



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 32 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

PRAFUL KUMAR PREMCHAND SALVA.....RESPONDENT

R U L I N G

1. By an application dated 4th October 2019 the DPP prayed that the court varies the order issued in respect of the ruling dated 18th October 2019 by Hon. Nyaloti CM in Mombasa Chief Magistrates Court Anti-Corruption Case No. 10 of 2018. According to the Applicant the court is to call for the trial Magistrates file to satisfy itself of the propriety, legality or otherwise of the said orders.

2. The applicant framed issues for determination as follows:-

- i. Whether the prosecution is at liberty to reach fundamental right to privacy of communication.
- ii. Whether telephone tapping, ear dropping and telephone conversation is admissible evidence under the Evidence Act.
- iii. Whether the prosecution can be ordered to supply what is not in their custody and/or possession.
- iv. Whether the court can direct the course of investigation in the matter.
- v. Whether the prosecution is supposed to go out of its way to help the defence in achieving its goal.

3. The application for revision was opposed vide Replying Affidavit of Praful Kumar Premchad Squalar shown on 8th day of October 2019. He averred that his application led to the ruling delivered on 1st October 2019 and it was occasioned by the prosecutions obvious intransigence on providing him with evidence he had sought. He argued that the ruling by the trial Magistrate was based on sound law and should not be interfered with.

4. The Respondent averred that the recording of the conversation he seeks is that which the prosecution have indicated they wish to rely on between the Respondent and Mike Mbuvi Sonko alleged made on 20th August 2018 at around 10.00pm. He said what he seeks is in possession of the prosecution already. The Respondent said at no time has he sought to have the subject he has tapped on eaves dropped upon as suggested by the prosecution.

5. Application for revision was canvassed by way of written submissions. In the Applicant submissions the holding in the authority of KHRC vs Communications Authority of Kenya and 4 Others was relied on to support the position that a person's right to planetary entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions.

6. It was argued that supply of telephone records of people who are not partner to the Anti-Corruption case for the period between 21/8/2017 to 30/8/2018 would amount to an infringement on the right to privacy as it would expose a lot of communication that is not part of the case to unnecessary scrutiny and exposure. It was also submitted that there was no legal foundation upon which the orders issued by the trial Magistrate were sought. The court was urged to find that the orders made are unenforceable and should be set aside.

7. On whether the duty of the prosecution to disclose extends to material not in its possession the applicant relied in the holding on Court of

Appeal decision in **Thomas Patrick Cholmandley vs Republic Criminal Appeal No. 116 of 2007 (2008) eKLR**, the decision in **Republic vs Ward [1993] 2 ALL ER 557** and Supreme Court of Canada holding in **Republic vs Stinchcombe [1992] LRC (Cri) 68** to say that they are in agreement with the said decisions as to their interpretation of what the word facilitation means and the legal obligation placed on the prosecution towards the defense to disclose not only the evidence it considers relevant to its case but also evidence it does not intend to use.

8. The applicant argued that it had not been demonstrated that the information sought is in the possession of the prosecution and that the trial Magistrate clearly misapprehended the investigation process. The Respondent on the other had submitted this court does not have the mandate grant the orders sought by the applicant and that the orders being sought to be revised are sound in law and the same should not be *interparties* with.

9. The Respondent argued that the application does not fit within the powers of this court exercising its power of revision. It was further submitted that the prosecution appears to have brought a wholly new matter for consideration before the court different, from that which is before the trial court. Thus has launched an onslaught upon the trial court's decision in the form of an appeal.

10. It was further argued that the powers of revision are being invoked to manage the trial courts proceedings in respect of matters which are properly before the trial court thereby severely limiting its power to proceed logically with the matters before it. It was argued that the right approach would have been to appeal the decision of the trial Magistrate as the application goes to the merits of the decision.

11. The Respondent relied on the holding in **Republic vs John Wambua Munyao & 3 Others (2013) eKL, High Court of Malaysia decision in public Prosecution vs Mutaribu Moh'd Jani & Another [1996] 4 LR C 728 at 734 & 735**. They also relied on the holding in **Republic vs Samuel Gathuo Kamau [2016] eKLR** where Waweru J held:-

“Needless to say that Supervisory jurisdiction is excused as may be provided by the law – by way of appeal, revision etc. It does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect of conviction, sentence acquitted (Sections 347, 348 & 348A of C.P.C.). As for revision the supervisory jurisdiction is exercised in respect of findings, sentences, orders and regularity of any proceedings. The Respondent argued that the applicant intends to trammel powers of the trial court by the present application”.

12. The Respondent on the 2nd issue argued that the telephone recordings they meant disclosed is that which is relied upon to charge the applicant and that the same was recorded by the complainant during his alleged conversation with the Respondent and the same was availed to EACC and is in possession of the prosecution and therefore the prosecution cannot cry privacy to obfuscate the facts at hand. It was submitted that the prosecution is attempting to conceal the obvious case of entrapment and extortion upon which the charges against the accused are based.

13. It was submitted that the prosecution had previously given assurances to the defence that it would supply CCTV footage; on 7/2/2019 prosecution requested for 7 days to compile and supply documents requested by the defence in their letter annexed to application dated 2/9/2019.

14. On 15th February 2019 the prosecution indicated that failure to supply accused persons call data was due to a mix up from service provide. On 27/2/2019 the prosecution indicated that the defence should specify period within which the complainants call data was required. The Respondents/Defence then specified the telephone numbers to which data was required and period as 0722886600 from 6/6/2018 to 27/06/2018 which data supplied was manipulated and 0739 55 55 55 which could not open as well as its data for 20/8/2018 and from 21/8/2017 to 20/8/2018.

15. The court thereby made and that the defence was at liberty to resort to other avenues if they feel that there is evidence which is unreasonably being withheld. The Respondent argued that the trial Magistrate was right in upholding the application in the circumstances.

16. The Respondent while relying in the holding in holding in **Joseph Ndungu Kagiri vs Republic (2016) eKLR, Republic vs Ward and Republic vs Stindscombe** argued that the prosecution under Article 50(12)(i) has a constitutional duty to inform the accused person in advance of the evidence, if intends to rely on, and to give reasonable access to that evidence. Numerous other authorities were cited by the Respondent namely:- **Thomas Patrick Cholmandley vs Republic**

17. **George Ngndine Juma, Peter Okoth Alingo & Susan Muthoni Nyoka vs AG (2003) eKLR** where it was held that the processing and hearing of trial of a case must be free from prejudice, favoritism and self-interest; and the court must be detached, unbiased, even handed, just disinterested balanced, upright and square. There must be shown all the qualities of impartiality and honesty.

18. The Respondent argued that the principles/elements set out in **Geronge Ngondhe & 2 Others vs AG** are the ones the trial court used to make the decision which is sought to be reviewed. The Respondent argued that the prosecution misconstrued the trial court's decision and in the application has no merit and should be dismissed.

19. I have considered the application for revision by the prosecution/applicant herein together with the Replying Affidavit opposing the application and submissions by the respective parties. I have also perused the ruling subject of this revision application and the issues to be determined are whether the applicant has satisfied the elements and/or grounds upon which this court can make an order revising the trial Magistrates orders made on 1st day of October 2019.

20. The criminal procedures code cap... Sections 362 to 365 provides for jurisdiction of the court to court revise and circumstances under which the High Court can call for and/or be moved to revise orders of a subordinate court under its supervisory jurisdiction. It provides:-

362. Power of High Court to call for records *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.

363. Subordinate court may call for records of inferior court (1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings. (2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court. [Act No. 17 of 1967, s. 35.]

364. Powers of High Court on revision (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; [Rev. 2018] Criminal Procedure Code CAP. 75 102 (b) in the case of any other order other than an order of acquittal, alter or reverse the order. (c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review. (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. [Act No. 10 of 1970, Sch., Act No. 19 of 2014, s. 20, Act No. 25 of 2015, Sch.]

365. Discretion of court as to hearing parties No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision: Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2). 366. Number of judges in revision All proceedings before the High Court in the exercise of its revisional jurisdiction may be heard and any judgment or order thereon may be made or passed by one judge: Provided that when the court is composed of more than one judge and the court is equally divided in opinion, the sentence or order of the subordinate court shall be upheld. 367. High Court order to be certified to lower court.

21. The trial Magistrate allowed the application by the defence and ordered the prosecution to avail specific telephone conversations requested by the defence before the close of prosecution's case to enable the defence prepare for their case.

22.. This finding was based and guided by the provisions of the constitution Articles 50(2) (c) & (j), Section 26 of the ODPP Act and authorities relied on by both the applicant and the Respondent counsel as well as authorities that the trial Magistrate researched on in the course of writing her ruling. Important excerpts of the said ruling are:-

“Disclosure of evidence held by the prosecution is one of the cornerstone of the criminal justice system and disclosure of unused material is a key component of the investigations and prosecution process”.

23. Paragraph 27:-

“It follows that the specific details include documents prepared by the prosecution from others file materials which have been excluded from the witness statements and documents”.

24. The trial Magistrate was guided by the holdings in **Brandy vs Maryland** and **Republic vs Ward** which held that it is a violation of due process for the prosecution to suppress evidence that the defence has requested and is material either to guilt or punishment and favourable to the accused and that the prosecution's duty at Common law is to disclose to the defence all relevant material.

25. The trial Magistrates ruling did not require the Applicant to disclose evidence that was not in their possession. It is evidence which Joan Nasimuyu in her affidavit alluded to. It is evidence which the complainant and other witnesses in the statements supplied to the Respondent also alluded to the conversations which the Respondents sought to be supplied with and the trial Magistrate rightly allowed the application because if she had not done so that point alone would as seen in the case of **Republic vs Ward** and **Republic vs Stinchcoulse** would be a good ground to quash conviction if any and set aside ensuing sentence. The applicant is therefore under constitutional duty to comply with the trial Magistrates ruling.

26. The applicant has not shown that there is an error apparent on record requiring revision. The applicant has not shown that the order made by the trial Magistrate was incorrect, illegal or riddled with any impropriety. It has not been shown that the proceedings were irregular. The Applicants application for revision is actually tantamount to an appeal against the order of the trial Magistrate brought in the form of an application for revision.

27. The order made by the trial Magistrate was based on sound principles of law and the constitution and cannot therefore be revised. The application for revision is not merited and is dismissed.

28. The Mombasa CMC Anti-Corruption Case No. 10 of 2018 should proceed to hearing as per directions of the trial Magistrate and the applicant should comply with the orders made on 1/10/2019.

Dated, signed and delivered at Mombasa this 25th day of February, 2021 by Microsoft Teams/Open Court.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:

Ms. Karanja for Applicant/State

Ms. Kithungi - Marete & Co. Advocate Respondent – No appearance

Court Asst. – Ogwel

FURTHER ORDERS:- Mention on 11/3/2021 before the trial court in Anti-Corruption Case No. 10 of 2018. File to be remitted back.

HON. LADY JUSTICE A. ONG'INJO

JUDGE