Onkundi v Republic (Criminal Revision E330 of 2023)
[2024] KEHC 330 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 330 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL REVISION E330 OF 2023

HM NYAGA, J

JANUARY 25, 2024

BETWEEN

JARED NYANGAU ONKUNDI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before me is an application filed by way of Notice of Motion under a Certificate of Urgency dated 25th September, 2023. The application is brought under Article 47(1), 50(2) (q) of *the Constitution* of Kenya 2010 and Section 362, 364 and 367 of the *Criminal Procedure Code.*

2. The application seeks the following orders:

    i. Spent

    ii. That this Honourable Court be pleased to stay the proceedings before the Trial Court pending the hearing and determination of this application.

    iii. That the Honourable Court be pleased to revise and alter the trial court's order dismissing the admission of Defence witness documents in evidence, asserting that the Prosecution ought to have been supplied with Defence documents prior to defence hearing.

    iv. That the Honourable Court be pleased to find that the defence has no obligation to furnish the prosecution Defence documents prior to hearing and order that the expert witness documents be admitted in evidence.

    v. That the costs of this Application be provided for.

3. The application is premised on the grounds set out on its face and is supported by an affidavit of the Applicant sworn on the even date.

4. It is the Applicant's case that during further defence hearing ,the prosecution counsel raised an objection to the production of a report on grounds that they had not been supplied with the said document before his expert witness sought to produce in evidence.

5. He deponed that that the objection was sustained by the trial court and therefore the learned trial magistrate exercised her discretion incorrectly and improperly, hence the need to revise the said decision with one that orders for admission of the expert witness documents in evidence.

6. The application is opposed by the prosecution counsel through her replying affidavit sworn on 19th October, 2023. She deponed that this application is misplaced as the right to fair trial should not only be apply to the accused but also to the victim and the prosecution, and that right must include advance notice on expert reports and alibi defense which may call for a further investigation into their genuineness.

7. She deponed that pursuant to Article 50(9) of *the Constitution*, Parliament enacted the *Victims Protection Act* under which section 9(1) (e) provides for the right of the victims to be informed of the evidence that the prosecution and the defence wishes to rely on and to have reasonable access to that evidence and as such the trial court was within the law when it sustained the objection raised by the prosecution.

8. The parties did not file any submissions, but the applicant relied on the authority of *Joseph Nduvi Mbuvi vs Republic* (2019) eKLR.

Analysis and Determination

9. The only issue for determination is whether the orders sought are merited.

10. Section 362 of the *Criminal Procedure Code* provides as follows:

> " The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

11. The powers of the High Court to exercise revisionary jurisdiction are provided for under Section 364 of the *Criminal Procedure Code* which provides for the following;

> " In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may:
>
> (a) In the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence.
>
> (b) In the case of any other order other than an order of acquittal alter or reverse the order.
>
> 2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."

12. The revisionary powers vested in this court under Section 362 of the *Criminal Procedure Code* is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

13. Accordingly, a revision is by no means to be taken as an appeal by the aggrieved party to the High Court in criminal cases. Where orders are being sought under Section 364 on revision the court should steer clear from trespassing into the realm of its appellate jurisdiction.

14. The right to fair hearing is provided for under Article 50(1) of *the Constitution*. This section provides as follows:-

> "(1) 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.
>
> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (a) to be presumed innocent until the contrary is proved;
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> (b) to be informed of the charge, with sufficient detail to answer it;
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> (c) to have adequate time and facilities to prepare a defence;
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> (d) to a public trial before a court established under this Constitution;
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> (e) to have the trial begin and conclude without unreasonable delay;
>
> (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> (i) to remain silent, and not to testify during the proceedings;
>
> (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
>
> (k) to adduce and challenge evidence;
>
> (l) to refuse to give self-incriminating evidence;
>
> (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
>
> (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
>
> (i) an offence in Kenya; or
>
> (ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. information shall be given in language that the person understands.

15. Article 50(9) of *the Constitution* required Parliament to enact legislation to provide for the protection, rights and welfare of victims of offences. Pursuant to that command, Parliament enacted the *Victim Protection Act* 2014. Section 3 of the Act provides as follows:

" The objects and purposes of this Act are to-

(a) recognize and give effect to the rights of victims of crime;

(b) protect the dignity of victims through-

(i) provision of better information, support services, reparations and compensation from the offender, in accordance with this Act;

(ii) establishment of programs to assist vulnerable victims;

(iii) supporting reconciliation in appropriate cases by means of a restorative justice response;

(iv) establishment of programmes to prevent victimization by all levels of government;

(v) preventing re-victimization in the justice process; and

(c) promote co-operation between all government departments and other organizations and agencies involved in working with victims of crime."

Section 9(1) of the Act states as follows:

"A victim has a right to-

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

(b) have the trial begin and conclude 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."

16. It is the Applicant's case that he had no obligation to supply the prosecution with the expert witness document he intended to rely on during defence hearing. On its part, the respondent holds the view that by dint of Section 9(1) of the *Victims Protection Act*, the applicant was duty bound to supply the victim and the prosecution the documents he intended to rely on so as to avoid trial by ambush.

17. In *Leonard Maina Mwangi vs Director of Public Prosecutions & 2 others* [2017] eKLR the court with respect to this subject held as follows:-

> " There is no other purpose for supplying the victim with statements comprising the evidence the defence and the prosecution intend to rely on, allowing them to be present at the trial and to be represented by counsel and have their views presented to court just as a formality. The purpose is to have prior information about the case before it commences, and I believe the reason for this is to aid them to knowledgeably prepare for the trial. Gone are the days they sat pensively in court, helpless and voiceless. The latest developments in the law and the promulgation of *the Constitution* 2010 increased the space for victims to participate actively at the trial and to be fully informed about the case. The victim has to determine what nature their participation in a case will take. Where they decide to play an active role, then it is for the court, in its discretion to determine the scope and level of participation.
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> 50. It is not in doubt from the provisions cited above that victims of crime have a right to participate in criminal proceedings. The VPA allows for presentation and recognition of victim's views and concerns to be presented and considered at stages of the proceedings as determined to be appropriate by the court. Furthermore, a victim is allowed to adduce evidence which has been left out. This participation must be realized within the confines of fair trial guarantees, and subject to the *Evidence Act*.
>
> The *VPA* under section 9(1) also recognises one of the rights of a victim as including the right to-
>
> (e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;...'
>
> The victim is placed in a unique position in that he has the right to access evidence; both the defence of the accused and the evidence of the prosecution. This has placed the victim in an exclusive position in law, since that right does not extend to the prosecution. The rationale behind this provision is, in my view, two-fold:
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> Firstly, it seeks to actualize the right of a victim to participate in the proceedings, since there cannot be participation without access to the relevant information. The victim in this sense is being viewed as a person distinct from the prosecution.
>
> Secondly, participation when actualized in the form the court finds appropriate should be realized within the limits of the evidence before the court in the form of the evidence intended to be relied on by the prosecution and the defence."

18. *Patrick Mugambi vs Republic* [2017] eKLR, Justice L. KIMARU (as he then was) regarding the issue herein held as follows:-

> " The plain reading of Article 50(2) of *the Constitution* clearly shows that it is the accused's right to fair trial in criminal proceedings that are being protected. Where the exercise of that right to fair trial by accused conflicts with that of the victim, then the right of the accused shall take precedence or shall prevail. In my considered opinion, Section 9(1)(e) of the *Victim Protection Act* cannot be read or considered disjunctive to the other subsections of Section 9(1). The side note to Section 9 provides that Section 9 deals with rights of victims "during the trial process". This court is of the view that the trial court erred when it elevated the rights of a victim during the criminal trial process to that of equal status to the accused person. The fact that *the Constitution* under Article 50(2) does not specifically recognize the rights of victims in the trial process, in the considered view of this court, is deliberate. It is a clear indication that the rights of an accused person to fair trial during the criminal trial process assumes primacy because of the likelihood that his right to fair trial may most likely than not be infringed if it is not specifically protected. The silence in recognition of a victim's right in *the Constitution* in the same trial process clearly points to the fact that the right to fair trial of an accused person in a criminal trial is superior to that of the victim. That is why the right to fair trial of an accused person is provided in *the Constitution* while that of the victim is provided by statute.
>
> This court therefore agrees with the Applicant that as an accused person, he cannot be compelled to disclose to the victim or for that matter the prosecution, the evidence that he may or may not adduce in his defence. This would be in breach of his constitutionally guaranteed right to fair trial as provided by Article 50(2) of *the Constitution*."

19. In *Fredrick Kirimi Mugiri vs Republic* [2016] eKLR, Justice Mabeya stated as follows:-

> " The prosecution relied on the case of *Republic .v. IP Veronicah Gitahi & Anor* (*supra*) *Republic V. IP. Veronicah Gitari and Anor* MSA H.C Cr Case No. 41 of 2014 (VR) which was decided under the 2010 *Constitution*. In that case which was decided in 2015, the court held that under section 9 of the *Victims Protection Act* No. 17 of 2014 and Article 35 (1) of *the Constitution*, the prosecution and the victims counsel were entitled to copies of witness statements from the defence. My view is that, the said decision is not applicable in this case. In that case, the court found that it had allowed the family of the victim to appear and be represented in the proceedings. In our present case, the victim has not been represented.
>
> In any event, a serious Constitutional question arises as to whether the state can, through a statute, seek to obtain that which *the Constitution* has not given it. A further constitutional question arises as to whether; the Constitutional protection of an accused person to remain silent in a criminal trial can be superseded by section 19 of the said Act. In any event, I doubt whether Parliament was authorized under Article 50(9) of *the Constitution* to enact a law that would erode and water down the rights of an accused as set out in articles 49 and 50 of *the Constitution*. A further question would arise as to whether the rights and protection as provided for in Article 50 (9) of *the Constitution* were to apply to the criminal trial of an accused or a trial for compensation or reparation. ....
>
> However, my view is and I so hold that, neither under *the Constitution* nor under the *Victims Protection Act* No. 17 of 2014 is the state or the prosecution entitled to disclosure of evidence

of the defence beforehand. Both *the Constitution* and the law are to be interpreted broadly to promote and protect the rights of an individual and not otherwise."

20. In *Joseph Nduvi Mbuvi vs Republic* [*supra*] Odunga J. (as he then was) held as follows:-

> " The Court of Appeal in the *Thomas Patrick Gilbert Cholmondeley vs. Republic* (*supra*) was clear in its mind that since there is a presumption of innocence that *the Constitution* bestows upon an accused person, there is no case that an accused person can be expected to disclose in advance.
>
> To the extent therefore that section 9(1)(e) of the *Victim Protection Act* expects that an accused will in advance inform the victim of the evidence he intends to rely on, and to have reasonable access to that evidence, those provisions clearly contravene both the spirit and the letter of *the Constitution* and to that extent it is null and void.
>
> I therefore agree with Kimaru, J in Patrick Mugambi vs. R .....
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> It is on the same grounds that I agree with Mabeya, J *Fredrick Kirime Mugiri vs. R* (*supra*). It is therefore with greatest respect that I disagree with the positions adopted by Lesiit, J in *Leonard Maina Mwangi vs DPP & Others* (*supra*) and Muya, J in *R vs. IP Veronica Gitahi & Another Mombasa* (*supra*)..."

21. Guided by the above precedents, it is my opinion that Article 50(2) applies only applies in favour of the accused person and it is not reciprocal.

22. However, where the victim is represented he or she can be supplied with materials the defence intends to rely on during hearing upon making an application under Section 9(1) of the *Victims Protection Act*.

23. Further the case of *Thomas Patrick Gilbert Cholmondeley vs Republic* [2008] eKLR is still a good law and is binding on this court. The Court of Appeal stated as follows:-

> " We start from the point that in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere whose grandson the appellant is said to be. So if at the beginning of the trial, *the Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by *the Constitution*. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced...Muga Apondi, J, appreciated that Parliament had not conferred on the prosecution the same rights as those conferred on accused persons. He, therefore, resorted to his inherent jurisdiction as a court and since he thought it would be convenient for the prosecution to have the same privileges as those of the accused person, the learned Judge would himself confer such powers on the prosecution through the exercise of his inherent jurisdiction. That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so

important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association... It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by sections 70 to 82 inclusive of *the Constitution*... We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges... In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court."

24. The Supreme Court of Canada took exactly the same stand espoused in the above case in the case of *R vs STINCHCOMBE* [1992] LRC (Cri) 68. The Supreme Court, while ordering a retrial, held that:-

> " In indictable offences the Crown had a legal duty to disclose all relevant information to the defence. The fruits of the investigation which were in the position of the Crown were not its property for use in securing a conviction but were the property of the public to ensure that justice was done. The defence were under no obligation to assist the prosecution, or make reciprocal disclosure, and was entitled to assume a purely adversarial role towards the prosecution. Arguments advanced by the Crown - the absence of a duty to disclose that such a duty would impose onerous new obligations on prosecutions resulting in delays, and would allow the defence to tailor its evidence to conform with the information disclosed – were not convincing. Failure by the prosecution to disclose would impede the ability of the defence to make full answer and defence, a common law right which was subsequently included in the Canadian Charter of Rights and Freedoms and was one of the pillars of the criminal justice system which ensured that the innocent were not convicted. The obligation to disclose was a continuing one and was to be updated when additional information was received. The material to be disclosed included not only that which the Crown had intended to introduce but also that which it had not. All statements obtained by the prosecution from persons who had provided relevant information were to be disclosed to the defence regardless of whether or not they were going to be called as Crown witnesses. Where statements did not exist, other information, such as notes, were to be disclosed or, where there were no such notes the name, address, occupation of the witness and all information in the possession of the prosecution relating to any relevant evidence that the person could give were to be supplied to the defence."

25. I am of the view, and in concurrence with the sentiments of the Court in *Joseph Nduvi Mbuvi vs Republic* (*supra*),that this court, even when exercising its powers of revision or supervision, ought not to be seen to be micro-managing the trial court's proceedings. This may distort the trial process itself and also compromise the court's position if it is called upon to determine an appeal therefrom.

26. However, when the decision by the trial court appears to prejudice an accused's right to a fair trial, then the court has a duty to step in. The authorities that I have cited fortify this position.

27. In the instant case the document in question was deemed important by the applicant in his defence. I find that the court erred in ruling that it ought to have been supplied to the prosecution in advance. That ruling was likely to prejudice the applicant. It is a sound ground for this court to make appropriate orders.

28. The accused, as it has been repeatedly said, is the most sacrosanct individual in a criminal trial. He is the one who stands to lose his liberty if convicted. Unless there is good cause, he ought to be allowed to tender his defence unhindered.

29. Consequently, I find that the Defence has no obligation to furnish the Prosecution with defence documents in advance and therefore the order issued by the trial court on 2nd August, 2023 in Nakuru Chief Magistrate's Traffic Case No. E2015 of 2021– *Republic vs Jared Nyangau* was improper and contrary to the protection of the rights of an accused person.

30. The said order is hereby called to this court by an order of revision under section 362 of the *Criminal Procedure Code* and the same is set aside. It is substituted by an order directing the applicant's defence expert witness be allowed to produce the document as evidence for the defence.

31. The trial court will be the one to determine the manner of the production of the document, its relevance and probity value.

32. The lower court record is hereby returned for compliance with the orders.

33. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JANUARY, 2024.

H. M. NYAGA

JUDGE