



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

REVISION E006 OF 2021

GEORGE GABRIEL KIGURU.....1ST APPLICANT

JANE NDATA KIGURU.....2ND APPLICANT

VERSUS

REPUBLIC.....ODPP

R U L I N G

1. Before me is the Notice of Motion dated 26th April, 2021 filed on 17th May, 2021 brought under **Articles 50(1,50(2),(c) (e) (j) & (k); 159(1),(2),165(3),(6),(7), of the Constitution and Sections 106 B of the Evidence Act Cap 80 and section 362 and 364 of the Criminal Procedure Code** seeking the following orders:

(a) THAT this Honourable Court be and is hereby pleased to stay the proceedings of Nakuru Chief Magistrate's Criminal Case Number 3465 of 2016, Republic vs George Gabriel Kiguru, Jane Ndata Kiguru pending the hearing and determination of this Application.

(b) THAT this Honourable Court be pleased to call for the file of Nakuru Chief Magistrate's Criminal Case Number 3465 of 2016 Republic vs George Gabriel Kiguru, Jane Ndata Kiguru from the Magistrate's Court revise the Ruling delivered on 12th March, 2021 and consequently alter and or reverse the orders arising therefrom.

(c) That the costs of this Application be provided for.

(d) Any other order that the court may deem fit and expedient to grant.

2. According to the applicant the prosecution has embarked on trial by installment and ambush by introducing a witness from Equity Bank who had not recorded a statement. Despite his objection through his advocates the same was over ruled in **Criminal Revision Application Number 31 of 2019** by the superior court and the prosecution was consequently allowed to record the witness statement of Samuel Ngari Kariuki, which was done on 2nd December, 2020 and he testified as PW5.

3. That the prosecution was also allowed to supply the defence with documentary evidence which included bank account statements before the matter was set for further hearing and on 28th February, 2020, the Investigating Officer testified as PW4 and he identified the bank statements and supporting documents.

4. On 9th February, 2021, the prosecution called its last witness PW5 who was a bank manager from Equity Bank one Samuel Ngari Kariuki to produce the said documents marked as PMF1 21 to 26. The defence objected to the production of the same for the reasons that they were inadmissible as they were not accompanied by a certificate in accordance to **Section 106 B of the Evidence Act** and that such certificate had not been supplied to the defence yet those documents were print outs of electronic records.

5. That though the prosecution on 1st March, 2021 submitted that they had filed a certificate dated 22nd February, 2021, the alleged certificate had not been supplied to the Applicants or their counsel. The court on 20th March, 2021 overruled the objection, granting Prosecution time to file the certificate in the interests of justice.

6. The applicants contend that the trial court's decision is unconstitutional and in violation of **article 50(2) (c) (e) (j) and (k) of the Constitution** since it is allowing the respondent to file the certificate as an afterthought.

7. The Application is supported by an Affidavit of Jane Ndata Kiguru the 2nd Applicant herein who reiterated the above grounds.

8. The Application was opposed by the respondent vide the Replying Affidavit sworn by Ms. Serling Joyce on behalf of ODPP on 11th June, 2021. She deposed that this matter is *res judicata* as the High Court had directed the trial court to consider the documents which the prosecution was to rely on were availed to the defence and the defence given time to respond. She deposed that the bank statements plus the certificate under **section 106 B** had been served upon the defence.

9. She deposed that it was in the interest of justice the prosecution be allowed to produce the bank documents which are essential and which are really at the heart of the prosecution case and that under **Article 159 (2) (d) of the Constitution** its stipulated that justice should be administered without undue regard to procedural technicalities.

10. This application was canvassed by the parties through written submissions.

SUBMISSIONS

Applicants' Submissions

11. The applicants filed their submissions dated 28th June, 2021 on 7th July 2021.

12. The Applicants submitted that the High Court has jurisdiction to revise an order of the Lower Court. For this proposition they relied on the cases of **Boniface Gubimilu vs Republic [2020] eKLR** and **Republic vs Anthony Thuo Karimi [2016] eKLR** which outlined the revisionary powers of the High Court and the purpose of the same.

13. The applicants further placed reliance on the cases of **David Makari Watila vs Republic [2020] eKLR**, **Peter Ngethe Ngari T/A Pnn Funeral Services Vs Standard Group Limited Plc & Another [2020] eKLR** and **MNN VS ENK (2017) eKLR** which explained the admissibility of electronic documents and the importance of producing a certificate under **Section 106 B of the Evidence Act**.

14. They argued that by the time they objected to the production of electronic evidence by the prosecution, a certificate under **Section 106 B of the Evidence Act** had not been prepared. They urged this court therefore to determine whether the lower court had jurisdiction to allow preparation of the same after objection by the defence.

15. The applicants relied on the case of **Republic vs Mark Lloyd Stevenson (2016) eKLR** where the court held that documents that are not authenticated and do not meet the requirements of the Evidence Act must be expunged and not admitted as evidence. Hence, the trial court's ruling occasioned them a great injustice and prayed that this court reviews and sets aside the orders by the lower court and directs that the bank documents be expunged for failure to meet the mandatory requirements of section 106 B of the Evidence Act.

Respondent's Submissions

16. The prosecution concurred with the trial court's ruling and reiterated that the objection by the Applicants was not on the authenticity of the documents but on account of lack of a certificate. They stated that such certificate was available and it was served upon the Applicants' counsel. They placed reliance on the case **Naomi Gathoni Njenga vs Catherine Masisata [2014] eKLR** where the court observed as follows;

“Having already stated above that the DVDS attached by the plaintiffs are not accompanied by a certificate as required under the evidence Act, it is therefore follows that the said DVDS are inadmissible as evidence. However, in the interests of justice it is my view that the plaintiffs are at liberty to produce such certificate for the admissibility of the said evidence. When that is done, the court will be able to examine the evidence and evaluate the probative value of the said DVDS as well as the authenticity.”

17. They thus urged the court to disallow the Application so that the matter can be heard and determined on merit.

ISSUES FOR DETERMINATION

18. Having considered the application, supporting affidavit and parties' submissions the issue that stands out for determination is ;

- Whether or not the trial court order dated 12th March, 2021 is proper and constitutional.

ANALYSIS & DETERMINATION

19. **Article 50(2) (c)** provides that every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence.

20. The admissibility of electronic records is provided for under **Section 106 B of the Evidence Act (Cap 80) Laws of Kenya** in the following terms:

“106B (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the

original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

21. Under **sub-section (4)**, where a party seeks to give evidence by virtue of **section 106B** she has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

“a) identify the electronic record containing the statement and describing the manner in which it was produced; and

b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer.”

22. In the case of **Republic vs Barisa Wayu Matuguda [2011] eKLR** the court observed that:

“ . . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.”

The court went on to state:

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence.”

23. In the decision of **Benson Mugatsia vs Cornel Rasanga Amater, Election Petition 2 of 2012**, which relied on the decision of **Republic vs Berisa Wayu Matuguda Criminal Case No.6 of 2008**, the court considered when a certificate will be admissible and it said:

“.....any information stored in a computer ...which is then printed or copied.....shall be treated just like documentary evidence and will be admissible as evidence without production of the original: However Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.”

24. It is evidently clear that electronic documents must be accompanied by a certificate in terms of **section 106 B (4) of the Evidence act** for them to be deemed admissible.

25. In the instant case therefore PMF1 21 to 26 is admissible as evidence before court only if they are accompanied by the certificate in accordance to **section 106 B of the Evidence Act**.

26. The respondent in their Replying Affidavit and oral submissions asserts that the certificate is available and that it was served upon Applicants’ counsel. The Applicants deny being served with the certificate the reasons why they objected to the production of the aforementioned marked documents. The certificate will confirm the authenticity of the electronic documents and their probative value.

27. The applicants stated in their Supporting Affidavit that allowing the respondent to produce the said certificate after cross examination is an afterthought and prejudicial to them. They however did not demonstrate how they stand prejudiced if this court was to allow the production of such certificate.

28. The marked documents are crucial to the respondent’s case and procedurally the respondent ought to have filed and served the certificate upon the applicants before the hearing.

29. Article 159(2) (d) of the Constitution states that **“justice shall be administered without undue regard to procedural technicality”**. The certificate is available. Would it be fair and just to deny the prosecution the opportunity to produce the documents which have already been marked for the reason that the certificate that has always been available may have been left out while serving the documents?

30. I am alive to the fact that the applicants are not fighting the contents of the documents but the lack of the certificate. I agree with the learned trial magistrate that it is in the interests of justice that the respondent be allowed to produce the certificate and for the court to deal with the evidence on its merits.

31. The objection by the applicants is therefore overruled, the application dismissed and the ruling of the Subordinate Court is upheld.

32. Costs should be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2022.

MUMBUA T MATHEKA

JUDGE

IN THE PRESENCE OF:-

MR. OGOLLA FOR THE APPLICANTS N/A

MS. MURUNGA FOR THE RESPONDENTS PRESENT

CA EDNA