REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ACEC REVISION NO. E004 OF 2021

(From original Ruling in Nairobi Chief

Magistrate's Anti-Corruption Case No. 19 of 2017)

JAMES ANTHONY MAINGI....................APPLICANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT ON REVISION

Introduction

1. The application before the court was instituted by way of a letter dated 23rd February 2021 by Charles Kanjama, Advocate. In the letter Counsel seeks revision of the decision of the trial Magistrate in **CMACC No. 19 of 2017**. Counsel has urged this court to call for the record of the trial court for purposes of satisfying itself as to the propriety, legality and correctness of the trial court's ruling of 28th January 2021 in which the prosecution's objection to the production of certain documents by the defence was upheld.

2. Counsel narrated the facts which give rise to this application as follows;

> *That the applicant was charged with two counts of **Abuse of Office contrary to Section 46** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act** and two counts of **Willful failure to comply with the law relating to management of funds** contrary to **Section 45(2)(b)** as read with **Section 48(1)(a)** of the **Anti-Corruption and Economic Crimes Act.** That the prosecution called 5 witnesses and closed its case and the applicant was put on his defence; That, the applicant then filed a Notice of Motion dated 5th October 2019 requesting for 19 documents that would aid him in his defence and which were to be furnished by the Export Processing Zones Authority, the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission; that however, the said parties denied the knowledge of the documents in affidavits sworn by their officers and provided only a few namely the Export Processing Zones (EPZA) Human Resources Policy and Procedures Manual, the Salary and Benefits Structure for the year 2002 and the EPZA Staff Rules and Regulations (Revised) 2003 but alleged that the rest of the documents sought could not be found. Mr. Kanjama narrated that following the applicant's failed attempt, he resorted to obtaining copies of the documents consisting of three sets of minutes of the EPZA Senior Staff meeting dated 2nd February, 29th March and 11th May 2010 respectively, email communication from one Fredrick Chere (PW4) to the applicant dated 17th March 2011 attached to a draft internal audit report and a bundle of official receipts from EPZA dated 30th June and 22nd July 2005 for Kshs 510,000 and Kshs 225,000 respectively from the EPZA offices and the documents to be produced as DMFI 5, 12, 13, 19, 21 and 22 were authenticated by one Kenneth Okello of EPZA as certified copies.*

3. Mr. Kanjama contends that when the applicant attempted to produce the documents Prosecution Counsel in conduct of the case vehemently objected on grounds *inter alia* that the documents were not originals, that the applicant was not the maker and that the documents constituted hearsay evidence. This despite the applicant's assertion that he was present in the said meetings and hence he was testifying from personal knowledge. Mr. Kanjama submitted that the objection was upheld by the trial court and the applicant feels aggrieved for the following reasons:

> ***a) That, despite the overwhelming evidence given on the need for admission of the documents based on his right to fair trial under Article 50 of the Constitution and the efforts he took to obtain the documents despite the custodians thereof denying their existence, the trial court made an adverse finding against their admissibility.***
>
> ***b) That, the trial court failed to appreciate the applicant's submissions on the applicability of Sections 66 and 69 of the Evidence Act on the circumstances in which secondary evidence is admissible especially given that the documents sought to be produced were in actual constructive possession of EPZA, DPP and EACC who all denied their existence***

c) That, with respect to the documents marked DMFI-21 and 22 the trial court erred by finding that they have to be in their original form to be admissible

d) That, the trial court failed to appreciate that DMFI 5, 12 and 13 were public documents hence there is a presumption in favour of their admissibility without requiring that they be produced by public officials.

e) That, the trial court failed to appreciate that the applicant had demonstrated sufficient efforts to reach the makers of the documents to no avail, that there are instances where a document can be produced by a person who is not the maker and with respect to the minutes of the meeting held on 29th March 2010(DMFI -13) the applicant attended the meeting and could attest to the contents of the deliberations therein

f) That, in relation to DMFI -19, the trial court failed to appreciate that under Section 79(1)(a) of the Evidence Act a draft document is distinctive evidence of its contents whose relevance is to allow the court to scrutinize the process towards preparation of the final document.

4. Mr. Kanjama for the applicant submits that under **Articles 165(6)** and **(7)** of the **Constitution** and **Sections 362** and **364** of the **Civil Procedure Code** this court has jurisdiction to review the ruling of the trial court. Counsel contends that the applicant is entitled to produce the documents in support of his defence for the following reasons: - Firstly, because **Section 33 as read with Section 35 of the Evidence Act** provides various situations where a party other than the maker of a statement can produce a document the principal underlying factor for consideration being that due to impossibility, expense and delay it becomes unreasonable to call the maker to produce the same. Counsel gives the example of public documents and minutes in which the maker has left employment or cannot for other reasons be called to produce the documents and asserts that those circumstances apply to this case as the respondents' officers denied the existence of the documents.

5. Secondly Counsel argues that **Section 69 of the Evidence Act** permits secondary evidence where the person in possession of a document knows of it but has refused to produce it. Counsel asserts that this applies particularly to the case of public documents within the meaning of **Section 79(1) (a) of the Evidence Act** and that the prosecution closed its case without producing the impugned documents yet they had notice that the same were important to the defence. Counsel states therefore, that it was unfair to deny the accused person an opportunity to produce the same. Counsel invited this court to make a firm finding that **Article 50 of the Constitution** should be applied in such a way as to accord an accused person the maximum possibility to present his case. In Counsel's view **Article 50(2) (k) and (j) of the Constitution** guarantee the right to adequate time and facilities to prepare a defence and to have reasonable access to the evidence of the prosecution as well as an opportunity to challenge it. Counsel argues that the ruling of the trial court hampered the accused's right to adduce evidence and to challenge the prosecution's evidence by interpreting the Evidence Act restrictively. He implores this court to set down constitutional principles to clarify the law for the benefit of all persons charged with corruption offences, confronted with numerous documents by the state and who all start at a disadvantage so that when they get a chance to adduce evidence they are not hampered by restrictive interpretation of the law. Counsel also referred to **Article 2 and Article 20(3)** of the **Constitution** which promote and safeguard an accused's right to a fair hearing and the case of ***Joseph Ndung'u Kagiri vs Republic (2016) eKLR citing Natasha Singh vs CB (2013) 5 SCC 741*** where the court stated:-

"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."

6. Counsel contended that the provisions of the Constitution cited can only have life and practical meaning if the accused is allowed to produce the documents in evidence for his case. Counsel contended that it has been proved times without number that provision of such facilities to an accused is not prejudicial to the prosecution but is instead a recognition of the accused's elementary right to fair trial which depends upon the observance by the prosecution and no less the court, of rules of natural justice. Counsel asserted that those who prepare and conduct prosecutions owe a duty to the accused and the court to ensure that all relevant evidence is made available to the accused in a reasonable manner and that the accused person should be afforded all facilities which includes production of documents upon which he intends to rely in his defence.

7. Relying on the case of ***Canon Assurance (K) Ltd vs Ali Hamadi Mwagude & 4 Others (2017) eKLR where the Court held: -***

"In my humble view copies would be admissible if they are certified. Photocopies made from copies would require two certificates. One that they have been made from copies and that the copies have been compared with the original. I have perused the four documents. They are photocopies that have not been certified. They are therefore not admissible."

Counsel asserted that in the instant case the impugned documents were certified copies of the original and were therefore admissible. Counsel further submitted that the trial court failed to appreciate it is not a requirement of the law that a document can only be produced if it is signed and that under **Article 35(1**) of the **Constitution** there are instances where a document can be produced by a person who is not the maker. Counsel also submitted that the right of access to information is a fundamental right whose importance was fully appreciated by the drafters of our constitution and the right can only be limited by the Constitution. Counsel contended that aces to information held by the State should be availed to the citizens upon request and without delay or conditions as was held in the case of ***Katiba Institute vs President's Delivery Unit & 3 Others (2017) eKLR where the court stated: -***

"The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in

their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country."

Counsel urged this court to uphold the accused's right to a fair trial by granting this application as it had been demonstrated that it shall not water down the spirit of the constitution.

8. In opposition to the application the respondent filed a replying affidavit sworn by Prosecution Counsel Ann Gitau on 3rd November, 2021. She deposed that the impugned ruling was in relation to documents that the defence attempted to produce without following the rules of evidence provided in the Evidence Act more especially on admissibility of secondary evidence. She associated herself with the trial magistrate's ruling stating that he correctly, properly and judiciously applied the law of evidence in holding that no basis had been laid by the applicant before presenting secondary evidence and that public documents ought to be produced by officials in charge of them to guarantee their authenticity and reliability. Miss Anne Gitau further deposed that this application is an attempt by the applicant to circumvent the rules of evidence; that this application does not meet the threshold required for this court to exercise its supervisory jurisdiction to interfere with the trial magistrate's ruling and that the applicant only cited **Article 50 of the Constitution** but failed to demonstrate how the decision of the trial magistrate violated his rights. She also deponed that the provisions of **Article 50** did not in any way preclude adherence to the rules of evidence which are intended to ensure a fair trial.

9. Relying on the affidavit of Anne Gitau, Miss Kahoro, learned Counsel for the Respondent submitted that the applicant attempted to produce the documents without regard to the Evidence Act in that the documents were never in his custody hence falling afoul of **Sections 79 and 80** of the **Evidence Act**. She submitted that as reflected in the court proceedings the applicant did not give any explanation as to why the custodian or maker of the documents could not produce them. Counsel argued that the applicant cannot get the orders sought when the provisions of the Evidence Act were not met. She asserted that the trial magistrate applied the law properly and that the orders sought are not tenable. Counsel placed reliance on the case of ***Republic v Milkah Jerobon Chumba [2017] eKLR*** in which the court held **that it is only where there is an illegality, incorrectness, irregularity, mistake or impropriety in the decision, sentence or order that an order for revision can be granted**. Counsel submitted that the above circumstances were not proved in this case. Counsel stated that the mere fact that the court declined to allow production of the documents because they had not met the requisite threshold of the Evidence Act does not amount to a violation of the applicant's right to fair trial. She asserted that the right to fair trial also includes proper admission of exhibits. Counsel contended that the cases cited by Counsel for the applicant are not relevant to this case. In reply to the applicant's submission that the orders sought should apply to all anti-corruption cases Counsel stated that this court cannot make a blanket order based on speculation and that **Sections 33 and 35 of the Evidence Act** are inapplicable to this case as it was not demonstrated firstly that the custodian of the documents is not available, and secondly because **Section 35** only applies to civil proceedings. Counsel reiterated that the learned magistrate correctly refused to permit the production of the documents which remain inadmissible. She prayed that this application be dismissed for lack of merit and for being an abuse of the court process for having been instituted six months after delivery of the impugned ruling.

Analysis and disposal

10. This application is brought under **Sections 362 and 364 of the Criminal Procedure Code and Article 165 (6) & (7) of the Constitution**. **Section 362** of the **Criminal Procedure Code** States:

"362. 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.

Section 364 states: -

"364. (1) 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 sections 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:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

Article 165(6) and (7) of the Constitution provide as follows:

> ***"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

11. The circumstances under which this court can exercise its supervisory jurisdiction under **Article 165 (6) of the Constitution** were considered in the case of ***Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR,*** where Mwongo J. stated and I agree with him: -

> ***"Supervisory Jurisdiction and its application in the circumstances of the case:***
>
> ***150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:***
>
> ***a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;***
>
> ***b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;***
>
> ***c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.***
>
> ***d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice"; This list showing rationale for intervention is of course not exhaustive.***
>
> ***151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:***
>
> ***i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court's independence in the conduct and management of its proceedings***
>
> ***ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question***
>
> ***iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;***
>
> ***iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;***
>
> ***v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice..." (Emphasis mine)***

12. As submitted by the respondent this court's revisional jurisdiction is limited. In the case of ***Republic v Milka Jerobon Chumba (supra)*** it was observed that:-

> ***"The jurisdiction of the High court on revision is not unlimited. Section 362 and Section 364 of the Criminal Procedure Code when read together leave no doubt that the court can only exercise its revisionary jurisdiction if it is satisfied that there was an illegality, incorrectness, irregularity, mistake or impropriety in the decision, sentence or order sought to be reviewed."***

13. In the case of ***Njuguna Mwangi & another v Republic [2018] eKLR*** where the court was faced with a similar application it observed as follows:

> ***"13. It is trite that exercise of revisionary orders by the High Court is a matter of judicial discretion which must be exercised judicially by the court within the confines of Section 362 and 364 (1) of the CPC and not a substitution to institution of an appeal (See Abraham Wafula vs Republic (2013) eKLR (Bungoma HC CR REV. No. 21/2013).***
>
> ***14. What is the effect of admitting an exhibit by the trial court after overruling an objection raised by the defence or prosecution challenging such admission" Production and admission of exhibits in the course of a trial is governed by laid down procedural and legal requirements whether in criminal or civil proceedings. Ordinarily, objections do arise when a party attempts to produce a document or materials relied on to prove one's case depending on the circumstances and attendant legal provisions governing such production. Depending on the nature of evidence and Exhibit sought to be produced, courts quite often do make***

interlocutory rulings allowing or disallowing production of such exhibits.

15. In a situation such as the instant case which is challenging the admission of certain exhibits for failure to comply with certain legal requirements or standards before production and admission, it is perfectly within the purview or discretion of the trial court to determine the element of admissibility based on the relent law. The consequence of such admission improper or otherwise, would attract a ground of appeal by either party upon conclusion of the case depending on whether there is a conviction or not. That is why the Luke Ouma Ochieng vs R(supra) case is not relevant to this case as it was referring to a situation of an accused person who had already been convicted based on production of exhibits that had been objected to at the trial stage. The admissibility of exhibits objected to should be challenged or raised after conclusion of the trial at the appeal stage and not at the admission stage or in the middle of a trial.

16. The production and admission of the said exhibits does not amount to condemnation of the accused person. It is not automatic that the Applicants will be adversely affected by being convicted. In case of a conviction based on those exhibits, the Applicants shall have a remedy by way of an appeal. The power to admit exhibits or not is purely a matter of interpretation of the law by a trial court. It will be prejudicial to the trial and the eventual outcome of the case which is ongoing if this court were to make a finding that the admission was wrong. A court handling an application of this nature must act with extreme caution and restraint not to unnecessarily invoke revisionary powers thereby interfering with the trial court's proceedings thus prematurely jeopardising the appeal process. Courts are not infallible as mistakes may occur but there are properly prescribed remedies e.g appeals where appropriate.

17. It would be a bad precedent for the High Court to intervene and annul each order made by a trial court in admitting each exhibit against the wish of the defence or prosecution. To allow such a scenario under revisionary powers would amount to anarchy in litigation thus entertaining several mini appeals in the middle of a trial of a case in the guise of exercising revisionary powers thus micromanaging and clogging the legal system by extension unreasonably delaying the expeditious disposal of cases and administration of justice.

18. Practically, it is inconceivable that every ruling on admission or non-admission of exhibit(s) by a trial court would automatically attract or generate a ground of revision. The grounds cited herein do not fall within the confines of an error envisaged under Section 362 of the CPC to call for revision. The Applicants have not been prejudiced by the admission of exhibits at this stage. The case is yet to be finalised. They will have a basis on appeal at the conclusion of the case in the event they are found guilty."

14. In this case the relevant part of the trial magistrate's ruling was as follows:-

" In the present case, the accused in his defence referred to minutes, DMFI-5, 12 & 13 which according to both parties submissions are certified.

It is not in dispute that the said minutes are internal management decision that were made by staff of EPZA who are Public Officers. To that extent, I would agree with Mr. Kanjama that indeed, under Section 79(1)9a), the said minutes constitute the acts on records of public officer of official bodies, hence by that definition they fall in category of public documents.

In that regard, I also agree that in offering the said document as proof before the court, the original need not be provided/presented as Section 81 clearly stipulates that:-

"Certified copies of Public documents may be produced in proof of the contents of documents or parts of contents of which they purport to be copies."

Moreover, his argument that the fact that they are unsigned does not exclude them from being admitted is also in my view correct. This is because if this is the document the Public institution has in its official custody, it cannot be expected to produce as evidence a copy that is signed. The document would have to be accepted as it is presented and the cross-examiner will have to deal with issues such as those being raised on account of these omissions/observation and leave the court to decide on what weight, if any should be attached to the evidence.

This now leads me to the next part; who then should produce the said minutes/documents.

My considered view is that it is not necessarily their authors as prosecutor, M/s Kahoro submitted!

Under Section 38 of Evidence Act, entries in public records can be produced in evidence without necessarily availing the author. those considered as statements made under special circumstances.

Section 38

"An entry in any public records or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in discharge of this official duty, or by any other person in performance of a duty specifically enjoined by the law of the county in which such book, register or record is kept, is itself admissible."

The rule proceeds on the basis that records made in the court of regularly conducted public official activity is taken as admissible as insisting on actual authorship of documents would make it crippling and burdensome to rely on such evidence, hence it is one

of these statement that it excluded from hearsay rule as a statement made under special circumstances.

Which then leads me to the next question, who then should produce the statement.

In my view, such record can only be produced by public officials who are in charge of actual custody of such document to guarantee their authenticity and reliability. On that ground therefore, the objection by the prosecutor is upheld, the accused cannot produce DMFI – 5 MFI – 12 and DMFI-13, if he wants the court to rely on the said document, he as to seek the court's assistance in summoning the officer who has actual custody of these records at EPZA to produce them in court as exhibits. The same case shall apply to the draft report.

In regard to copies of receipt which are in his name, DMFI-12 and DMFI-22,the normal scenario is that when a receipt is issued to you, it is issued in its original form. It is thus anticipated/expected that the holder of the receipt that is in his name should as a matter of fact be having the original receipt.

If not, then, the accused is/was expected to lay a clear foundation before offering secondary evidence and probably, issuing a notice to the advance party to that effect.

In case he obtained the said document from custody to EPZA again, his former employer would in that circumstances be the most appropriate person to produce the same form its custody under procedure explained already.

Fourth, although M/s Machuki said, the said evidence is relevant and fundamental to accused defence. It is obvious that for evidential principles, not every relevant evidence is admissible, for evidence to be admissible. It must satisfy the admissibility requirement. For instance, hearsay may be very relevant but is not admissible unless it falls within the exceptions to hearsay.

For the reasons the objection by the prosecution is upheld."

15. From a reading of the trial court's ruling, it is evident that the magistrate addressed his mind to the submissions of the parties on each document objected to by the prosecution. Firstly, the trial court agreed with the defence that the minutes marked as DMFI 5, 12 and 13 were public documents whose originals need not be produced as **Section 81 of the Evidence Act** allowed for certified copies. Secondly, he found that it is not a requirement that such documents must be signed because the unsigned document may be what is in the custody of the public institution and such an issue must be left to be dealt with in cross examination. Thirdly, the trial magistrate found that under **Section 38 of the Evidence Act**, entries in public records can be produced in evidence without availing the author/maker and are an exception to the hearsay rule. The only reason he gave for rejecting the documents was that the applicant was not the appropriate party to produce them. That such documents ought to be produced by public officials in charge or in actual custody of the same so as to guarantee their authenticity and reliability. The trial magistrate then went ahead and provided the applicant with a remedy as follows: -

" ………….. if he wants the court to rely on the said document, he has to seek the court's assistance in summoning the officer who has actual custody of these records at EPZA to produce them in court as exhibits. The same case shall apply to the draft report."

16. It is evident from the ruling that the documents were not rejected because they were not in the original or because they were not certified. It is also evident that the trial court did not insist on the authors of the documents being called to produce them. Indeed, the trial magistrate offered to assist the applicant to a call witness(es) who had acted as custodians of the same to produce them. The reason the trial magistrate gave was that there was need to ascertain their authenticity and reliability.

17. It is my finding therefore that this is not an appropriate case for this court to exercise its power of revision. As can be seen from the cases cited above the courts have always been reluctant to entertain interlocutory appeals, in criminal proceedings, (indeed this application is but an appeal baptised as a revision or invocation of the High Court's supervisory jurisdiction) due to the delay it would occasion to the trial and also because it would be tantamount to taking away the discretion of the trial court and would result in micromanaging the trial. Indeed, faced with a similar application in the case of **Thomas Patrick Gilbert Cholmondely v Republic, Criminal Appeal No. 116 of 2007 [2008] eKLR** the Court of Appeal held: -

"…We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court. **(emphasis mine)"**

18. I am also alive to the recent guidelines given by the Supreme Court in the case of **Joseph Lendrix Waswa vs Republic [2020] eKLR** in regard to interlocutory appeals. The court stated:-

"………………………………..

92. Therefore, although criminal trials are not timebound like election petitions, there is need to have them determined expeditiously in line with the constitutional prescriptions. In the election petition of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC. Application No. 16 of 2014; [2014] eKLR (Nick Salat Case), we affirmed the significance of time as a component in the dispensation of justice, hence the maxim: Justice delayed is justice denied. We emphasized that it is a litigant's legitimate expectation that when they seek justice that the same will be dispensed timeously.

93. We have also stated that the right of appeal against interlocutory decisions is available to a party at a later date when the final decision of an election Court has been delivered. In Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others, Petition No. 18 as consolidated with Petition No. 20 of 2018; [2019] eKLR, (the Loitiptip case) we held that while there is a right to appeal an interlocutory decision, this right is delayed for good order and in keeping with timelines of election petition matters. We concluded that a person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the decision, in line with Rule 75 of the Court of Appeal Rules.

94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial Court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the trial Court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

> *a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;*
>
> *b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;*
>
> *c. Where the decision entails the recusal of the trial Court to hear the cause." (Emphasis mine)*

19. In this case I am not persuaded that exceptional circumstances exist to warrant this court to exercise its discretion in favour of the applicant albeit sparingly. I find no irregularity, illegality or procedural impropriety that would warrant this court to set aside the ruling of the trial court either by way of revision or by invoking the supervisory jurisdiction of this court. It is instructive that contrary to the Petitioner's submissions that his documents were rejected the record reflects that they were not and that he could with the help of the court call a witness to produce the same. The applicant must allow the trial to proceed and if in the end he still feels aggrieved by the decision of the trial court he can exercise his undoubted right of appeal to the superior court. Accordingly, I find no merit in the application and it is dismissed.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.

E. N. MAINA

JUDGE