



REPUBLIC OF KENYA



**Republic v Obado & 2 others (Criminal Case 46 of 2018)
[2025] KEHC 9104 (KLR) (Crim) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 46 OF 2018**

CW GITHUA, J

JUNE 25, 2025

BETWEEN

REPUBLIC APPLICANT

AND

ZACHARIA OKOTH OBADO 1ST ACCUSED

MICHAEL JUMA OYAMO 2ND ACCUSED

CASPAL OJWANG OBIERO 3RD ACCUSED

RULING

1. The second accused, Michael Juma Oyamo (hereinafter the respondent) together with his two co-accused has been undergoing trial for the offence of murder. Their case is currently at the defence hearing stage. Upon being placed on their defence under Section 306 (2) of the *Criminal Procedure Code*, each of the accused persons elected to give a sworn statement in his defence and to call witnesses.
2. Before the respondent presented his defence, he applied and obtained orders from this court requiring Safaricom Ltd to furnish him with call data records pertaining to the use of his mobile phone including details capturing his location from 1st July 2018 to 2nd September 2018 which information he insisted was very crucial to his defence.
3. True to his claim, when he opened his defence by giving sworn testimony, the respondent in his evidence in chief heavily relied on the call data records supplied by Safaricom Ltd which upon his request was marked as DMFI 5. He also relied on travel documents which were marked as DMF1 4.
4. On 23rd May 2025 when the respondent wound up his evidence in chief, learned prosecution counsel Ms. Gikui Gichuhi applied to be supplied with all the documents marked for identification by the



- respondent including DMFI 4 and DMFI 5 together with all other documents produced by him as exhibits.
5. The application was made on grounds that the documents were not previously supplied to the prosecution and the prosecution needed to study them in order to prepare for its cross-examination of the respondent in the most timeous and efficient manner.
 6. The application was opposed by Mr. Ogada Messo, learned counsel for respondent. Mr. Oganda, though acknowledging that the prosecution had a right to prepare for cross-examination in order to balance the scales of justice, objected to the application on grounds that the defence was not under a duty to supply the prosecution with any documents as the burden of proof lay on the prosecution. Counsel further submitted that the prosecution had heard the evidence the respondent had given on the documents in question and should have made notes on the same.
 7. In rejoinder, Ms. Gikui submitted that the documents referred to by the respondent will form the basis of her cross examination; that the right to a fair trial guaranteed in Article 50 (1) of the *Constitution* goes both ways and it includes access to evidence and information referred to in court to enable parties prepare for their respective cases; that sharing of vital documents was part of our legal process which ensured that all parties including the prosecution, had access to information required to prepare their cases.
 8. In addition, Ms. Gikui contended that allowing the application will not prejudice the respondent as he had already testified on the documents; that it was only fair and just that the information sought be made available to the prosecution.
 9. I have considered the prosecution's application and the rival oral submissions made on behalf of both parties. Having done so, I find that the only issue arising for my determination is whether the prosecution's application was merited.
 10. At the outset, it is important to note that under Article 50 (1), the *Constitution* guaranteed to all persons the right to a fair trial before a court or another independent tribunal or body. This is a general right bestowed on all persons but the drafters of our Constitution did not stop there. They found it necessary to give additional safeguards to accused persons by enumerating a host of rights specifically given to accused persons to ensure that they were accorded a fair trial. Those rights are set out in Article 50 (2) (a) to (q) of the *Constitution*. One of those rights is the right provided under Article 50 (2) (j) which gives an accused person the right to;

"be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence".
 11. It is noteworthy that the rights given to an accused person under Article 50 (2) of the Constitution amounts to obligations conferred on the State for the benefit of accused persons. It is common knowledge that the state is represented by the prosecution in criminal cases. That is why under Article 50 (2) (j) above, the prosecution is commanded to disclose to an accused person in advance the evidence it intends to rely on in support of its case.
 12. The obligation imposed on the prosecution under Article 50 (2) (j) stems from two fundamental legal principles namely, the cardinal principle in criminal law that an accused person is presumed to be innocent until proved guilty and the basic principle in the law of evidence that he who alleges must prove.
 13. A plain reading of Article 50 (2) (j) above leaves no room for doubt that the duty of disclosure of evidence upfront is only imposed on the prosecution and does not apply to an accused person.



This position was restated by the Court of Appeal in the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] KECA 319 (KLR) which was followed by this court in *Joseph Nduvi Mbuvi v Republic* (2019) eKLR where the court stated as follows:

“.....under the above Article the right to disclosure is only exercisable in favour of the accused. Whereas Article 50 (1) of the Constitution provides for fair hearing generally, as the Court of Appeal appreciated, that right cannot be stretched to confer upon the prosecution the right to be informed in advance of the evidence the accused intends to rely on, and to have reasonable access to that evidence or reciprocity of statements.....”

14. In view of the foregoing, I totally agree with Mr. Ogada’s submissions that the obligation to disclose evidence in advance lies with the prosecution and the accused does not have a reciprocal duty to disclose his evidence to the prosecution in advance.
15. That said, it is apposite to point out that in this case, the prosecution’s application was not made before the respondent started his testimony. As indicated earlier, the application was made after the respondent testified in his examination in chief and substantially relied on the documents the prosecution is now seeking to be provided with to enable it prepare for cross-examination.
16. Given the above scenario, it cannot be argued that the prosecution’s application offends Article 50 (2) (j) of the *Constitution* since it does not seek to compel the respondent to disclose in advance the evidence he intended to adduce in his defence; that evidence has already been disclosed and some of the documents referred to by the prosecution has already been tendered before the court as defence exhibits. Had the application been made before the respondent testified, different considerations would have applied.
17. The question that this court must now answer is whether the respondent should serve the prosecution with the documents subject of the instant application particularly those he marked for identification since those already produced as exhibits are public documents given that they now form part of the court record and can be accessed by any of the parties including the prosecution.
18. In my considered view, the right to cross-examination is at the core of any trial whether in civil or criminal proceedings and under Article 50 (1) of the Constitution which as stated earlier provides for the right to a fair trial, the right to effectively cross-examine witnesses is at the heart of a fair trial and must be availed to all disputants in a trial. The right to a fair trial applies to all parties involved in a trial and in criminal proceedings, as correctly submitted by Ms. Gikui, it applies to both the defence and the prosecution.
19. The supreme Court in *Waswa v Republic* (Petition 23 of 2019) [2020] KESC 23 [KLR] when considering the rights of victims in criminal trials held that the rights of an accused person cannot be considered in isolation and that for a trial to be fair, those rights must be considered alongside the rights of other participants in the trial.
20. At paragraph 70, the Supreme Court expressed itself as follows;

“....The trial judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim’s interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not



undermine those of the accused or the public interest. The true interrelationship of the three is complementary...”

It is important to mention that the public interest alluded to by the Supreme Court above is represented by the state through the prosecution in criminal trials.

21. Whereas it is true as submitted by learned counsel Mr. Oganda that the prosecution bears the duty of proving a criminal charge against an accused person to the standard required by the law, the discharge of that duty entails disproving the case presented by an accused person. This is why under Section 309 of the *Criminal Procedure Code*, if an accused person adduced new evidence in his defence which the Prosecution Counsel would not have foreseen, for instance an alibi defence, the prosecution had a right to adduce evidence in reply to rebut it.
22. One of the tools used by parties in a trial to refute the case presented by the opposite party is cross – examination. In criminal trials, once an accused person elected to give sworn evidence, the prosecution automatically acquired the right to test that evidence in cross-examination as one of the ways of challenging the defence case.
23. In cases where an accused in his evidence in chief has relied on documentary evidence which was not in the prosecution’s possession like in the present case, it is my opinion that if the prosecution was not given access to the said evidence, it’s right to cross-examination of the respondent would be defeated or prejudiced since it will be forced to cross-examine the respondent blindly without having had the benefit of studying or interrogating the documents to understand their actual content before cross-examination. This in my view will put the prosecution at a disadvantaged position and will go against the principle of equality of arms which is at the centre of the right to a fair trial.
24. Having relied on documents including DMF14 and DMF15, the respondent should not be allowed to hide them under the table or use them as a secret weapon against the prosecution case. In the interest of fairness and justice, the respondent should share the documents with the prosecution to accord it an opportunity to interrogate them to enable it prepare for effective cross-examination.
25. In any event, doing so will not occasion the respondent any prejudice as after cross-examination, his learned counsel will have an opportunity to re-examine him on any issue that may arise during cross-examination which would require further explanation or clarification.
26. For all the above reasons, I am satisfied that the prosecution’s application is merited and it is hereby allowed. I consequently order that the respondent shall supply to the prosecution all the documents marked for identification in the course of his evidence in chief including DMF14 and DMF15 within the next 14 days. The Hon. Deputy Registrar of this court shall also supply the prosecution with copies of documents produced as defence exhibits by the respondent within the same period of time.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 25TH DAY OF JUNE 2025.

C.W GITHUA

JUDGE

In the Presence of:

All the three accused persons

Ms. Gikui Gichuhi for the State

Ms. Mwanzia holding brief for SC Mr. Kilukumi and



Mr. Sagana for the 1st Accused

Mr. Oganda Messo for the 2nd Accused

Mr. Oronga for the 3rd Accused

Mr. Awour for the victims family

Mr. Kinyua, Court Assistant

