



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 23 OF 2016

BETWEEN

I.P.VERONICA GITAHI.....1ST APPELLANT

P.C.ISSA MZEE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment of High Court of Kenya at Mombasa (Muya, J.) dated 15th February, 2016

in

HCCR.A. No.41of 2014)

RULING OF THE COURT

At the trial of the appellants, who were jointly charged with murder contrary to **section 203** as read with **section 204** of the Penal Code, Muya, J, after hearing arguments in favour and against Mr. Ndubi's participation by way of watching brief, as a victim's representative under **section 2** of the Victim Protection Act, No.17 of 2014 granted him audience. In granting the application the learned Judge drew the following limits for Mr. Ndubi's role;

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

At the end of the trial the learned Judge found the appellants guilty of manslaughter and sentenced each of them to seven years imprisonment, a decision that has aggrieved the appellants and the State, both of whom have challenged it before this Court. When the hearing of the appeal came up on 11th May 2016 Mr. Ndubi's application to continue appearing before this Court as victims' representative was resisted by Mr. Magolo, learned counsel for the appellants, while Mr. Muteti, on behalf of the state supported it.

Mr. Ndubi informally moved us under **Article 50 (7) and (9)** of the Constitution and **section 9 (2)** of the Victim Protection Act and urged us to permit his participation in the appeal, restricted to submissions on the appellants' conviction and sentence. Mr. Muteti, learned counsel, while supporting the application cited the legislative intent of the Victim Protection Act, international best practices in terms of **Articles 2(5) (6) and 50** of the Constitution, the provisions of the Rome Statute, and concluded that victims of crime today have audience in the court and can be heard at all the stages of the case and at all levels of the court hierarchy.

Mr. Magolo, learned counsel for the appellants, however was of a different persuasion, that the victims representatives' involvement in the trial and even in this appeal is limited to "watching brief" only and that any participation beyond this would open a *pandora's* box and an avalanche of such applications which the court may not cope with; that the victims cannot take over the role of a prosecutor; that, as a matter of fact, Muya, J's decision to allow the participation of Mr. Ndubi at the trial was an act of generosity; and that, even if the victim's representative had the right of audience, it was limited and confined only to the trial court and did not extend to this Court.

By **section 55** of the Advocates Act, it is declared that every advocate is an officer of the court, and, subject to certain requirements, such as formal appointment to act in a matter, has automatic right of audience in the courts in Kenya.

Over the years the only practice known in a criminal trial where a victim or a victim's family would participate in a trial was through an advocate watching brief, only as a passive observer, with no right of audience and could only communicate with the court through the prosecutor. The practice was based on the fact that the victim in a criminal trial is a third party, the case being between the State and the accused person (or the appellant). There is no debate, however, that a victim's advocate can be just as important to them as defense counsel is to the accused person. It has been argued that by allowing the victims to participate in a trial they would run roughshod over the accused person's right to a fair trial, prolong proceedings, increase expense and hinder the prosecutor's ability to conduct a focused prosecution. As a result of these arguments, historically victims have been relegated to one role only-that of witnesses in trials.

In recent decades, however, in countries with civil law traditions as opposed to those with common law lineage, the victims are fully involved in criminal proceedings. The common law system jurisdictions have been slow in embracing victim participation due to the adversarial nature of the system, where the prosecution and defence make zealous presentations of their respective cases to the trial court and where the Judge (or Magistrate) only acts as a referee, mediating the process. Victims in the common law system, as witnesses, are limited to their testimony and can participate only through the prosecutor or only when called upon to articulate or provide 'impact assessment' statements during sentencing phase. (See **part IXA**, Criminal Procedure Code)

In contrast in courts within the civil law system judges are generally permitted to supervise the compilation of the evidence to which the accused person is expected to respond at the trial. Unlike the relatively passive role of the common law Judge, the system in the civil law tradition is inquisitorial, with the judge actively controlling the trial's direction. In a system based on such tradition victims tend to play a more central role, for instance, by presenting any evidence they may have over and above that brought by the prosecution, cross-examine witnesses and make closing statements.

In recent times debate has commenced generally, on the question of the victim's right to participate in criminal trials, especially those conducted in international tribunals and courts. This move has been seen as essential to the legitimacy and effectiveness of the proceedings in the tribunal or court. It is based on the appreciation of the importance of victims' contribution to criminal investigations, judicial processes and decision-making, all of which can enhance the quality of criminal trials and willingness of the citizenry to accept outcomes from the courts.

Under the Rome Statute for example, victims before the International Criminal Court (ICC) are granted far-reaching rights, as compared to the *ad hoc* Tribunals for Rwanda and the former Yugoslavia. Under

Article 68 (3) of the Rome Statute victims are granted the right to be heard on issues affecting their personal interest. Victims who have been accepted by the court are entitled, during the proceedings, to be informed of all the relevant developments in the case, to have legal representation, to make statements at the beginning and end of the proceedings, present their views regarding investigations, charges and to put questions to witnesses, including the accused person.

It is against this backdrop that the recent developments in the law of victim protection in Kenya ought to be seen.

Articles 2 (5) and 50 (7) and (9) of the Constitution of Kenya, 2010 heralded a new dawn. Apart from enjoining the courts to apply general rules of international law, the Constitution also mandates the courts, in the interest of justice, to allow an intermediary to assist a complainant (or an accused person) to communicate with the court, while requiring Parliament to enact appropriate law to provide for the protection, rights and welfare of victims of offences. That law, the Victim Protection Act was enacted in 2014. By its **section 2**, a victim is defined to include, any natural person who suffers injury, loss or damage as a consequence of an offence, a definition wide enough to include the deceased's mother and uncle who are represented by Mr. Ndubi in this appeal. It also defines a "victim representative" to mean an individual designated by a victim or appointed by the court to act in the best interest of the victim. Mr. Ndubi having been appointed by the family of the deceased fits this definition.

The Act further provides the parameters of the victim's representative's participation in the trial. The victim's views and concerns may be presented in court at any stage of the proceedings as may be determined to be appropriate by the court. Those views and concerns may be presented by the victim himself or herself or by a "legal representative" acting in the victim's behalf, at the stage of plea-bargaining, bail hearing and sentencing, as far as possible to be heard before any decision affecting him or her is taken; to be accorded legal and social services of his or her own choice, and if the victim is vulnerable, to be given these services at the State's expense, and to make a victim impact statement at the stage of sentencing. These rights must however not be prejudicial to the rights of the accused person or be inconsistent with a fair and impartial trial. See **sections 20 and 21**.

The appellants and the respondent have challenged both the conviction and sentence. While the appellants will be arguing that the sentence is manifestly excessive, the respondent on the other hand will be submitting that it is illegal in the circumstances. The question of sentence is the only aspect of this appeal that Mr. Ndubi wishes to address us on during the hearing. To that extent, we think Mr. Ndubi is within the law and properly before us. It would, in our view be unconscionable to deny him audience in this Court when he was allowed, on specific terms to participate in the trial court.

We allow the informal application by Mr. Ndubi to make submissions on behalf of the victims, limited to the question of sentence imposed by the trial court. The objection is otherwise overruled.

Dated and delivered at Malindi this 17th day of June, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR