



**Republic v Nzenge (Criminal Case 23 of 2019)
[2024] KEHC 4562 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 23 OF 2019**

**MW MUIGAI, J
APRIL 25, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SCOLASTICA KAWERA NZENGE ACCUSED

RULING

1. The Defense Counsel cited the authority; [George Ngodhe Juma, Peter Okoth Alingo, Susan Muthoni Nyoike v Attorney General](#) [2003] eKLR where the land mark case of fair hearing states in part;

That is what the [Constitution of Kenya](#) requires, in mandatory terms, the court to do in every case. The accused must be given and afforded those opportunities and means, so that the prosecution does not gain an underserved or unfair advantage over the accused; and so that the accused is not impeded in any manner and suffer unfair disadvantage and prejudice in preparing his defence, confronting his accusers, and arming himself in his defence; and so that no miscarriage of justice is occasioned.

Therefore, in our considered judgment, the provisions of the [Constitution of Kenya](#) under consideration can have life and practical meaning only if accused persons are provided with copies of statements made to the police by persons who will or may be called to testify as witnesses for the prosecution, as well as copies of exhibits which are to be offered in evidence for the prosecution. This is not a novel idea. It was well-known and approved in this country under the Emergency Regulations, and it was never found to prejudice the prosecution at all. See *Kariuki Kamau and others v Reginam* (1954), 21 EACA 203, where this practice was approved of by the Court of Appeal for Eastern Africa. This is only a recognition of the accused’s elementary right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice. No authority is needed for such a proposition. On the broad basis of this right, an accused person is plainly entitled,



(subject to statutory limitations on disclosure, and public interest immunity) to be supplied in advance with copies of statements to the police by persons to be called as witnesses for the prosecution, and those who prepare and conduct prosecutions owe a duty to the court to ensure that all relevant evidence of help is either led by them or made available to the accused reasonably early

There can be no true equality if the legal process allows one party to withhold material information from his adversary, without a just cause or peculiar circumstances of the case. There are very compelling reasons to support our conclusion that an accused person should be informed well in advance of a hearing, with the evidence against him. The statements given to the prosecution by witnesses, and the exhibits, if made available to the accused will enable him well before his appearance in the court for trial, to have the fullest opportunity to prepare for trial.

2. Defense Counsel objected to the production of the knife as an exhibit by the Investigation Officer PW9 as the Defense was not made aware /informed of the knife and the knife was not identified by PW5 & PW6 and the ambush creates prejudice to the Defence.
3. The Prosecution objected to the allegation of bias and prejudice, PW1 made reference to the knife where the deceased came and suspect was washing the knife. The chain custody was proper as the Investigation Officer is producing the knife that he recovered and kept in custody upto now. The Post Mortem Report disclosed the cause of death of the deceased.
4. This Court is enjoined to observe tenets of fair hearing as outlined in the above landmark case and as now enshrined in the Constitution 2010 and in particular what is relevant is in Article 50 (2) (c) & (j) to have adequate time and facilities to prepare a defence; to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
5. On perusal of the Court record this Court found as follows in compliance with requirement of fair hearing;
6. On 16/10/2019, the Trial Court ordered Prosecution to provide requisite documents to the Defence before the hearing.
7. On 28/10/2020 PW1 testified she saw the deceased who came to her hotel and had an exchange with the Accused, her employee and a scuffle ensued the deceased demanded refund of Ksh 50/- he advanced the accused person. In the process they chased each other and deceased said he had been stabbed and was holding his stomach his intestines were out.PW1 confirmed that the knife was retrieved from the scene by Police Officer.
8. PW2 testified that he was alerted that the deceased was injured. He rushed to the scene and found the deceased groaning in pain lying on the ground facing up and had his intestines out and he was covered with a sheet. He told him he was stabbed by the Accused person whom he did not know but the guard who called him knew her and she was standing by. The lady was handed over to Police Officers from Mlolongo Police Station and they also took the knife.
9. PW3 the Accused person's workmate confirmed witnessing the incident and helped to apprehend the Accused person when she took off. She confirmed that she saw the knife that had been used and saw the bloodstains.



10. PW4 Pathologist formed the opinion after Post Mortem examination that the deceased died from excessive blood loss due to penetrating sharp object trauma to the abdomen constant with a stab wound.
11. PW5 Scene visiting officer met found the deceased who told her he was stabbed with a knife by the Accused person.
12. PW9 received the knife from the Arresting Officer and he kept it till during the proceedings and would produce it as exhibit.
13. Therefore, from the totality of the evidence highlighted above the Prosecution served copies of statements of the witnesses before the hearing and the witnesses said what they recorded in their statements and mentioned the knife that was used and recovered from the scene. There was no objection of the proceedings proceeding which means the Defence received the Statements before the hearing in compliance with Article 50 [CoK 2010](#).
14. In addition, the Police file Contains the Investigation Diary that contains actions that took place during the investigations and the copy would be availed to the Defence to prepare for the Defence.
15. Furthermore, The Police File contains a Covering Report, an executive summary of all investigations and proposals on the way forward. Again a copy would be availed to the Defence to prepare for the Defence.
16. Lastly, Article 50 2 j [CoK 2010](#) refers to reasonable access to that evidence; this means that documents statements exhibits shall be availed to the Defence as soon as is practically possible; there is no set timeline to avail these statements, documents or exhibits to the Defense but reasonable access to enable the Defence reasonable time to prepare for the Defence. Investigations are conducted by Police Officers and upon compilation of the Police file forwarded to the Office of Director of Public Prosecutions.
17. The Prosecution will share what is in their custody at the time and clearly as PW9 testified, he received the knife found at the scene from the Arresting Officer and kept it as an exhibit until the day he was testifying in Court. It is unreasonable to hold the Prosecution liable for not sharing the knife used during the incident if it was not presented earlier. This position is illustrated in the following cases; the duty to disclose is continuous throughout the trial.
18. Thomas [Patrick Gilbert Cholmondeley v Republic](#) [2008] eKLR which considered *R v Ward* [1993] 2 ALL ER 557,

“Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.....”

R v Stincombe [1992] LRC (Cri) 68

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.

19. the facilitation of documentary evidence and Witness Statements is much easier as the investigations are complete and compiled in a Police file. In the instant case reference is to real or physical exhibit a single physical weapon, gadget or instrument where no photograph was/is taken is difficult to share / provide to the Defence save for reference in the Witness Statements and/or Documentary evidence.
20. In conclusion, the above consideration on the issue of production of the knife by the Investigation Officer PW9 at this stage is not prejudicial to the Accused person as the duty to disclose evidence the Prosecution will rely on during trial is a continuous process. The Court must ensure any production of evidence in form of Witness Statements, documentary and/or physical exhibits during trial is reasonable grounds and the Defence is allowed ample time to prepare for cross examination with regard to the produced evidence.
21. The Application /objection to objection of production of the knife as exhibit by PW9 is allowed/ granted and thereafter, the matter maybe adjourned to allow the Defense prepare for cross examination.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25/4/2024
(VIRTUAL & PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

