



**Njoroge v Republic & another (Miscellaneous Application E033 of 2022)
[2022] KEHC 11181 (KLR) (Crim) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E033 OF 2022
LN MUTENDE, J
JUNE 23, 2022**

BETWEEN

PPAG NJOROGE APPLICANT

AND

REPUBLIC 1ST RESPONDENT

SAFARICOM LIMITED 2ND RESPONDENT

RULING

1. Ppag Njoroge, the applicant herein is jointly charged with another in the Subordinate Court with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. It is alleged that they obtained the money by falsely pretending that they were in a position to sell to the complainant some business containers. They also faced another charge of conspiring to commit a felony in contravention of Section 393 of the Penal Code. They denied the charges and the matter has not proceeded to hearing.
2. On the 4th day of February, 2022, the applicant approached this court through a Notice of Motion seeking issuance of compelling orders against Safaricom Limited to avail geolocation data; all archived data including call logs, messages and M-Pesa transactions for mobile phone Number 0727902619 and 0704480986 and geolocation data of phone Number 0727902619 showing where the money sent to it on 7th April, 2014 was withdrawn.
3. The application which is supported by an affidavit sworn by the applicant is premised on grounds that: The applicant has discovered that the Number 0727902619 allegedly registered under his name was used to commit the crimes in question; that he visited the Safaricom Shop in Nakuru to inquire when and how the number was registered in his name but he was informed that the information could only be issued following issuance of a court order; which necessitated this application.



4. That the application is made in good faith so as to help in Criminal Case No. 3832 of 2021 coming to a just, expeditious, proportionate and affordable resolution.
5. The Director of Public Prosecutions (DPP) for the 1st Respondent, the Republic, filed grounds of opposition for both Respondents. It was stated that the application should have been made at the trial court as this court is seized of appellate jurisdiction on ongoing matters in the Magistrates' courts; that the applicant is seeking assistance of this court to get him evidence that he intends to use in his defence at trial and none of the prayers sought touches on the 1st Respondent who should not have been a party in the matter.
6. The application was disposed through written submissions. It was urged by the learned counsel for the applicant, Mr. Mugweru that this court has jurisdiction which flows from Article 23 of *the Constitution* to hear and determine applications for redress of denial, violation or infringement of/or threat to a right or fundamental freedom in the bill of rights as stated in the case of Samuel Kamau Macharia Vs. KCB & 2 others; Hussein Khalid and 16 others vs. the Attorney General & 2 others (2019) eKLR, Petition Number 21 of 2017; and Lilian 'S' Vs. Caltex Oil (K) Ltd (1989) eKLR.
7. That Article 165 (3) of *the Constitution* confers jurisdiction upon the court.
8. That Parliament in its wisdom enacted the Magistrates' Court Act that provides for the jurisdiction of the said court when it comes to constitutional matters. That following the decision of Hussein Khalid (Supra) where it was decided that:

“It consequently follows that the position in which the Appellants sought to clarify regarding the jurisdiction of the Magistrate's Courts in dealing with the enforcement of the Bill of Rights has since been addressed by Section 8 of the Magistrates' Court Act. However, that legislation was not in force when the Appellants were first before the Magistrate's Court and the Magistrate's Court at that time rightly applied the applicable law. Parliament has granted to the Magistrates Courts power to consider applications on alleged violations of the Bill of Rights but has limited that power to only two rights under Article 25(a) and (b): freedom from torture and cruel, inhuman or degrading treatment or punishment; and freedom from slavery or servitude. This limitation is constitutional as Parliament does not bar a person from bringing a case alleging violation of his right but only limits the forum where that cause can be done.”

The magistrate's court lacks jurisdiction to enforce Article 35 of *the Constitution* as the right does not fall within the ambit of Article 25(a) and (b) of *the Constitution*.

9. The applicant cited the case of *Mariam Mohammed Salim Vs. Republic* (2016) eKLR where the court delivered itself thus:

“The Applicant has the right to be given the information that she seeks is without dispute. Although Safaricom Limited is a Public Limited Liability Company, the services that it offers and the dominant position that it has in the telecommunication sector, elevates it to the unique position where it is the keeper of crucial information in form of telecommunication data that no other organization has. Article 35(1)(b) of *the Constitution* confers a right on any citizen to obtain information held by “another person” when such information is required “for the exercise or protection of any right or fundamental freedom.” and urged that the court has requisite jurisdiction.



10. That it is in the interest of justice that parties get to the root of the issue at hand and it is in the interest of justice that the applicant knows who used his personal information to register the sim card that was allegedly used to commit the offence.
11. That Article 35 of *the Constitution* grants every Kenyan Citizen the right to access information that is required to exercise or protect any fundamental right.
12. 1st Respondent relied on the grounds of opposition filed.
13. I have considered the application, affidavit in support, grounds of opposition filed and written submissions filed by the applicant.
14. Of utmost importance is the question of jurisdiction. As clearly stated, jurisdiction is everything such that a court not seized of it should not determine issues placed before it. The High Court, and in particular the Criminal Division where the application has been filed is seized of original jurisdiction, then appellate and supervisory jurisdiction over Subordinate Courts. The High Court has been vested with the power by *the Constitution*, and Statute. The court therefore confines itself to jurisdiction as provided by *the Constitution* Statute and also judicial precedent.
15. Article 165 (3) and (6) of *the Constitution* provides thus
 - (3) Subject to clause (5), the High Court shall have—
 - (a) Unlimited original jurisdiction in criminal and civil matters;
 - (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) The question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) A question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.



- (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.
16. Written laws set out courts with jurisdiction to determine various offences. For instance the Criminal Procedure Code at the 5th column of the first schedule clearly indicate that offences the applicant is facing are triable by the Subordinate Court which means that it removes the original jurisdiction from the High Court.
17. The argument raised by the applicant is that the Subordinate court does not have jurisdiction to hear matters touching on access to information. Section 35 of *the Constitution* provides thus:
- (1) Every citizen has the right of access to—
 - (a) Information held by the State; and
 - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 - (3) The State shall publish and publicise any important information affecting the nation..
18. The applicant has also buttressed his argument based on Section 26 of the *Data Protection Act* which provides as follows:
- A data subject has a right-
- a. To be informed of the use to which their personal data is to be put;
 - b. To access their personal data in custody of data controller or data processor;
 - c. To object to the processing of all or part of their personal data;
 - d. To correction of false or misleading data; and
 - e. To deletion of false or misleading data about them.
19. And, Section 4 of the *Access to Information Act* which provides thus:
1. Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a. The State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - (2) Subject to this Act, every citizen's right to access information is not affected by—
 - a. Any reason the person gives for seeking access; or
 - b. The public entity's belief as to what are the person's reasons for seeking access.



- (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 - (4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
 - (5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.
20. The applicant herein in actual sense seeks an order that will enable him obtain documents that he will use in his defence. The proceedings before the court being criminal in nature, the prosecution has the burden of proof. It will be its responsibility to prove the disputed charges.
21. Where the accused needs documents/evidence that have not been availed by the prosecution which are in possession of another party, they should resort to the law as provided by Section 144(1) of the CPC that stipulate thus:
1. If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.
22. The Magistrate's court has the duty of ensuring justice is done. It will not be expected to overlook the right to a fair trial. The applicant would have been obligated to make an application for the party in possession of the documents to be summoned by the trial court to provide the necessary information, where the application is not granted he can move the Superior Court to either exercise its supervisory or appellate jurisdiction.
23. The upshot of the above is that the application is bereft of merit. Accordingly, it is dismissed.
24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 23RD DAY OF JUNE, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Mugweru for Applicant

Ms. Ntobo for 1st Respondent

Court Assistant - Mutai

