



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL REVISION NO. E031 OF 2020**

**OTWAL & MANWA ASSOCIATES.....APPLICANT**

**VS.**

**DIRECTOR OF CRIMINAL INVESTIGATIONS..... RESPONDENT**

*(Being a revision from the original Ruling of the Chief Magistrate's Court at Kiambu, P. Gichohi, CM, in*

*Misc. Criminal Appl. No. 451 of 2020 dated 21<sup>st</sup> October, 2020)*

**RULING**

1. **OTWAL & MANWA ASSOCIATE ADVOCATES** have moved this Court for Revision of the order made in Chief Magistrate's Court Kiambu under the provisions of **Section 362** of the Criminal Procedure Code [Cap 75]. That Section provides:-

*“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.”*

2. The revision sought by the applicant's law firm is in respect to the order made on 21<sup>st</sup> October, 2020, in **Kiambu Chief Magistrate Court Misc. Criminal Application No. 451 of 2020**. On that date, the subordinate court authorised an investigating police officer to demand the law firm to grant him access to their computer system and to take away the law firm's email headers that originate from the law firm's email. The subordinate court further authorized police to carry as exhibits, certified soft copy of email header originating of the law firm's email account dated 3<sup>rd</sup> July, 2020 and any other that would be relevant to the case.

3. When the revision application came before court on 13<sup>th</sup> May, 2021, the prosecution counsel of the Director of Public Prosecutions (DPP), *Mr. Kasyoka* conceded to the application citing the possible breach of Advocate/client privilege by that order of the subordinate court.

4. **Section 134** of the Evidence Act provides the legal basis of the privilege between advocate and client. That Section is in the following terms:-

*“(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*

*Provided that nothing in this section shall protect from disclosure:-0*

*(a) any communication made in furtherance of any illegal purpose;*

*(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.”*

5. It will be noted that the above Section has a proviso which exempts certain communications from such privilege, where it is for furtherance of criminal activity. There was no suggestion by DPP that in this case the privilege of advocate/client is lost as provided under

that proviso.

6. The advocate's client's privilege, by itself commands a unique status within the legal system. The important relationship between a client and his advocate stretches beyond the parties and is integral to the working of the legal system itself: See the Canadian case **R. VS. Mc.CLURE, 2001 SCC (CanLII) (2001) ISCR 445**. In that case, it was stated thus:-

*“Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system ... The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented...”*

*In GEFLEN V. GOODMAN ESTATE, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, at p. 383, Wilson J. confirmed that in Solosky, supra, solicitor-client privilege was a “fundamental civil and legal right”. Finally, in SMITH V. JONES, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455, Cory J. for the majority stated at para. 45:-*

*“solicitor-client privilege has long been regarded as fundamentally important to our judicial system” and at para. 48: “now it has evolved into a substantive rule.”*

7. In view of DPP not opposing the revision, I grant the following order:-

The order made on 21<sup>st</sup> October, 2020 in Kiambu Chief Magistrate Court Misc. Criminal Application No. 451 of 2020 is hereby reviewed and set aside.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 20TH DAY OF MAY, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant Ndege

For Applicant: .....Ms. Manwa

For Respondent: .....Ms. Kathambi

**COURT**

RULING delivered virtually.

**MARY KASANGO**

**JUDGE**