



Director of Public Prosecutions v Mwiraria & 6 others (Anti-Corruption and Economic Crimes Revision E005 of 2022) [2022] KEHC 14180 (KLR) (Anti-Corruption and Economic Crimes) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E005 OF 2022
EN MAINA, J
OCTOBER 19, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

**DAVID MWIRARIA 1ST RESPONDENT
DAVE MUNYA MWANGI 2ND RESPONDENT
JOSEPH MBUI MAGARI 3RD RESPONDENT
DAVID LUMUMBA ONYONKA 4TH RESPONDENT
RASHMI CHAMANLAL KAMANI 5TH RESPONDENT
DEEPAK KUMAR KAMANI 6TH RESPONDENT
INFOTALENT LIMITED 7TH RESPONDENT**

*(Being a revision on the ruling of Hon. M. Mutuku (Miss)
CM delivered on 18/2/2022 in ACC Case No. 4 of 2015)*

JUDGMENT

1. The Director of Public Prosecutions is aggrieved by a ruling of the trial court in ACC No. 4 of 2015 *Republic v David Mwiraria & 6 others* delivered on February 18, 2022 in which the court disallowed the production of evidence obtained from the Swiss Confederation through Mutual Legal Assistance, public documents and other documentary evidence obtained locally in the course of investigations by the Kenya Anti-Corruption Commission.



2. The Director of Public Prosecutions filed a Notice of Motion dated April 7, 2022 which is supported by the affidavit of Eunice Oloo, Principal Prosecution Counsel sworn on even date.
3. The Application is brought under Article 165(6) and (7) of *the Constitution* and Sections 362, 364 and 367 of the *Criminal Procedure Code* and it seeks the following orders:
 - “i. Spent
 - ii. That the Honourable Court grants a stay of the proceedings in ACC 4 of 2015 (*Republic v David Mwiraria & 6 others*) pending the hearing and determination of this Application for revision
 - iii. That the Honourable Court be pleased to call for and examine the record of the proceedings in ACC 4 of 2015 (*Republic v David Mwiraria & 6 others*) for purposes of satisfying itself and pronouncing on the correctness, legality and propriety of the findings and orders issued on February 18, 2022 by Hon. Martha Mutuku CM
 - iv. That the Honourable Court be pleased to review, vary reverse and/or set aside the orders disallowing production of evidence obtained from the Swiss Confederation in Anti-Corruption Case Number 4 2015 (*Republic v David Mwiraria & 6 others*) on grounds of integrity.
 - v. That the Honourable Court be pleased to review, vary reverse and/or set aside the orders disallowing production of public and other documentary evidence obtained locally in the course of investigation by KACC as it then was.
 - vi. That the Honourable Court be pleased to make any other order that it deems fit in the interest of justice.”
4. The Application is made on the following grounds stated on the face of it and expounded in the supporting affidavit:
 - “i. That the Learned Magistrate erred in law by disallowing production of the evidence obtained from the Swiss Confederation and marked as MFI 103 a, b & c and 104 despite having found that the transmission of the evidence obtained through MLA was in order.
 - ii. That the Learned Magistrate erred in law by stating that all evidence obtained through MLA was conveyed to the Investigating Officer, John Kilu, PW50 through a flash disk which he printed from, disregarding the evidence of Mark Henzelin, PW31, Githu Muigai, PW35 and Gedion Kimathi Rukaria, PW37 that the evidential material had been transmitted in both hard copies and marked as MFI 103 a, b & c and 104 and soft copy in a flash disk and marked as MFI 89.
 - iii. That the Learned Magistrate erred in law in stating that there was tampering and mishandling of the evidence obtained through MLA without any demonstration of the alleged tampering and mishandling.
 - iv. That the Learned Magistrate erred in law by contradicting herself in finding that the evidence obtained through MLA failed the integrity test and the chain



of custody was broken while at the same time finding that the transmission of the said materials was proper

- v. That the Learned Magistrate misdirected herself in law by failing to appreciate that the Mutual Legal Assistant (MLA) Act has specific provisions for admissibility in Kenya of evidence obtained abroad as provided for in Part VI of the said Act and ruled that the evidence obtained through MLA did not comply with the provisions of the [Evidence Act](#).
- vi. That the Learned Magistrate erred in fact by implying that the evidence obtained through *MLA Act* (MFI 103 a, b & c and 104) was printed and thus ought to be accompanied by an electronic certificate while the said evidence was obtained in hard copies and were in compliance with Section 33 and 34 of the MLA Act.
- vii. That the Learned Magistrate erred in law and in fact by finding that the documents marked as MFI 115, 116a, b & c, 117 a, b & c, 118 & 122 were not accompanied by an electronic certificate while the same were obtained during investigations in form of hard copies.
- viii. That the Learned Magistrate erred in fact by not according due weight and exercising discretion to the basis laid for production of secondary evidence by the testimony of Philip Langat PW39 and John Kiilu, PW50 on the difficulties experienced in obtaining original public documents in respect of MFI 2, 5, 6, 8, 11a, 12, 16, 19, 20, 24, 25, 33, 34, 36, 53, 57, 58, 61, 63, 67, 87, 88, 91, 92, 93, 97, 105, 106, 107, 109, 110, 112, 114, 119, 120, 122 and 133.

The Response

5. The 4th, 5th and 6th Respondents opposed the Application *vide* a replying affidavit sworn by 4th Respondent on May 24, 2022 and grounds of opposition dated June 10, 2022.
6. The 4th Respondent contends that the Application was filed more than 3 months from the date of the decision, which amounts to inordinate delay. He contends that there is nothing manifestly incorrect, illegal or improper regarding the court's ruling of February 18, 2022 that warrants the application and that the ruling is well-reasoned and accurate. That the applicant seeks that this court micromanages and superintends over the conduct of the trial court and issue directions on the conduct of the trial and that applicants have not made a case to warrant the grant of reliefs sought.
7. The 5th and 6th Respondent raised 30 grounds of opposition, which may be summarized as follows: they contend that the application is an abuse of the court process; that this court lacks jurisdiction to re-evaluate the evidence placed before the lower court; that the trial court correctly disallowed admission of electronic evidence which was not accompanied by a certificate; that the trial court correctly applied the [Evidence Act](#) to the admissibility of evidence obtained from Mutual Legal Assistance; that the integrity of the documents was questionable; the public documents were uncertified and the chain of custody of the documents was broken and further that the evidence consisted of uncertified photocopies and unauthenticated documents that lacked certification from the country of origin and a certificate of electronic transmission.
8. The 5th and 6th Respondents contend that the Respondent's right to a fair trial will be violated should the document be admitted in evidence. Lastly, that the Applicants have not met the threshold for revision and the admission of the documents would result in a miscarriage of justice.



Submissions by the parties

9. The application was canvassed by way of written submissions.
10. The Applicant framed three issues:- whether the court erred in disallowing the production of uncertified public documents; whether the court erred in law and fact by stating that the documents obtained through Mutual Legal Assistance do not comply with the rules of Evidence; and whether the court erred in finding that the chain of custody was broken.
11. The Applicant submitted that PW 39 Philip Kipkemoi and PW50 John Kiilu enumerated the challenges encountered in obtaining the original documents, including the investigations begun in the year 2003, hence obtaining the original documents was impossible. That the case attracted public interest, being an Anglo Leasing case hence several government institutions were involved and the investigating officer could only rely on the documents supplied. Learned Counsel for the Applicant explained the basis and reasons for the production of the documents as follows:
 - “i. The Applicant submits that the trial court erred in holding that Section 33 and 34 of the *MLA Act* does not take away the requirements of compliance with the *Evidence Act*. That there is an underlying presumption that evidence obtained abroad was lawfully gathered in accordance with the law applicable in that jurisdiction; that documents are issued by a competent authority and the subsequent custody of the Mutual Legal Assistance. That the request for Mutual Legal Assistance was sent to the Federal Office of Justice and Police Switzerland and US Central Authority Mario Tariche PW26 and Mark Henzelin PW31. That their evidence regarding the MLA materials was in compliant with Section 23 of the *MLA Act* and as such, the documents transmitted by the two witnesses should be admitted as exhibits.
 - ii. That Sections 33 and 34 of the *MLA Act* allow the production of the evidence obtained through MLA from Swiss and USA, namely MFI 103, 104, flash disks and CDs 89, 90a and 90b in the form in which it was received in Kenya. That these documents were received in hard copies, alongside the flash disks in which the documents had been scanned and saved, as shown by the letter from the Attorney General transmitting the documents to the EACC dated February 16, 2015 Exh 96. That PW 50 did not need to produce a certificate for electronic evidence as he did not print them.
 - iii. They submit that the trial court erred when it made a finding that the MLA process was proper and contradicted itself by finding that the MLA process was interfered with. They submitted that the chain of custody was not broken and explained the sequence of events leading to the transmission of documents from Lalive Switzerland to the Attorney General. That the documents were well preserved and the evidence was neither tampered with nor mishandled. They concluded by submitting that the trial court erred in law and fact by denying the admission of documents and urged the court to admit the excluded documents.”
12. On their part, the 5th and 6th Respondents submitted on two issues: whether the court acted correctly, legally and properly in disallowing the production of uncertified public documents and in disallowing the documents obtained through MLA do not comply (sic) with the rules of Evidence.



13. They submit that Section 67 of the *Evidence Act* the basis of the best evidence rule provides that documents must be proven by primary evidence, except as exempted under Section 68 of the Act. They submit that Section 68(2) and Sections 80 and 81 of the *Evidence Act* confine the production and admissibility of public documents to certified copies and no other kind of secondary evidence is admissible. They cited the cases of *Attorney General v Torino Enterprises Limited* [2022] KECA 78 [KLR], *Dickson Ngigi Ngugi v Morrison Njenga Waweru* [1979] eKLR and *Cannon Assurance [K] Ltd v Ali Hamadi Mwagude & 4 Others* [2017] eKLR in support.
14. They submitted that the following documents were properly excluded by the trial court as they were either drafts or unsigned copies and/or uncertified copies: MFI 2, 5, 6, 8, 11(a), 12, 16, 19, 20, 24, 25, 33, 34, 35, 36, 53, 57, 61, 63, 67, 87, 88, 91, 92, 93, 97, 99(b), 103 MLA (a) to (c), 104, 105, 106, 107, 109, 110, 112, 114, 119, 120, 122 and 133.
15. On the second issue, the Respondents submitted that no law justifies the production of uncertified copies of Mutual Legal Assistance documents, that the uncertified copies of documents obtained through Mutual Legal Assistance were properly excluded. These documents were MFI 79, 80, 81(a), (b), (c), 89, 90(a), (b), 98(a), (b) 100, 103 (a-d), 104, 115, 116(a-c), 117(a-c), 118 and 122. They contend that Article 46(2) of the *United Nations Convention Against Corruption* requires that Mutual Legal Assistance shall be afforded in accordance with the laws, treaties and agreements of the requested state. Further, that Article 46(3) (f) of the *Convention* requires that documents be provided in original or certified copies.
16. The 4th and 5th Respondents submit further that Sections 66, 67, 68(2)(c), 69, 70, 71 and 81 of the *Evidence Act* stipulate that secondary evidence must be certified as true copies of the original; that the Investigating Officer was not the author of the documents and therefore could not explain the whereabouts of the originals. Further, that Section 46 of the Mutual Legal Assistance Act stipulates that the laws of Kenya shall govern the procedure for complying with a request and the admissibility of evidence to be gathered under the *Mutual Legal Assistance Act*; that there was no compliance with foreign law as argued by the prosecution and that in any event, the foreign law must be pleaded and an expert witness called to testify. Counsel cited a text from Dicey, Morris and Collins “*Conflict of Laws*”.
17. Counsel asserted that the Marc Henzel’s testimony did not explain how the documents were stored or preserved so as to maintain the integrity and that the security and chain of custody of the documents was not established.
18. They argued further that the electronic evidence did not meet the requirements of Sections 78(A), 106 (B), 176 and 177 of the *Evidence Act*. That there was no witness called from the bank to verify the documents or an affidavit sworn under Section 177 of the *Evidence Act*. That the investigation officer did not have ordinary custody of the documents and therefore could not verify them. That he was not a super witness and the documents objected to could not be admitted and the admission of these documents will violate their rights.

Analysis and determination

19. The learned trial Magistrate in her ruling delivered on February 18, 2022 disallowed the production of the documents the subject of this application for reasons that:

“ a. the documents were uncertified copies of public documents;



- b. the documents obtained through Mutual Legal Assistance do not comply with the [Evidence Act](#);
 - c. the evidence obtained through Mutual Legal Assistance was tampered with, mishandled, failed the test of integrity and there was a break in the chain of custody.”
20. The admissibility of documents is provided for in Section 64 of the [Evidence Act](#) which states that the contents of documents may be proved either by primary or by secondary evidence. What constitutes primary evidence is defined in Section 65 of the Act. Section 67 of the Act prescribes that documents must be proven by primary evidence, except as provided under Section 68 (1) of the Act, the relevant part of that section states:
- “68(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—
- ...
- (e) when the original is a public document within the meaning of section 79 of this Act;
 - (f) when the original is a document of which a certified copy is permitted by the [Evidence Act](#) or by any written law to be given in evidence.”
21. Section 68 (2) (c) of the [Evidence Act](#) provides further that in the case of public documents the only secondary evidence admissible are certified copies. The subsection states:-
- “68(2)(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible”.
22. The manner of certification of public documents is provided for under Section 80 while the term “public document” is defined at Section 79 of the [Evidence Act](#) as follows:
- “(1) The following documents are public documents-
- a. documents forming the acts or records of the acts-
 - i. of the sovereign authority; or
 - ii. of official bodies and tribunals; or
 - iii. of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
 - b. public records kept in Kenya of private documents.
- (2) All documents other than public documents are private.”
23. While urging that the expunged documents should be admitted, the Applicant gave the following explanation:



NO	MFI	DEFENCE OBJECTION	PROSECUTION RESPONSE
2	The document is not signed	The original document has been obtained	
5 & 6/34	The documents are photocopies of certified copies	It is the evidence of PW39 that his role was receiving and filing classified documents of which MF1-5 and 6/34 were among them. He stated in his testimony that he had the original copies when he was certifying the said document. He was cross examined on the same and he admitted as such. The document should in the circumstances be admitted as evidence based on the testimony of PW39	
16	The documents are photocopy of certified copies	PW5 John K. Birech testified about this letter That he was the author and therefore confirmed its authenticity. The same has been certified as a true copy of the original	
8,24,11a,20,53,63,91,92,93,105,106,107,109, 110,112	These documents are uncertified	These are public documents and the efforts to secure the original documents	



		were futile as demonstrated by the Investigating Officer.
36	That the document is uncertified	The letter was addressed to Edwin Nyaseda who is deceased; it was impossible to obtain documents addressed to him.
25,67	That the documents are uncertified MFI 25 is an unsigned document	These documents were obtained in the state they are in. MFI 25 is an unsigned document and therefore it was impossible to certify the same and in the absence of the original. MFI 67 is a letter from 7 th accused person and obtained in the state it is in.
57,58/86, 87,88,97 and 119	That the documents are copies	These are letters emanating from the Republic of Kenya to USA Central Authority and Switzerland. The original documents are in the possession of the recipient authorities.
99b	The document is a copy	This is an original document, a request from MLA made by EACC through the Honourable Attorney General to the British Virgin Islands. The document is in its original form.
19	The witness was not available	The prosecution submits that the



		witness testified as PW8, Wilson Gikonyo. The witness testified and stated that he is the author of the said statement. He also stated that he is the one who signed it. The original statement had been availed to EACC but due to the number of cases being investigated to which the document referred to, it has become impossible to trace the same within reasonable time.
85/98a and 98b	That the documents are copies	There are original documents. There are letters addressed to the Attorney General from Marc Henzelin PW311 and an envelope that was used to mail the letter.
121	This document has not been made reference to by the accused persons	The document is in its original form. The same should be admitted as an exhibited.
91	That the document is a copy	The document was cutting across various cases

24. I will consider each set of documents, the defense's objection and make a finding in a chronological manner as below:



Unsigned documents

25. MFI 2 and MF1 25 are draft documents that have not been signed by the authors. The prosecution submitted that the originals have since been found. In expunging MFI 2, the court directed that the prosecution was at liberty to produce the original and signed document. In my view, the documents, being unsigned and hence not attributable to any particular person and also being copies, do not meet the threshold set for admissibility of public documents under Section 81 of the *Evidence Act* and therefore are inadmissible. My finding gets support in the case of *George Kimani Njuki v National Lands Commission and 2 others* [2022] eKLR where the court stated:-

“ 30. In my humble view, the fact that the documents, which were availed to the court, were neither signed nor approved, the same therefore do not satisfy the provisions of Section 81 of the *Evidence Act*, Chapter 80, Laws of Kenya.

31. In my humble view, such documents are not admissible and therefore same cannot be relied upon and/or otherwise, be therefore subject of admissibility, even if the witness seeking to produce same, is a Public officer.”

26. Accordingly, I find no error in the decision of the trial magistrate in regard to the unsigned documents and it is upheld.

Uncertified public documents

27. Section 68(2)(C) as read with Section 81 of the *Evidence Act* provides that secondary evidence of public documents can only be through certified copies. The court expunged the following documents for being uncertified public documents: MFI 2, 5, 6, 16, 34, 36, 8, 24, 11(A), 20, 25, 53, 63, 67(a), 91, 92, 93,105, 106, 107,110 and 112. It is my finding that the prosecution’s contention that the originals have been lost or cannot be traced and that the said documents were found in that state does not suffice to depart from the application of Section 68(2)(c) and 81 of the *Evidence Act* to the same. In the case of *Dickson Ngigi Ngugi v Morrison Njenga Waweru* [1979] eKLR the Court of Appeal while dealing with the application of Section 68(2) of the *Evidence Act* stated:-

“ Also, in our opinion, a copy of a document which is not certified is inadmissible and the Court may not look at it because of the provisions of sections 67 and 68(1) (e) and (f) and (2) (c) of the *Evidence Act*.”

28. I therefore find no error in the trial court’s finding which led to the expunging of the uncertified public documents. It is not enough to state that the makers of these documents cannot be found and that the originals are untraceable.

Documents obtained through Mutual Legal Assistance

29. The trial court expunged MFI 103, 104, flash disks and CDs 89, 90a, 90b, 115, 116 (a-c), 117a and b, 118 and 122 upon the defense’s objection that these were documents obtained through Mutual Legal Assistance conveyed and printed from a flash disk, hence electronic evidence, which did not conform with the requirements of the *Evidence Act*, for want of the requisite certificate.

30. The Applicant contends that the documents obtained through Mutual Legal Assistance were in two sets: documents contained in a flash disk (soft copy) and hard copies sent via courier the latter of which in their opinion are not subject to the requirements of the *Evidence Act*. On the other hand, the Respondents contend that the Mutual Legal Assistance documents consisted of uncertified copies,



electronic evidence and that the same had a broken chain of custody contrary to the provisions of the *Evidence Act*.

31. It is clear from the arguments of both sides and the ruling of the Learned magistrate that there were indeed two sets of documentary evidence one being the evidence contained in the flash disk (soft copy) which in my view constitutes electronic evidence under Section 106(B) of the *Evidence Act* and the other being the (hard copies) evidence that was couriered which in my view constitutes evidence under Section 65(4) (c) of the *Evidence Act*.
32. The law requires that both types of documents are accompanied by certificates authenticating the manner in which the evidence was recorded, stored or reproduced - see Section 65 (5) and (6) and 106B of the *Evidence Act*.
33. Section 65 (5) (c) of the *Evidence Act* provides as follows:

“(5) Notwithstanding anything contained in any other law for the time being in
(c) force

- a. a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or
- b. a facsimile copy of a document or an image of a document derived or captured from the original document; or
- c. a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a "computer print-out")

shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Subsection 6 states: -

- (6) The conditions referred to in subsection (5) in respect of a computer print- out shall be the following, namely—
 - a. the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;
 - b. the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;
 - c. the computer was operating properly or, if not, that any respect in which it was not operating properly was not such as to affect the production of the document or the accuracy of its content;
 - d. the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of business.”



Subsection (8) then provides that a certificate for the purpose prescribed therein shall be admissible in evidence. The subsection provides:-

- “(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—
- a. identifying a document containing a print-out or statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
 - c. dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.”

34. Similarly, Section 106B (4) of the *Evidence Act* requires that electronic evidence is accompanied by a certificate similar to the one provided for in Section 65(8) of the *Act*. Indeed Sections 65(8) and 106B(4) are similar word for word and I need not reproduce section 106B(4) here. Suffice it to say that, the requirement for a certificate under Sections 65(8) and 106B (4) is mandatory as it is crucial for the authentication not only of the contents of the documents sought to be produced but also of their integrity. The trial court therefore rightfully excluded the two sets of documents for having not been accompanied by the requisite certificates and it cannot be faulted for so doing.

35. I am fortified in so holding by a similar finding in the case of *Republic v Mark Lloyd Stevenson* [2016] eKLR where it was held:

“48. For completeness, it is important to refer to the provisions of sections 106B (1), (2) and (3) as well as section 106(I) of the *Evidence Act* even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B (2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:

- a. It must identify the electronic records and production process;
- b. It must show the particulars of the producing device; and
- c. It must be signed by the responsible person.

49. In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B (1), it must satisfy the conditions in section 106B (2)”³⁶.



36. More crucial is the admissibility of the evidence obtained through mutual legal assistance which is guided by the Mutual Legal Assistance Act and Article 46 of the UN Convention Against Corruption. The *Mutual Legal Assistance Act* states as follows at Section 6(2):

- “(2) For the purposes of this Act, legal assistance means mutual legal assistance in criminal matters and includes, but is not limited to—
- a. identifying and locating of persons for evidential purposes;
 - b. examining witnesses;
 - c. effecting service of judicial documents;
 - d. executing searches and seizures;
 - e. examining objects and sites;
 - f. providing, including formal production where necessary, originals or certified copies of relevant documents and records, including but not limited to government, bank, financial, corporate or business records;
 - g. providing information, evidentiary items and expert evaluations;
 - h. facilitating the voluntary attendance of witnesses or potential witnesses in a requesting state;
 - i. facilitating the taking of evidence through video conference;
 - j. effecting a temporary transfer of persons in custody to appear as a witness;
 - k. interception of items during the course of carriage by a public postal service;
 - l. identifying, freezing and tracing proceeds of crime;
 - m. the recovery and disposal of assets;
 - n. preserving communications data;
 - o. interception of telecommunications;
 - p. conducting covert electronic surveillance;
 - q. any other type of legal assistance or evidence gathering that is not contrary to Kenyan law.”

37. Section 46 of the *Mutual Legal Assistance Act* on the other hand provides that the law of Kenya shall govern the procedure for complying with an MLA request and the admissibility of evidence gathered under the *Act*. More specifically it states: -

“46. Applicable law



The law of Kenya shall govern the procedure for complying with a request and the admissibility of evidence to be gathered under this Act.”

38. However, the application of the Evidence Act is limited to the extent that the evidence gathered shall not be inadmissible only for the reason that the same is hearsay. This is provided at Sections 33 and 34 of the Mutual Legal Assistance Act which state:-

“ 33. Foreign records

(1) A record or a copy and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record sent to the Central Authority by a requesting state in accordance with a Kenyan request, shall not be inadmissible in evidence in a proceeding with respect to which the court has jurisdiction by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion.

(2) For the purpose of determining the probative value of a record or copy admitted in evidence under this Act the court may examine the record or copy, receive evidence orally or by affidavit, including evidence as to the circumstances in which the information contained in the record or copy was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record or copy.

34. Foreign things

A thing and any affidavit, certificate or other statement pertaining to the thing made by a person in a requesting state as to the identity and possession of the thing from the time it was obtained until its sending to the Central Authority by the requesting state in accordance with a Kenyan request, are not inadmissible in evidence in a proceeding with respect to which the court has jurisdiction by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.”

It is clear therefore that the admissibility of the documents before the trial court depended on their conformity to the Evidence Act of Kenya.

39. The other objections raised by the defense in respect to the Mutual Legal Assistance documents were that: the documents were uncertified copies; that they were obtained in non-compliance with the Mutual Legal Assistance law on the chain of custody, confidentiality and tampering with evidence.

40. I reckon that no objection was raised on account of these documents being “hearsay” within the meaning of Sections 33 and 34 of the Mutual Legal Assistance Act. In my view, the trial court correctly interpreted this law as follows:

“ The provisions of this section seek to exempt foreign documents and copies thereof obtained through MLA processes from the ordinary requirement that the makers must be called to authenticate and produce them or to permit statements or affidavits about the contents of such documents to be admissible as evidence of the contents. This does not bar any



party from raising objections on admissibility of such evidence on other grounds. These provisions do not lock out the application of the *Evidence Act*.”

41. The preceding paragraphs have conclusively dealt with the issue of the inadmissibility of uncertified public documents. This means therefore that all the uncertified public documents obtained both locally and through Mutual Legal Assistance are inadmissible and were properly expunged from the record by the trial court. It is noteworthy that the State could have, if they so intended, obtained certified documents under Section 6(2) (f) of the *Mutual Legal Assistance Act*.
42. PW 31 testified that the flash disks contained all the Mutual Legal Assistance documents that were transmitted to Kenya. In my view, all the Mutual Legal Assistance documents contained in the flash disks, CDs and those sent by courier must be produced in compliance with the mandatory rules of evidence under Sections 65 and 106B of the *Evidence Act*, that is to say, they were to be accompanied by the certificates under Sections 65 (8) and 106B (4), which were lacking and hence they were inadmissible.
43. In regard to the documents marked MFI 85/98a and 98b, 99b and 121 my finding is that they were not expunged. Indeed, at page 7 of the Ruling, the Learned trial magistrate’s finding was that the documents had not been produced; that the prosecution was in the possession of the documents and that the prosecution was at liberty to produce the original documents.
44. It is important to note that the right to fair trial is non-derogable (See Article 25 of *the Constitution*). The provisions of the *Evidence Act* exist to ensure that the right to fair trial is accorded to both the prosecution and the accused persons. Ignoring the mandatory provisions of the *Evidence Act* on the admissibility of evidence as the Applicant is asking this court to do would in my view amount to a violation of the Respondents’ right to fair trial. The upshot is that the Application for revision is unmerited and it is dismissed.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2022.

E N MAINA

JUDGE

