

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION- MILIMANI COURT
CRIMINAL CASE NO EO11 OF 2020

REPUBLIC..... APPLICANT

VERSUS

ADAN IBRAHIM SALAT.....RESPONDENT/ACCUSED

RULING

1. **Adan Ibrahim Salat** is indicted for murder contrary to section 203 as read with section 204 of the Penal Code following the death of **Adan Abdi Madhobe** and **Muhidin Adan Haji**.
2. In the course of trial, the State sought to present virtually the testimony of one of Its witnesses.
3. The substratum of the application for virtual hearing in respect of only one witness is premised on the ground that the witness is unable to travel to Nairobi due to ill health and evidence to be tendered is crucial to the case.
4. The State availed medical evidence in the form of letters from Garissa Referral hospital indicating that the witness has a kidney problem. It is hence urged that the witness is

very sick, and, that the doctor recommended that he travels to India for specialized treatment.

5. The application is opposed by the accused who does not doubt the witness' ailment but contests the report availed to support the application. It is urged that the Criminal Procedure Code (CPC) provides for hearing in open court and that the appearance ought to be in the presence of the accused. That the information is not clear on the witness ailment and that the back and forth submissions on his ailment makes the allegation of his health status doubtful. The accused takes issue with the fact that the witness is scheduled to travel to India but he cannot attend court which is in Nairobi.
6. That the Evidence Act and the CPC do not speculate such a situation and that is why a call over is conducted for parties to appear before court for hearing.
7. That the law does not speculate a hybrid trial; virtual proceedings would be a gross compromise of the law, and, that the accused right to fair trial would be compromised.
8. Further that the prosecution has other witnesses to be lined up and ought to start with them, there is no

guarantee to prevent the witness non-attendance and further motions for adjournment.

9. That the demeanor of the witness must be observed for the court to act on the evidence, and the medical evidence availed is relatively old.
10. In a rejoinder the State suggests that the witness takes oath and testifies in the presence of a Deputy Registrar at Garissa High Court which is the nearest court premises. That there would be no prejudice as the accused would cross examine the witness. That there is need to seek treatment out of the country as the effort to get adequate treatment in the country has not borne fruit.
11. I have considered rival arguments put up. Medical evidence availed refer to scans and tests that the witness underwent in the year 2021. It is clear that he suffers from a kidney problem, however, there is no update on whether the situation has deteriorated or whether he has recovered. Whether it is impossible or it would be strenuous to present him before the court and whether the court would have to be set up to accommodate his medical condition.

12. That notwithstanding, the record shows that the application has been made in the interest of justice. There being an indication that the witness desired to get treatment outside the country means that he might not have recovered at the time scheduled to give evidence. This court may also not speculate on his current health status as there is no reason to suggest that the application has been brought in bad faith.
13. Section 63A of the Evidence Act which refers to teleconferencing and video conferencing provides that:
- (1) A court may receive oral evidence through teleconferencing and video conferencing.**
 - (2) The Chief Justice may develop regulations to govern the use of teleconferencing and video conferencing.**
14. Virtual sessions / hearing is not speculated in the Criminal Procedure Code since the inclusion of Section 63A in the Evidence Act did not also see to a corresponding amendment of the CPC. The Evidence Act places video conferencing as competent and legal mode of receiving oral / direct evidence.

15. The concept of virtual hearing was introduced and become the practice during the Covid -19 pandemic. The High Court Organisation Administration Act and practice directions on standardised procedures in the High Court (Practise Rules) enacted in 2022 (vide Gazette Notice No.189) still embrace this mode of recording evidence.
16. The objective of the practice directions is to *interalia; enhance access to justice, facilitate timely and efficient disposal of cases and also promote use of technology in court proceedings for expeditious disposal of cases.*
17. According to Rules 27 and 28 of the Practise Rules, during pretrial directions in criminal cases the court is expected to confirm among other things whether teleconference or live TV link shall be necessary and /or appropriate. The court is mandated to also give directions on whether the hearing will be in open court or virtual or in camera. The directions on witness testimony during virtual hearing have also been enacted in the rules.

18. It is apparent that the prevailing situation was not expected by the State to have been deliberated upon during pre-trial conference.
19. It has been argued by the accused that his right to fair trial would be compromised in the process of virtual sessions but he does not point out which particular right under Article 50 of the Constitution, however, it is clear that relevant rights here refer to the right to cross examine the witness on the other end and to challenge whatever evidence that is brought.
20. He states that the law under the Evidence Act and the Criminal Procedure Code would be compromised, however, the practice rules do not take away any procedural rules on Evidence. Additions are also seen to be in the interest of justice and expeditious taking of evidence. It cannot be said that the subsidiary legislation contradicts the applicable statutes in any way.
21. By virtual hearing, parties are allowed to present their case through video or teleconference links. Witnesses in virtual sessions would still be cross examined and any documentary evidence adduced should be served in

advance and verified by parties in line with Article 50 of the Constitution.

22. The court and the accused would still be able to see the witness and hear the witness' evidence albeit virtually. This means that the evidence would be taken in the presence of the accused and tested through cross examination.

23. Lastly, on whether the witness may testify before the Deputy Registrar who may take oath and record the evidence, the Criminal Procedure code enacts under **Sectionh 154** that:

(1) Whenever, in the course of a proceeding under this Code, the High Court or a magistrate empowered to hold a subordinate court of the first class is satisfied that the examination of a witness is necessary for the ends of justice, and that the attendance of the witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the court or magistrate may issue a commission to any magistrate within the local limits of whose jurisdiction the

witness resides, to take the evidence of the witness.

(2) The magistrate to whom the commission is issued

shall proceed to the place where the witness is

or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in the case of a trial.

24. The prosecution has referred this court to this option. The challenge would be that the case would stall in the event the court does not expedite in taking the proceedings and remitting the record back to this court. Further, that the provision of the law was enacted when the option for virtual court sessions was not available.

25. Virtual session would be an available option to avoid any inconvenience. Technology is now advanced. Recording evidence virtually enhances access to justice. The Deputy Registrar shall be present to ensure the law is not flouted. Evidence shall be recorded as required in a narrative

manner. The court will observe the demeanor of the witness and record it if necessary.

26. Having considered arguments in totality, I find circumstances advanced being compelling enough such that if the order sought is denied, the State will be prejudiced. On the part of the defence as afore noted, it will have the opportunity of cross examining the witness. This being the case, I grant the State leave to avail the witness to testify virtually from Garissa Court in the presence of the Deputy Registrar, Garissa High Court, and, further direct as follows:

- a) A copy of the statement recorded by the witness shall be availed to the Hon. DR in case reference to the same is required;
- b) Other persons will not be allowed in the room, unless it is an interpreter and /or a caregiver.

29. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY
THROUGH MICROSOFT TEAMS AT NAIROBI,
THIS 23RD DAY OF MAY, 2023.**

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms, Ogwen0 & Ms. Tum for ODPP

Ms. Owino for IPOA

Mr. Nyaberi for Accused

Accused.

Court Assistant- Mutai