



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC NO. 35 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

MARY NGECHI NGETHE.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 29th January, 2019 filed by the Plaintiff seeking the admission into evidence of the statement of Henry Musyoki Kilonzi without calling him as a witness. Further, the Plaintiff also seeks the admission into evidence of certified copies of the proceedings and Judgment in Anti-Corruption Criminal Case No. 20 of 2010. The application was brought under Articles 50 (1), 159 (2) (d) and 165(7) of the Constitution of Kenya, Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 11 Rule 3(2) (c), Order 51 Rule 1 of the Civil Procedure Rules and Sections 34, 35, 36 and 84 of the Evidence Act Cap 80 of the Laws of Kenya.

2. The application is supported by the affidavit dated 29th January, 2019 sworn by Francis Wafula an investigator of the Plaintiff/Applicant. It is his disposition that he is one of the investigators in conduct of a series of related matters including the matter herein. He contends that this is a recovery suit which arose from a flawed procurement process involving the purchase of land from Henry Musyoki Kilonzi (deceased). He further claims that before his demise, the deceased had signed a statement on 22nd April, 2009 and testified as PW6 in Nairobi Anti-corruption Criminal Case No. 20 of 2010 on 18th November, 2014 a related case, where the defendant/respondent herein was the 3rd accused person.

3. The deponent further states that during the said trial, the defendant/respondent cross-examined the deceased and the deponent now prays that the statement and the proceedings thereto be admitted into evidence. It is his case that the statement of the deceased and the proceedings in Nairobi Anti-corruption Criminal Case No. 20 of 2010 are fundamental in these proceedings to enable him prove his case against the Defendant/respondent. He states that he intends to produce the statement of the deceased to prove its contents as against the Defendant/respondent herein. He asserts that the defendant/respondent will not be prejudiced if the orders sought are granted. Further that the application is necessitated by circumstances beyond the plaintiff's control. He urges this Court to exercise its discretion as provided under **Order 11 Rule 3 (2) (c)** of the Civil Procedure Rules and admit the evidence of the deceased.

4. No response was filed by the defendant/respondent in opposition to the application. However, at the hearing of the application on 28th January, 2021 the Respondent's advocate on record made oral submissions in opposition to the application.

5. In their oral and written submissions, the Plaintiff/Applicant asserted that under **Order 11 Rule 3(2)(c), (f) and (j)** of the Civil Procedure Rules this Court has jurisdiction to admit statements without calling their makers and to make any procedural orders to facilitate expeditious disposal of the suit. Further, that **Section 34(1)** of the Evidence Act allows admission of evidence given by a witness in subsequent judicial proceedings for purposes of proving facts where the witness is deceased, among other exceptions, the subsequent proceedings are between the same parties and the adverse party in the first proceedings had the right and opportunity to cross-examine the questions in issue which were substantially the same.

6. The Plaintiff/Applicant further submitted that under **Section 35(1)** of the Evidence Act, the condition that the maker of the statement be called as a witness need not be satisfied if the maker is dead among other exceptions. Therefore this court has discretion to admit certified copies if satisfied that undue delay will be caused. The plaintiff contended that in estimating the weight to be attached to a statement rendered inadmissible by **Section 35** regard shall be given to all circumstances in which any inference can be drawn to the accuracy of the statement as provided under **Section 36**. Further, that **Section 84** of the Evidence Act provides that any document produced in court purporting to be a record of evidence in judicial proceedings or any officer authorized to take such evidence, the court shall presume that the document is genuine. The plaintiff relied on the case of **Captain Moses Kariuki vs Joseph Mureithi & 3 others [2013] eKLR** in support of their case.

7. In their oral submissions, Mr. Nderitu counsel for the defendant/respondent submitted that the prayers sought amount to denial of defendant's right to a fair hearing. He contended that Nairobi Anti-corruption Criminal Case No. 20 of 2010 was prosecuted by the Office of the Director of Public Prosecutions and not the Plaintiff/Applicant herein insisting that the ODPP and EACC are not the same and therefore the Plaintiff/Applicant was not a party in the suit. Further that the issues in the present case are not similar to those in EACC No. 20 of 2010. He contended that the circumstances under which the statement of the deceased was recorded is not in evidence consequently, what can be proved is that the statement was made and not the contents as was being attempted by the Plaintiff/Applicant.

8. Counsel further submitted that none of the conditions set under the evidence act on admissibility of evidence of a deceased had been met by the Applicant. He also argued that parties in the two cases are not similar since the EACC did not prosecute the matter in question. Learned counsel asserted that admission of such evidence to the present case would be prejudicial to the defendant/respondent as she will not be able to cross-examine the witness.

9. On the issue of **Section 35** of the Evidence Act counsel for the defendant/respondent submitted that the intended reference is statements made by persons in the ordinary course of business not production of documents by investigation or prosecution agents. He faulted the application of **Order 11** of the Civil Procedure Act as submitted by the Applicant asserting that the orders sought are not procedural but substantial and go to the core of the rights to a fair trial.

10. I have considered the application, the affidavit in support and the oral and written submissions made by Counsels for the parties herein and I formed the following issues for determination:

- i. Whether the statement of Henry Musyoka Kilonzi (deceased) can properly be admitted into evidence
- ii. Whether Certified Copies of proceedings and Judgments in Nairobi Anti-Corruption Criminal Case No. 20 of 2010 can properly be admitted into evidence.

11. Order 11 Rule 3 (2) (c) of the Civil Procedure Rules provides as follows.

“In addition to any other general power the court may at the case conference-

(c) order admissions of statements without calling of the makers as witnesses and the production of any copy of a statement where the original is unavailable.”

12. Further Section **1A, 1B, 3** and **3A** of the Civil Procedure Act on the basis of which this Application has been made provides that this grant of the Orders sought is discretionary. That discretion however is not to be exercised capriciously but with great circumspection. The court must consider all the relevant circumstances before reaching a determination whether or not to exercise that discretion. In the present application, the Plaintiff/Applicant contends that Henry Musyoki Kilonzi (now deceased) was the vendor in the transaction involving the purchase of the land parcel No. 14759/2 for use as a cemetery. That due to the flawed procurement process in the purchase of the said land, the defendant/respondent was charged with others in Nairobi Anti-Corruption Criminal Case No. 20 of 2010. The deceased recorded a statement and testified as PW6 in the stated case. A copy of the statement and certified copies of the proceedings and Judgment thereto have been annexed in the application.

13. **Section 34** of the Evidence Act provides for conditions to be met on admissibility of documentary evidence. It provides that:

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances —

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding —

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

14. **Section 34** of the Evidence Act encompasses circumstances where a witness who has already testified is dead as is in this case. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by another court. To resort to previously recorded evidence under **Section 34**, the proceeding must be between the same parties as the previous proceeding and in criminal trial the

parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceeding.

15. Havelock J (as he then was) explained this position in the case of Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 others [2013] eKLR in the following terms:

7. The admissibility of evidence taken in criminal proceedings and the judgments arising therefrom, in subsequent civil proceedings, is provided for under various Sections of the *Evidence Act Cap 80 of the Laws of Kenya*. The admission of any such evidence before the Criminal Court may not be conclusive evidence of facts, but may be used by a Plaintiff in civil case by way of establishing a prima facie case as against a Defendant being the accused person(s) in the criminal suit. Section 34 (1) of the *Evidence Act* allows for the admission of evidence in judicial proceedings in subsequent proceedings, including those of a civil nature but in the following circumstances:

“(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;”

Sub-section (b) and (d) of section 34 (1) as read together with Section 45 of the Act, enunciate the admissibility of evidence in proceedings between the same parties and the question in issue being substantially similar in the first as in the second proceeding. Section 45 provides that the judgment obtained in such proceedings may be admissible as evidence if the matter is of public interest. It therefore follows that evidence taken in a prior criminal case, at the discretion of the Court (exercising such discretion as provided under Section 3A of the *Civil Procedure Act* and the overriding objective enunciated under Sections 1A and 1B of the same Act), may be allowed in subsequent civil proceedings. The Court in exercising such discretion shall take cognizance of the provisions of the Section 34 (1) (b) and (d) as aforesaid in that the issues in question in the two proceedings are similar in nature as the parties thereto.

8. Given that the scope of reference in such matters is so diverse, the Court would be at liberty to admit evidence and judgments rendered in criminal matters in subsequent civil matters, but not the alternate. Sopinka, Lederman & Bryant in *The Law of Evidence in Canada*, 2nd Edition (Butterworths, 1999) at page 1123, the learned authors state:

“A judgment of a civil court, however, need only be based on proof to a balance of probabilities. A civil judgment is, therefore, worthy of less respect in a subsequent proceeding and should not, as a general rule, be admissible as prima facie proof of the commission of the relevant acts or the existence of negligent conduct. ... It is not logically irrelevant; it just has less weight.”

16. It is the duty of the Plaintiff/Applicant to satisfy this Court that the threshold for admission of documents as encompassed under Section 34 of the Evidence Act has been achieved. The key words in subsection (1) are “for the purpose of proving the facts which it states” while subsection a, b, c, d further limit the circumstances in which such proceedings may be admitted.

17. Mr. Nderitu Counsel for the Defendant/Respondent argued that the parties in the two cases are not similar since it was the ODPP and not the EACC that prosecuted the matter in Anti-Corruption Criminal Case No. 20 of 2010 and the applicant was therefore not a party in the criminal case. The Applicant on their part argued that it was the EACC’s investigations that prompted the charges against the Defendant/Respondent. Further, that it was the EACC that recorded the statement of the deceased and therefore played an integral part in the criminal prosecution.

18. Article 157 of the Constitution creates the Office of the Director of Public Prosecutions with the mandate to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. On the other hand the role of the Ethics and Anti-Corruption commission is to combat and prevent corruption through law enforcement, preventive measures, education and promotion of standards and best practices in integrity and ethics.

19. The first limb on admissibility of evidence under Section 34 (1) (b) is that the proceedings have to be between the same parties or their representatives in interest. As argued by the Defendant/Respondent the ODPP and the EACC are not similar but both work in tandem and are crucial in the prosecution of cases, with the Plaintiff being the investigating authority in corruption cases and the ODPP the prosecuting agent. I therefore find that the Plaintiff/Applicant played a pivotal role in the Prosecution of the Respondent and cannot be said to be a stranger in this matter.

20. The second limb is that the adverse party in the first proceedings had the right and opportunity to cross-examine as required under Section 34 (1) (c) of the Evidence Act. On the importance of cross-examination in criminal trials, the Court of Appeal in Jairus Mukolwe Ochieng v Republic [2013] eKLR stated as follows:

“Cross examination is a vital and indispensable tool for the discovery of truth by testing the perceptions, passions and predilections of witnesses. When evidence is tendered without being tried, tested, challenged and turned inside out by cross-examination, its strength and cogency could well be spurious.

It is not accidental that the legislative in its wisdom imposed a duty upon the court to play a didactic and facilitative role on the question of cross examination where an accused person is without the benefit of legal representation.”

The claim that the Defendant/Respondent had an opportunity to cross-examine the witness in issue was not disputed, she cannot therefore assert that she has been denied the right to a fair trial. Consequently, the Applicant has satisfied this pre condition.

21. Another issue raised by the Defendant/respondent was that the orders sought in the application before Court infringe on her rights to fair hearing as guaranteed in the Constitution. It was argued that the defendant/respondent will not get an opportunity to cross-exam the deceased witness and will be greatly prejudiced if the orders sought are granted. The Plaintiff/Applicant on their part asserted that the deceased was already cross-examined by the defendant in the criminal case in observance of the rules of natural justice.

22. **Article 50** of the Kenyan Constitution provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

It is now a well-developed principle that , a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where the court stated:-

“Constitutional violations must be pleaded with a reasonable degree of precision.”

The Articles of the Constitution which entitles rights to the defendant/respondent must be precisely set out and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings and evidence.

23. In these proceedings, Counsel for the defendant/respondent only made the allegation that the rights of his client to fair hearing had will be infringed. He did not demonstrate to the required standard how those individual rights and fundamental freedoms were violated, infringed or threatened by the Plaintiff/Applicant. No evidence was adduced to demonstrate the alleged violations. Even assuming that the allegations are in reference to the right to be heard, it was not disputed that the defendant/respondent was a party to Nairobi Anti - Corruption case No 20 of 2010 and was afforded an opportunity to cross-examine the said deceased witness which she utilized. She was therefore afforded an opportunity to her right to fair hearing within the meaning of Article 50 of the Constitution.

24. The third limb is that the questions in issue have to be substantially the same in the first as in the second proceedings. In the present application, the Plaintiff/Applicant annexed the statement that they are seeking to be admitted as evidence and proceedings before the Anti-corruption court in Case no. 20 of 2010 and the Judgment. From the annexures, I deduce that the issue for determination in the criminal trial was whether the respondent was guilty of the offence of abuse of office, or willful neglect in reference to the manner in which a property known as LR 14759/2 was purchased. The issue in the present cause is whether there was fraudulent procurement in the process of the purchase of the said property. The issues are therefore related as they involve the same property and the manner in which it was procured. In my view, the Applicant has therefore satisfied this limb.

25. I will now address second prayer which is whether the Certified Copies of proceedings and Judgments in Nairobi Anti-Corruption Criminal Case No. 20 of 2010 should be admitted into evidence. From the pleadings, it is the Plaintiff/Applicant’s intention to establish a prima facie case against the defendant/respondent using among others the evidence in the criminal case. Consequently this is not an opportunity to re-litigate the issues already determined. This was stated in **Mills v Cooper (1967) 2 All ER 100** where the Court stated that;

“... a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or the legal consequence of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.”

26. Further **Section 45** of the Evidence Act, provides that a Judgment in a criminal case is not conclusive proof of the fact that the Plaintiff wishes to prove. The veracity, thereof may be determined by allowing the defendant to file her further documents in rebuttal to the evidence admitted. This position was stated in reiterated in the Canadian case of **Trang v Alberta (Edmonton Remand Centre) 2002 ABQB 658** and also cited in the Kenyan case of **Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 others [2013] eKLR** where it was held that:

“The fact of the convictions and the essential findings upon which the convictions were based, determined beyond a reasonable doubt by a court of competent jurisdiction, are to be afforded a high degree of deference. They are not subject to re-litigation. The non-essential findings, not held to the same standard of admissibility, are to be given some deference. Certainly, as a minimum, they provide prima facie proof of the underlying circumstances, and strong evidence would be required to refute those findings”.

27. Accordingly, the Plaintiff/Applicant having satisfied the preconditions set in **Section 34** of the Evidence Act, I will allow their application dated 29th January, 2019 as prayed. No orders as to costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF APRIL, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Plaintiff/Applicant

In the presence of.....Advocate for the Defendant/Respondent