



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE NO 34 OF 2014**

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH LENTRIX WASWA .....ACCUSED

**RULING**

1. The accused herein **Joseph Lentrrix Waswa** is faced with a charge of murder Contrary to Section 203 as read with Section 204 of the Penal Code. **Mrs. Njeru** appears for the State, as **Professor Lumumba** leads a team of 3 other Counsel **Mr. Amolo**, **Mr. Kweyu** and **Miss. Ashioya** for the accused whereas **Mr. Murunga** has been having a watching brief for the family of the deceased one **Mitch Barasa Kibiti**. So far Mr. Murunga has sat in court passively and many a times consulting with the State counsel. The matter has reached an advanced stage as the prosecution has so far called a total of 9 witnesses; Mr. Murunga through an oral application moved the court on the 20th of April, 2016 seeking to “actively participate” in the matter.

2. In support of his application **Mr. Murunga**, cited Article 50 (1), (7) & (9) of the Constitution 2010, Sections 1(a)-(e), (2)(a)-(d), 4 (b) 7(b), 9(1) (c) & 13(a)&(b) of The Victim Protection Act 2014 (the Act). He urged that **Mr. David Kibiti Barasa** the father of the deceased **Mitch Kibiti Barasa** and his family are the victims herein as they suffered loss and damage as a result of their son’s death and it is therefore imperative that the family be allowed to actively participate in the trial.

3. He also relied on **Mary Kinga Rukwaru Vs. Ragunathan Santosh & Another [2014] eKLR** a road traffic accident case, where the accused faced a charge of causing death by dangerous driving. The applicant took issue with the bond terms given to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent on the other hand cited lack of *locus standi* on the part of the applicant. In considering the matter Kimaru J, stated *inter alia* that the Victim Protection Act 2014 grants complainants in criminal cases audience before the court to make representation during the cause of trial.

4. Counsel also made reference to **Gideon Mwiti Irea Vs. D.P.P. & 7 others 2015 eKLR** where Korir J on his part in reference to Section 4 (2) of the Victim Protection Act stated that a victim has a right to be given an opportunity to be heard and respond in criminal proceedings before any decision that affects the victim is taken.

5. As a comparable, counsel cited an Indian case **Sathyavani Ponrani Vs. Samuel RAJ CRL O.P (MD) No. 5474 of 2010** in the case the father of a deceased made an application seeking for cancellation of bond for an accused. The court was of the view that the deceased father was not a stranger to the

proceedings and held *inter alia*;

***i. “Therefore on a consideration of the above said Constitutional provisions, this court is of the opinion that the victim has got every right to take part in the prosecution...”***

***ii. “Engaging a lawyer in accordance with the proviso under Section 24 (8) would mean permitting him to argue along with the public prosecutor and also in a given case even examined a witness of course with the permission of the court...”***

6. Counsel further cited Article 2 (5) of the Constitution 2010 which provides that the General rules of International Law form part of the laws of Kenya and urged that the court in arriving at a decision ought to consider Rules 89, 90 and 91 of the International Criminal Court.

7. Mrs. Njeru for the State supported the application by the Victims Counsel and unlike her colleagues did not file any written submissions but brought to the court’s attention the case of **Gideon Mwiti Irea Vs D.P.P & 7 Others** (supra).

8. Much after submissions were filed by counsel on record and while the court was in the process of writing this ruling Mr. Jessie Kamau a state counsel who held brief for Mrs. Njeru currently on leave during a date when the matter was mentioned, filed written submissions on 5.8 2016, and left the same in the judge’s chambers this is probably not strange. What is perplexing is that the said submissions are contrary to Mrs. Njeru’s. I will make no further comment but leave it to the D.P.P to deal with the import of such an act. On the courts part the submissions made way out of time and without indication as to whether the state had a change of mind have been ignored.

9. Professor Lumumba on behalf of the defence in objecting to the application made reference to Articles 10,27 & 48 of the Constitution 2010, Sections 213, 306, 311 of the Criminal Procedure Code & Section 9(1) & 2 of the Victim Protection Act, urging that an advocate having a watching brief is tied to only being an observer in the proceedings. And that traditionally an advocate having a watching brief participated through the prosecution as his mouth piece as the reason for the brief is a post judgment interest as there may be an interest in mounting a civil cause.

10. Counsel also cited Article 157 of the Constitution that gives power of prosecution to the D.P.P, he argued that any issue arising therefrom would be taken by the D.P.P and the complainant remains a witness. He argued further that it would be disastrous if the court were to allow a counsel watching brief to prosecute.

11. He further submitted that the resultant statute pursuant to Article 50 (9) of the Constitution; the Victim Protection Act has not addressed the issue of watching brief; it does not permit such counsel to prosecute side by side with the D.P.P, that the victim referred to in the Act is one that is alive and not in a situation such as the case before court and further that criminal cases are in the public interest as the recourse for complainants lies elsewhere.

12. He admitted though that the Act permits limited presentations on account of the victim where the personal interest of the victim has been affected and in plea bargaining.

13. The defence relied on the following cases:

**Republic vs. Paul Mwangi Macharia Criminal Case No. 56 of 2011** where Korir J, stated;

**“... I do not consider this application one which I should make an expose on the place of victims of crime in criminal trials. Suffice it to state that criminal jurisprudence recognizes the state as the complainant on the one hand and the accused as the defendant on the other. A victim of crime is not considered a party by extension, therefore, an advocate holding watching brief has no right of audience before the court. Where therefore there are any concerns affecting the trial the victims of crime should bring the same on board through the prosecution.”**

**Moscatti Vs. Lawson [1835] Mood & R.** was quoted where the judge denied a barrister participation.

**Francis Ogoti Otingo Vs. Republic revision case no. 397 of 2012** was also quoted &;

**Halisburys laws of England Vol 3, 3rd editions** which agreed with the above preposition.

14. Further the defence cited practices in South Africa and Australia supporting the above argument.

15. Having considered the rival submissions by counsel for the parties, the issue for determination is whether a counsel watching brief for the family of a deceased in a criminal matter can actively participate in the trial on behalf of a victim" and if so to what extent"

16. This case for one reason or the other has elicited a lot of emotions and enthusiasm from counsel representing the parties. This can only be taken as positive engagement towards the growth of our jurisprudence in this area in light of the Constitution 2010. The local cases cited by the rival parties indicate that there are conflicting decisions especially from the High Court. The subject remains moot for now.

17. The Constitution 2010 expanded space for participation of citizens in various areas, one such expanded space is in the area of rights and fundamental rights. We are all grappling and trying to understand the extent and limits if any to these rights.

18. Article 27 (1) of the Constitution provides

**“Every person is equal before the law and has the right to equal protection and equal benefit of the law”**

19. Article 50 (1) provides that;

**“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**

20. Article 50 (7) & 9 provides that;

**“(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person communicate with the court.**

**“(9). Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.**

21. From the above provisions there is no doubt that the Constitution 2010 has provided equal rights and protection to all unless where limitation is prescribed in the Constitution. It goes further to recognize that

a complainant may wish to communicate with the court and in Article 50(9) it directs Parliament to legislate for the protection rights and welfare of victims.

22. In the circumstances of this case do the father and family of the deceased fit the bill" Parliament enacted the Victim Protection Act 2014 pursuant to the provision of Article 50(9)

23. The Act defines a victim broadly as follows;

***“Means any natural person who suffers injury, loss or damage as a consequence of an offence.”***

Section **4(2) (b)** of the Act provides 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.”***

**Section 9** of the said Act gives rights of the victim the during trial process as follows;

***“(1) a victim has a right to***

- a. be present at the trial either in person or through a representative of their choice.**
- b. have the trial before and conclude without unreasonable delay.**
- c. Have any dispute that can be resolved by the application of law decided in a fair hearing ...**
- d. be informed in advance of the evidence of the prosecution and defence**
- e. have the assistance of an interpreter ...**
- f. Be informed of the charge which the offender is facing *in sufficient details.***

***(2). Where the personal interest of a victim have been affected, the court shall;***

***(a) permit the victims views and concerns be presented and considered at stages of the proceedings determined to be appropriate by the court and***

***(b). ensure that the victims 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 hearing.***

24. As indicated earlier the subject is moot and there are conflicting High Court decisions on the subject as seen from authorities cited.

25. In ***LP Veronica Gitahi & P.C Issa Mzee and Republic Criminal Appeal No. 23 of 2016*** the Court of Appeal sitting in Mombasa considered the subject and the decision of the trial court with approval where Muya J had stated;

***“... will allow interventions only on matters of law at appropriate stages of the proceedings where***

***and if necessary ... I will also allow submissions as need be. The victim while granted reasonable access the prosecution file is not allowed (sic) to add any point of fact or any evidence. In the present case file (sic) or to question witnesses”***

26. The Court of Appeal did not interfere with the decision of the trial court and went further to consider the effects of the provisions of Article 2 (5), 50(7) and 9 of the Constitution 2010 and had this to say;

***“Articles 2 (5) and 50 (7) and (9) of the Constitution, 2010 heralded a new dawn apart from enjoining the courts to apply general rules of international law, the Constitution mandates the courts, in the interest of Justice to allow an intermediary to assist a complainant (or an accused) to communicate with the court, while requiring parliament to enact appropriate law ...”***

27. In the said Appeal counsel for the family sought audience at the appeal level, the court allowed the counsel watching brief to make submissions on behalf of the victim, limited to the question of sentence imposed by the trial court.

28. The rationale behind the emerging jurisprudence in line with the provision of the Constitution 2010 is well captured In the case of ***Sathyavani Ponrani Vs. Samuel Raj(supra)*** The issue before court was whether a victim is entitled to be heard and take part in a criminal trial or not. The Court considered the role of the prosecutor and that of the victim at length and made the following observations;-

***“The public prosecution conducts the prosecution whereas a victim ventilates his grievance. A public prosecutor conducts the case with a sense of detachment whereas the victim is attached to the case. A decision made in a case does not impact a public prosecutor which is not the case with the victim who is the affected party.***

“... It is the duty of the State to ensure that every citizen of the country should have a free and fair investigation and trial ... such a right is a constitutional right as well as a fundamental right. Such a right cannot be confined only to an accused but also to the victim depending upon the facts of the case.”

29. From the Cited Articles of the Constitution 2010, provisions of the Victim Protection Act 2014 and cases cited from within and outside, the law has shifted the traditional parameters of a victim in a criminal case and therefore the arguments advanced by the defence are certainly out of place and would if adopted by court be contrary to the provision of the Constitution and the Victim Protection Act, and by all means against progressive jurisprudence. The victims counsel can no longer be considered a passive observer.

30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of **Sathyavani** and as advocated by counsel for the family herein The above Indian case in that regard is distinguishable as the Victim Protection Act 2014 gives the parameters of involvement during trial to include; the victim's views and concerns at various stages of the trial as the court may determine either directly by a victim or his/her representatives, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not thought out the trial and parallel to the prosecution.

31. I will accordingly therefore allow the participation of the counsel watching brief but limited in the following terms;-

***i. On submission at the close of the prosecution case whether there is a case to answer***

*ii. Final submission should the accused be put on his defence*

*iii. On points of law should such arise in the course of trial*

*iv. Upon application at any stage of the trial for consideration by the court*

**DATED and DELIVERED at Bungoma this 17th day of August 2016**

**ALI-ARONI**

**JUDGE.**



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