



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM; KOOME, OKWENGU & SICHALE, JJA)

CRIMINAL APPLICATION NO. 3 OF 2019

BETWEEN

KULDIP MADAN SAPRA & ANOTHER.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an appeal (with leave of court) from the Ruling and Order of the High Court (Ngenye, J.) dated the 12th March, 2019 in CRI. REV. APPL. NO. 800 of 2019)

RULING OF THE COURT

[1] The Notice of Motion dated 19th March, 2019 was the one that was fixed for hearing before us. However, when it was called out for hearing, many issues cropped up. Among them, Mr O'mirere learned counsel for **Director of Public Prosecution** (respondent) indicated that he was not ready to proceed with the application as drawn as it lacked crucial documents that would enable this Court deal with the matter conclusively; such being the charge sheet that is being challenged and the Ruling by the learned magistrate that was before the High court. Incidentally this is a second appeal on the matter. Counsel also sought leave to file a replying affidavit in regard to the instant application. Also, Mr. Kilukumi who had entered his name on the coram sheet as appearing for the victim, one **Dr. Nisha Supra** who is a complainant in a criminal case before the magistrate's court indicated that he was not ready to proceed as he had not been served with the instant application.

[2] In reaction to the above, both Mr. Ndubi and Mr. Bwire, learned counsel appearing for the applicants rose on their feet and opposed strongly the appearance of Mr. Kilukumi for the said victim. They did not even remember to address the issue of the missing documents. Be that as it may, counsel for the applicant's opposition to Mr. Kilukumi's appearance was based on the provisions of **Section 2 (1)** of the **Victim Protection Act** (VPA) which refers to a victim as a person who has suffered loss or damage and according to them, Mr. Kilukumi's client is neither a victim nor did she suffer loss or injury.

[3] Counsel for the applicants quoted the provisions of Part 9 A of the **Criminal Procedure Code** and in particular **Section 329 A** which describe a

“

Family victim”, in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence...”

In counsel's view the applicants and the **Director of Public Prosecutions** (respondent) are the parties in the matter being appealed against therefore they did not serve the so called victim with the application. Emphasizing further on those submissions, Mr. Ndubi cited the provisions of **Article 157 (10)** of the Constitution of Kenya that provides that the DPP shall not require the consent of any person or authority in the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. Therefore the participation of Mr. Kilukumi in the proceedings is akin to having a second prosecutor in the matter who would interfere with the heavily guarded independence of the DPP. For those reasons counsel urged us to exclude Mr. Kilukumi from these proceedings.

[4] The respondent was represented by Mr. O'mirera learned Senior Assistant Director of Public Prosecution. He gave some brief overview of the matter by stating that Mr. Kilukumi was counsel for Dr. Nisha Suppra who is a complainant in a criminal case where the respondents are charged with the offence of forgery regarding the estate of the complainant's late husband. On the other hand, Dr. Nisha Suppra is also facing a charge of manslaughter of her late husband. According to Mr. O'mirera, the respondent has no objection to Mr. Kilukumi being allowed very limited participation in the proceedings akin to watching brief for the complainant who is a beneficiary of the deceased estate together with her children.

[5] Mr Kilukumi on his part cited the provisions of **Article 50 (7)** of the Constitution which provides that in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. In this respect the complainant as a wife of the deceased against whom an offence of forgery was committed and her own signature was forged so as to exclude her as a beneficiary of the estate cannot be shut out of the proceedings. Counsel stated that his client has high stakes in the matter where she stands the risk of losing her estate. Also under the VPA, the complainant is entitled to be heard.

[6] As demonstrated by the aforesaid summary, what is before us is a determination of whether Mr. Kilukumi should participate in the hearing of the application by way of notice of motion dated 19th March, 2019 as counsel for the victim who is a complainant in a criminal case; and if he is allowed to participate to what extent. The material before us is rather scanty as indicated above, that key documents such as the charge sheet or the Ruling that has escalated to the instant application is not before us. Nonetheless we are able to discern that in the matter before the magistrate's court, the applicants are charged with the offence of forgery and the complainant is Dr. Nisha Suppra where we assume Mr Kilukumi represented her and wishes to continue doing so in the instant application.

[7] In determining whether Mr. Kilukumi can be allowed to appear for the complainant, we need to look at the interpretation of the relevant provisions of the Constitution and of the **Victim Protection Act – No. 17 of 2014 (VPA)**. Beginning with **Article 50** of the Constitution, which 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 includes **Article 50 (7)** which 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.”

It goes without saying that VPA was enacted pursuant to the provisions of **Article 50 (9)** and under **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”

[8] **Section 39** of the VPA stipulates that 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**, also **Section 4 (1)** goes on to provide 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.”

[9] Section 9 (2) of the VPA stipulates the rights of a victim during the trial process as 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) goes on to provide that: -

“

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 ...”

[10] We have taken the liberty to illuminate the key provisions of the Constitution and other laws so as to contextualize the objection raised before us. In doing so we have also considered a recent decision of this Court sitting in Kisumu in the case of Joseph Lendirie Waswa vs. Republic [2019] eKLR where the Court was faced with a similar issue of determining the role of a counsel appearing for the victim of a crime. The Court in dismissing the appeal that challenged the orders of the trial Judge that had permitted counsel for the victim to participate in the proceedings within some set limits stated;-

“

■ ■ ■ 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.”

[11] The issue before us is not very different from what was dispensed with in the aforesaid decision and we too should draw from the provisions of the Constitution and VPA in determining the issue at hand. The overarching objective of all those provisions is to ensure there is justice, and fairness for all the parties and to avoid an abuse of the court process. What would be the harm or prejudice in allowing Mr. Kilukumi’s to represent the complainant in the instant application. To us the complainant fits the description of a victim as she is the complainant and the victim of the offence under trial before the subordinate court. We therefore see no prejudice as this is a continuation of what was happening before the two courts below, where counsel represented the complainant who claims to be a victim of a crime. The parameters of what he could do during a trial are set out in the case of *Joseph Waswa* (supra) and we need not repeat them.

[12] The application that is before us is a notice of motion which is not ordinarily presented to Court through oral evidence, we therefore do not envisage any adduction of evidence and cross examination of witnesses. It is usually done by way of written submissions and oral arguments. In this respect, the State is the primary party that is named as the respondent and that is the party at liberty to file a replying affidavit. All Mr. Kilukumi was asking for was to be served with the application but since his client is not named as a party we do not think that it would be necessary to respond by filing a replying affidavit which essentially responds to factual matters. We discern the appropriate role of counsel for the victim in the present circumstances as confined to his participation in making submissions on points of law.

[13] This being our position, we find the objection raised by counsel for the applicants lacking in merit. We dismiss the same and order that Mr. Kilukumi or any other counsel acting for the complaint who is a victim, is at liberty to represent her, to be served with the motion, and to file and make submissions (if any). Costs of this application shall abide the outcome of the motion.

Dated and delivered at Nairobi this 26th day of August, 2019.

M. K. KOOME

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR