavani v. Samuel Raji (CRL.OP (MD) No. 5474 of 2010)**, hereafter referred as **Sathyavani's case** and made findings thus:-

“29. From the cited Articles of the Constitution, 2010, provisions of the Victim Protection Act, 2014, and cases cited from within and outside, the law has shifted the traditional parameters of a victim in a criminal case and therefore the arguments advanced by the defence are certainly out of place and would if adopted by court, be contrary to the provisions of the Constitution and the Victim Protection Act, and by all means against progressive jurisprudence. The victims counsel can no longer be considered a passive observer.

30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of Sathyavani and as advocated by counsel for the family herein as the Victim Protection Act, 2014 gives the parameters of involvement during trial to include; the victims views and concerns at various stages as the court may determine either directly by victim or his/her representative; at plea bargaining; at the level of sentencing or where a decision is likely to affect the right of the victim and not throughout the trial and parallel to the prosecution.”

Having made those findings, the learned judge allowed the participation of the counsel watching brief limited thus:

“31 i on submission at the close of the prosecution case whether

there is a case to answer.

ii Final submission should the accused be put on his defence.

iii On points of law should such arise in the course of trial.

iv Upon application at any stage of the trial for the consideration

by the court.”

[7] By a Ruling dated 9th March, 2017 in **Kisumu Civil Application No. 6 of 2016**, this Court, differently constituted, allowed the appellant's application for stay of the criminal proceedings pending the determination of the intended appeal. The record of appeal in the present appeal was subsequently filed.

[8] The appeal is based on nine grounds which were argued together. The learned judge is faulted for, *inter alia*, failing to apply the words “protection”, “rights”, “welfare” in **Article 50 (9)** in their proper perspectives, introducing a non-existent right and unrecognized fundamental right and freedom; elevating position of a counsel watching brief to a status equal to the constitutional office of DPP; acting in ignorance or in subversion of Article 157 and thereby amending Article 157 (6); by concluding that powers of DPP are to be exercised collegially with counsel watching-brief, and, in failing to acknowledge that section 329 A -329 E of Criminal Procedure Code wholly and completely address the rights of a victim in the context of a criminal trial.

[9] **Mr. Amollo**, learned counsel for the appellant contended, among other things, that, the learned judge opened the door widely for the victim to take over the trial; the terms of order (ii), (iii) and (iv) made by the learned judge are not provided for in the law and order No. (iv) opened a Pandora's box; that the Constitution does not donate any right to a victim and the victim is given a right at the stage of plea bargaining and to make a victim assessment statement. **Edwin Sifuna** also for the appellant added that the orders of the learned judge were open ended; that the orders were prejudicial to the appellant as he would face two prosecutors and affect right to speedy trial; there is a disconnect between findings of the learned judge at para. 30 and orders made at para. 31 and that the views and concerns of a victim do not include the right of victim's counsel to cross-examine witnesses.

[10] **Mr. Ketoo**, prosecution counsel for the DPP supported the submissions of the appellant's counsel and added that the law does not say at what stage personal interest of the victim should be addressed and that a victim can only address the court at the stage of plea bargaining, bail hearing and sentencing.

[11] On his part, Murunga for the family of the deceased, contended that: the concerns of victims of offences have to be addressed at any stage of the proceedings; the rights are determined on case-to-case basis; counsel for a victim has even right to cross-examine witnesses; VPA does not usurp the powers of DPP under Article 157 (6) and compliments the powers of the DPP; according to **Sathyavani's case**, a court should be careful that an innocent person is not convicted as well as that a guilty person is not allowed to escape and that the purpose of the victim's application in the High Court was that in the event of any issue either of law or fact that affects the victim arising, the victim would be allowed to participate.

[12] The appeal in essence concerns the rights of a victim of an offence during the trial process and in particular whether or not the deceased's father and family are entitled to the rights that were granted by the trial judge. The determination of the victim's rights necessarily require the interpretation of the relevant provisions of the Constitution and of the Victim Protection Act – No. 17 of 2014.

Article 50 of the Constitution deals with the right to fair hearing.

Article 50 (1) provides: -

“Every person has the right to have any dispute that can be resolved by the application of law, decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Article 50 (2) provides that: -

“Every accused person has the right to a fair trial.”

The elements of a fair trial are stipulated in that Clause.

Article 50 (7) – gives a court power to allow an intermediary to assist a complainant or an accused person to communicate with the court.

Lastly, Article 50 (9) provides: -

“Parliament shall enact legislation providing for the protection, rights and welfare of the victims of offences.”

[13] Thus, the VPA was enacted pursuant to Article 50 (9). In section 2, the VPA defined “rights of a victim” thus: -

“Means any rights to which a victim is entitled under the Constitution, this Act or any other written law”

As stipulated in section 39 of the VPA, one of the objects of the Act is to recognize and give effect to the rights of victims of crime. The principles of the Act are set out in section 4.

One of the principles stated in section 4 (1) is that a court or administrative body or persons performing any function under the Act:

“Shall respect and uphold the values and principles in the Constitution, and in particular, be guided by the provisions of Article 10, 27 (4), 47, 48 and 49 of the Constitution.”

Section 2 (b) thereof provides that the bodies specified therein including a court should ensure that:

“Every victim is as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken.”

[14] Section 9 of the VPA stipulates the rights of a victim during the trial process. Section 9 (2) states that a victim has a right:

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

(b) have the trial begin and concluded 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.”

Further, section 9 (2) provides: -

“where the personal interests of a victim have been affected, the court shall –

(a) Permit the victims views to be presented and considered at stages of the proceedings determined to be appropriate by the court and

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

(i) Prejudicial to the rights of the accused, or

(ii) Inconsistent with a fair and impartial trial”.

Section 13 of the VPA provides that where a victim is a complainant in a criminal case, the victim shall either in person or through an advocate be entitled to-

“(a) subject to the provisions of the Evidence Act (cap.80), adduce evidence that has been left out;

(b) Give oral evidence or written submission ...”

Lastly, section 20 gives a right to a victim to submit information to the police or prosecution on a decision whether or not to lay a charge, or to appeal or withdraw and also a right to submit information to court during plea bargaining, bail hearing and sentencing.

[15] This is not the first time that the issue of the victim’s right in the trial process has arisen in the domestic courts.

In High Court Criminal Case No. 56 of 2011 at Nairobi – **Republic V. Paul Mwangi Macharia**, where the accused was charged with the offence of murder, the High Court allowed an advocate watching brief for the family of the deceased to participate in an application for admission of the accused to bail. In that case, the advocate for the family of the deceased submitted that Article 50 of the Constitution gives the victims of crime a right to participate in criminal trials. The court however excluded the submissions of the victim’s counsel on the ground that an advocate holding watching brief has no right of audience before the court and should have channelled any issues through the prosecutor. As the counsel for the victim in this appeal correctly submitted, the decision in that case was made on 21st November, 2013 before the VPA was enacted. In **Mary Kinga Rukwaru V. Ragnathan Santosh & Another [2014] eKLR**, a magistrate’s court released the accused, a foreigner, who was charged with three counts of causing death by dangerous driving on cash bail. The applicant, **Mary Kinga Rukwaru**, who was the widow of one of the deceased persons applied to the High Court to impose additional conditions to bail by requiring the accused (respondent), *inter alia*, to deposit his passport in court on the ground that the respondent was likely to abscond from the jurisdiction.

The application was opposed on grounds, among others, that, the applicant had no *locus standi* to bring the application. Although the application was dismissed on the merits, the High Court ruled that the applicant had *locus standi* as Article 50(7) as read with section 9(2) of the VPA allowed the applicant to communicate with the court.

In **Gideon Mwitira Irea –v- Director of Public Prosecutions & 7 others [2015] eKLR (Mwitira Irea’s case)**, the High Court (**W. Korir, J**) dismissed a petition by Gideon Mwitira Irea who had been charged in a magistrate’s court with three offences including rape, assault and causing actual bodily harm. The petition challenged, among other things, the decision of the trial magistrate to allow three advocates for the victim to participate in the trial, which had not yet begun, on the ground that the decision of the trial magistrate was *ultra vires* his powers. The reliefs sought in the petition included a declaration that the participation of the three advocates had denied the petitioner a right to a fair trial.

The petition was opposed by the respondents. The DPP in opposing the petition submitted that a victim has a right to appoint intermediaries to communicate with the court and that the VPA allows the victim’s advocate to directly address the court on matters of law only.

Relying on sections 4(2) and 9(1) of the VPA and Articles 50(7) and 50(9) of the Constitution, the High Court held that the victim and a complainant had a right to participate in criminal proceedings either in person or through a representative.

In **Republic -v- Veronica Gitahi & PC Isaa Mzee – Mombasa Criminal Case No. 4 of 2014**, the trial judge allowed an advocate who was holding a watching-brief for the victim of the crime of murder to participate in the trial on matters of law; to make submissions at a stage of case to answer and at final submissions, and reasonable access to the prosecution file but denied the victim’s advocate a right to cross-examine witnesses. Upon conviction for the lesser offence of manslaughter for which the accused was sentenced to seven years’ imprisonment, both the accused and the State appealed to this Court sitting in Malindi in **Criminal Appeal No. 23 of 2016 – IP Veronica Gitahi & Another –v- Republic [2016] EKLR**. The convicts’ appeal was against both conviction and sentence. The application by the advocates for the victims to continue appearing for the victims in the appeal restricted to submissions on the appellant’s conviction and sentence was opposed by the counsel for the convicts but it was supported by counsel acting for the DPP. By a Ruling dated 17th June, 2016, the Court allowed the participation of the victim’s counsel in the appeal limited to question of sentence only.

Lastly, the High Court sitting at Nairobi in a Ruling delivered on 24th May, 2017 in **Criminal Case No. 57 of 2017 – Leonard Maina Mwangi –v- Director of Public Prosecutions & 2 others [2017] eKLR** upheld the right of an advocate holding watching brief for the victim of crime to cross-examine witnesses. The application was brought by one of the persons accused in the trial where they faced a charge of murder for orders that the advocate holding watching-brief for the family of the victim be barred from cross-examining witnesses and for expunction of the evidence already introduced through cross-examination on the ground that the cross-examination was not sanctioned by law and violated principles of fair hearing.

The victim’s advocate; the Law Society which was an interested party and the DPP opposed the application contending in essence that VPA allowed full participation. The High Court (**Lesiit, J.**) considered the provisions of domestic law particularly the provisions of the VPA with regard to the concept of fair trial both in relation to the accused person and victims of crime in great detail and concluded thus:-

“78. I find that cross-examination of witnesses by the advocates for the victims neither compromised the accused persons’ right to a fair trial, nor hindered the prosecution’s ability to conduct a focused prosecution of the matter. I find that the cross-examination of witnesses by the counsels for the victims is the best avenue that a victim could use to bring out the evidence that has been left out by the prosecution in examination in chief, and which evidence was within the statement of the witnesses supplied to the defence and the victim.

80 ...I find that the victims’ right to participation in the trial process subsists throughout the court process, and is not passive but active within the limits set in. I find that the participation of the victim is a non-derogable right under Article 25 of the Constitution...”

[16] The origin of the recognition of rights of victims of crime by the domestic laws is the United Nations General Assembly Resolution No. A/RES/40/34 of 29th November, 1985 at its 96th plenary meetings which adopted the **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** which is designed to assist Governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power. Clause 6 of the aforementioned basic principles under the heading of *Access to Justice and Fair Treatment* states in part:

“The responsiveness of judicial and administrative process to the needs of victims should be facilitated by:

(a) ...

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”

...

The resolution was passed in recognition of problems that victims of crime and abuse of power face including:

“...that millions of people throughout the world suffer harm as a result of crime and abuse of power and that the rights of these victims have not been adequately recognized.”

Prior to the promulgation of the current Constitution, the Criminal Procedure Code (*Cap 75 of the laws of Kenya*) (*Code*) recognized the right of the victim in the trial process at two stages. First, at the stage of plea agreement negotiation between the prosecutor and accused under section 137A of the Code. Section 137 D (c) of the Code provides that a prosecutor shall only enter into a plea agreement, unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representation to the prosecutor regarding the contents of the agreement.

Second, before sentencing, where under section 329 (c), the court has discretion to receive a victim impact statement given by the primary victim or family victim where the offence results in the death of a person or actual physical bodily harm to any person.

[17] The Constitution, 2010 now contains the National Values in Article 10 which includes social justice, equality, human rights and non-discrimination. The Constitution also has a Bill of Rights. The protected rights include a right to access justice (Article 48) and right to fair hearing (Article 50).

By Article 20, every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. By Article 21(4), the State is enjoined to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

It is noteworthy that clause 9 of Article 50 which requires Parliament to enact legislation providing, *inter alia*, for rights of victims of offences is contained in the same Article which generally provides for a right to fair hearing including the right of an accused person to fair trial. The general principles underlying the VPA as stated in section 4(1) include upholding the National Values in Article 10, and access to justice in Article 48. Further, the provision of section 9(1) (d) of the VPA – rights of victims to fair hearing during trial process is identical to the provisions of clause 1 of Article 50.

[18] By section 13 of the VPA, a victim who is a *complainant* in a criminal case has a right either in person or through an advocate and subject to the provisions of the Act to adduce evidence which has been left out and give oral evidence or written submissions. The VPA does not define the word *complainant*. The word is also not defined in the Criminal Procedure Code but the same Code defines a *complaint* as meaning –

“an allegation that some person known or unknown has committed or is guilty of an offence.”

The Sexual Offences Act defines a complainant as meaning –

“the Republic or the alleged victim of sexual offence and in case of a child or person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse.”

The **Black's Law Dictionary 9th Edition** defines a *complainant* to mean

“A person who under oath signs a statement (called “complaint”) establishing reasonable grounds that some named person has committed a crime.”

By section 12 of the VPA, a victim of a criminal offence may make a victim impact statement in accordance with section 329C of the Code. By section 329C (2) of the Code, if the primary *victim (that is a person against whom the offence was committed)* has died as a direct result of the offence, a victim impact statement can be made by a family victim defined to mean, a member of the primary victim's immediate family, and includes a member of the primary victim's immediate family, the victims spouse or *de facto* spouse; a parent, guardian, step-parents,; child, step child, brother, sister, step-brothers or step sisters of the victim.

The VPA uses the phrase “*immediate family*” which has the same meaning as “*a family victim*” in the Code.

[19] In **Leonard Maina Mwangi's** case (supra) the High Court said at paragraph 74:

“The only comment I wish to make about Mwiti Irea case, is in fact section 13 of the VPA applies where the victim is the complainant in a criminal case. In the cited case, the complainant in the case was allowed to participate in the trial. The Constitutional Court held that there was nothing wrong for the complainant to take part in the trial and even give evidence if she required to do so.

In the instant case, the victims are not the complainants; as the victims are deceased. By that, I mean, that, the primary victims are the complainants in the case. Section 13 of the VPA does not therefore apply to this case.”

In this appeal, Mr. Sifuna for the appellant submitted that the word “*complainant*” in section 13 of the VPA means a living complainant.

The construction of the word “*complainant*” in section 13 of the VPA by the High Court in **Mwiti Ireas's case** and by Mr. Sifuna in this appeal would mean that there is no express statutory provision giving a member of a family of a person killed as a direct result of the commission of the crime a right to adduce evidence that has been left out and also a right to give oral evidence and make submissions. That narrow construction would derogate from the purpose of the Constitution and the VPA read as a whole and would create different categories of victims some with more rights in the trial process than others.

In the absence of a definition of *complainant* in section 13 of the VPA, the word, in our view, bears the meaning which nearly corresponds to the meaning of *complaint* in the Criminal Procedure Code to include a family victim who initiates the prosecution of a suspected offender by lodging a formal complaint with the police that a certain person known or unknown has murdered a person to whom he is related.

[20] From the foregoing, it is clear that the Constitution and the VPA gives a victim of an offence a right to access justice and a right to fair trial which rights, as Article 20(2) provides, should be enjoyed to the greatest extent consistent with the nature of the right. The right to a fair trial as Article 25 provides is an absolute right. The fact that the rights of an accused person to fair trial are enumerated and the rights of victims of offences are recognized by Article 50(9) but to be stipulated in a legislation indicates that the Constitution intends, as a principle, that the constitutional rights of an accused person to a fair trial should be balanced with the statutory rights of the victim of the offence as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial.

[21] The concept of “*watching brief*” in a criminal trial where an advocate for the victim does not play any active role in the trial process is now outdated. The Constitution and the VPA now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process.

[22] The constitutional and statutory role of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process. The nature and scope of the victim's intervention prescribed by the VPA should be interpreted in conformity with the Constitution and implemented by the trial court at the appropriate stages of proceedings as the justice of each case requires. It is the duty of the trial court to conduct a fair trial and to protect and promote the principles of the Constitution (*Article 159(2) (e)*).

The rights granted to victims of offences just like the rights conferred by the Bill of Rights are to be liberally construed. Some rights in the trial process are stipulated in the VPA, such as the right to submit information during plea bargaining, bail hearing and sentencing (*section 20, section 12*), the right to adduce evidence which has been left out and to give oral evidence or written submissions (*section 13*).

[23] The right to cross-examine witnesses is the most contentious. It is not expressly provided for by the VPA. By section 150 of the Criminal Procedure Code, a trial court has general power to be exercised *suo moto* to;

“summon, or call any person as a witness, or examine any person in attendance though not summoned as a witness; or recall and re-examine a person already examined and the court shall summon and examine and recall and re-examine any such person if his evidence appears to it essential to the just decision of the case; provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

The independent and discretionary power given by the trial court by section 150 of the Criminal Procedure Code is intended to help the court

to search for the truth and to function as a court of justice.

It is not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP if a victim of an offence, either in person or through his advocate is allowed to exercise the full power of the court in the manner provided by section 150 of the Criminal Procedure Code so long as the safeguards in the proviso thereto are observed.

Accordingly, we find that a victim of an offence or his advocate or representative may exercise the plenitude of the powers of the court under section 150 of the Code with the permission and directions of the trial court.

[24] We have been asked in this appeal to set the full parameters of the extent of the victim's participation in the trial process. Other than what we have said above, we recognize that the issue of victim's participation would arise in infinite variety of factual situations where the trial court would be required to offer guidance to ensure a fair trial to an accused person.

A rigid prescription would not only limit the exercise of rights and the judicial discretion of the trial court but would also impede the administration of justice and the development of the law. It is preferable that the exercise of the victim's rights should be determined by the trial court as occasion arises and as the justice of each case requires.

[25] Ultimately, we are satisfied for reasons stated in the foregoing paragraphs that the impugned rights given by the trial court to the victim of the offence who is the father of the deceased are in conformity with the Constitution and the Victim Protection Act.

Accordingly, the appeal is dismissed in its entirety.

Dated and delivered at Kisumu this 21st day of May, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.