REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. E106 OF 2020

ALEX MUTUNGI MUTUKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant, *Alex Mutungi Mutuku* was charged before the *Milimani Chief Magistrate's Court* in two counts with the offence of electronic fraud contrary to *Section 84 (B) (b)* of the *Kenya Information and Communications Act.*

2. The particulars supporting the charge in the first count allege that on diverse dates between 19th February 2015 and 10th March 2015 at an unknown place within Nairobi, the applicant caused *Safaricom Kenya Limited* a loss of airtime valued at KShs.3,691,500 by interfering with the functioning of a computer system, namely convergent billing system resulting in irregular top ups of airtime to diverse mobile numbers (schedule attached) with intent to procure for himself an advantage.

3. In the second count, it was alleged that on 9th March 2015 at an unknown place in Nairobi, he caused loss of Safaricom airtime valued at KShs.20,000 by interfering with the aforesaid computer system leading to irregular top up of airtime to his mobile phone number 0722****** with the intention of conferring onto himself an advantage.

4. In the course of the trial, a printout of some WhatsApp communication allegedly between one *Paul Nderitu (PW1)* and the applicant was produced in evidence by PW2 Chief Inspector *Peter Maina* together with a certificate issued under *Section 65 (8)* of the *Evidence Act*. The two documents were admitted in evidence and marked as exhibit 1 and 5 respectively despite objection to their production by the applicant's learned counsel *Mr. Kiprotich*.

5. In his objection, *Mr. Kiprotich* argued that PW2 was not competent to produce the two documents because he had not disclosed his qualifications pertaining to WhatsApp operations which were not related to Safaricom; that PW2 did not hold any responsible position with regard to management of WhatsApp and that only investigators attached to the Cybercrime Unit were competent to extract such communication.

6. In his ruling, the learned trial magistrate overruled the defence counsel's objection and allowed PW2 to produce the two documents as exhibits on grounds that being a police officer from the Directorate of Criminal Investigations Headquarters seconded to the Fraud Investigations Unit, PW2 was a competent witness for that purpose and he had sworn a certificate confirming that he personally extracted the communication from the Safaricom network in the ordinary course of his duties.

7. The applicant was aggrieved by the trial court's ruling. He filed through his advocates a Notice of Motion dated 16th December 2020 in which he sought the following orders:

> "*1. Spent*
>
> *2. Spent*
>
> *3. That the honourable court be pleased to issue revisionary orders to revise and set aside the orders of the learned honourable trial magistrate Hon. Abdul admitting into evidence the WhatsApp communication extract and dismissing the accused's objection in the ruling of 09/12/2020 and substitute it with an order striking out the admissions and upholding the accused's objection raised on the 09/12/2020 on admissibility of the same.*
>
> *4. That the honourable court be pleased to issue a declaratory order in regards to 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.*

5. That the costs of this application be provided for."

8. The application is supported by grounds stated on its face which are largely replicated in the supporting affidavit sworn by the applicant on 16th December 2020. In the main, the applicant contends that the learned trial magistrate erred by incorrectly and illegality admitting electronic evidence in contravention of *Section 65 (8)* and *Section 106 (B) (2)* of the *Evidence Act* which govern admission of electronic evidence; that the authenticity of the WhatsApp communication was doubtful since the phone used in the communication was not produced in evidence and further, the learned trial magistrate ignored PW2's testimony that the extract was produced at the complainant's premises. Moreover, the names of the persons involved in the alleged communication were fictitious as the extract did not show the mobile numbers used in the communication.

9. In addition, the applicant claimed that in admitting the WhatsApp communication extract (hereinafter the extract), the trial court flouted *Section 48* of the *Evidence Act* since PW2 did not qualify to be an expert as he was not attached to the Cybercrime Unit. He asserted that if the orders sought were not granted, his constitutional and fundamental right to a fair trial are likely to be violated.

10. The application is opposed by the respondent through a replying affidavit sworn on 10th March 2021 by Senior Prosecution Counsel *Ms Evah Kanyuira* as well as grounds of opposition dated 9th March 2021. In her replying affidavit, besides narrating the proceedings before the trial court and supporting the trial court's decision in admitting the extract and certificate in evidence, *Ms Kanyuira* invited me to find that the revisionary jurisdiction of this court had been wrongly invoked as the applicant had not demonstrated any illegality, impropriety or incorrectness in the decision made by the trial court; that the applicant had not specified how his fundamental right to a fair trial was likely to be violated if the application was not allowed. She advanced the view that the application was frivolous and amounted to an abuse of the court process and ought to be dismissed for lack of merit.

11. In the grounds of opposition, the respondent re-iterated the depositions made in the replying affidavit and added that matters regarding identification and production of exhibits during a trial should be left entirely to the discretion of the trial court unless extreme injustice was likely to occur and there was no remedy to address it; that this was not the position in this case as the applicant has the remedy of challenging the decision on appeal in the event that he is eventually convicted.

12. To counter the respondent's case as presented in the replying affidavit and grounds of opposition, the applicant swore and filed a supplementary affidavit without leave of the court. On application by the applicant, the court regularized filing of the said affidavit and deemed it as having been properly filed.

13. In the said affidavit, the applicant basically re-iterated his position that he had properly invoked this court's revisional jurisdiction and that the trial court erred by admitting in evidence the WhatsApp extract and the certificate without following the relevant provisions of the *Evidence Act.*

14. The application was canvassed by both written and oral submissions. On behalf of the applicant, learned counsel *Mr. Kiprotich* made lengthy submissions on the court's supervisory and revisional jurisdiction with a bid to demonstrate that the application was properly before the court and was not a tool being used by the applicant to micro manage the trial court. To expound on the court's supervisory jurisdiction, counsel relied on the authorities of ***Joseph Nduvi Mbuvi V Republic, [2019] eKLR*** and ***R V Samuel Gathuo Kamau, [2016] eKLR***. Counsel urged me to find that the admission of the extract and certificate was an illegality as it was done contrary to the law and that it affected the propriety of the trial court's proceedings; that if not corrected, it may lead to a miscarriage of justice.

15. In addition, counsel submitted that the trial court erred in failing to establish the authenticity and the process of extraction of the communication and whether PW2 qualified to be a responsible person with regard to the management of the device (PW1's mobile phone) before admitting the communication and certificate as evidence. In support of this aspect of his submissions, he relied on the authorities of ***R V Barisa Wayu Mutuguda, [2011] eKLR*** and ***Ernest Tsuma & 2 Others, V Republic, [2002] eKLR***.

16. On its part, the respondent supported the decision of the trial court asserting that the production of the extract and certificate complied fully with the procedure and conditions set out in *Section 65* and *Section 106 B* of the *Evidence Act*; that admission of the aforesaid evidence was correct and legal and there was no irregularity in the proceedings that would justify intervention of this court by way of revision.

17. Further, relying on the authority of ***Njuguna Mwangi & Another V Republic, [2018] eKLR***, the respondent submitted that a decision on admissibility of evidence is a matter within the discretion of the trial court and that a party aggrieved by such a decision can only challenge it on appeal after conclusion of the trial and not by way of revision; that the revisional jurisdiction of the High Court can only be invoked and exercised to correct manifest errors made by subordinate courts and not because the trial court had taken a wrong view of the law or misapprehended the evidence tendered; that the application does not meet the threshold of revision under *Section 362* as read with *section 364* of the *Criminal Procedure Code* and should be dismissed for want of merit.

18. Having carefully considered the application, the affidavits filed by the parties in support and in opposition thereof as well as the oral and written submissions made on behalf of both parties, I find that although the parties submitted at length on the court's supervisory jurisdiction, none of them contested that the High Court has supervisory jurisdiction to review decisions or orders made by subordinate courts either on appeal or by way of revision. What was hotly contested was the applicant's claim that the trial courts decision to admit a print out of the WhatsApp communication and electronic certificate amounted to an error or an illegality which ought to be corrected by this court in the exercise of its revisional jurisdiction.

19. As correctly submitted by the parties, the revisional jurisdiction of this court is donated by *Section 362* as read with *section 364* of the *Criminal Procedure Code*.

Section 362 is in the following terms:

"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."

20. *Section 364 (1)* which is the only provision relevant to the instant application states as follows:

"(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;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order."

21. Flowing from the foregoing and considering that what has been invoked in this application is the court's revisional jurisdiction, it is my finding that the only issue for my determination is whether the impugned decision meets the threshold stipulated in *Section 362* of the *Criminal Procedure Code* to warrant revision by this court.

22. I have read the record of the trial court. It confirms that the decision challenged in the application was made in a ruling delivered by the learned trial magistrate after hearing both parties in an objection raised by the applicant's learned counsel to admission of electronic evidence and certificate as exhibits in support of the prosecution case. In his ruling, the learned trial magistrate stated as follows:

"I have considered the objection and the response thereto. The witness introduced himself as a police officer based at DCI headquarters and seconded to Safaricom fraud investigation unit. In the course of his ordinary duty, he came across information from PW1 concerning the conversations as per MF1. It is this information that prompted him to extract the information. It is not in dispute that the mobile phone from which the conversation was extracted was paired with a Safaricom number. It is on this strength and the network that enabled the witness access the information on WhatsApp. He is an investigator and the issue of a person from Cybercrime Unit does not arise. There is a certificate under section 65 (8) Evidence Act which is clear evidence that he personally extracted the information. Therefore, I reject the objection by the defence counsel and find that the witness is fit to produce the WhatsApp conversation alongside the certificate under section 65 (8) evidence act."

23. With respect, I wish to disagree with *Ms. Mutella's* submission that admissibility of evidence is a matter within a trial court's discretion. My take is that admissibility of evidence is a question of law since the law, particularly the *Evidence Act* sets out the procedure and conditions precedent to admission of particular pieces of evidence.

24. From the above ruling, it is evident that the learned trial magistrate addressed his mind to the reasons advanced by *Mr. Kiprotich* in support of his objection, the evidence sought to be admitted and the applicable law. As the learned trial magistrate's decision was based on his interpretation and appreciation of the applicable law, I entirely agree with *Ms. Mutellah's s*ubmission that his decision fell outside the ambit of this court's revisional jurisdiction. The decision does not contain a patent or glaring error or illegality on its face which this court can easily pick out even without hearing any of the parties as envisaged in *Section 365* of the *Criminal Procedure Code*. It is a decision which requires investigation to ascertain whether or not on the facts before it, the trial court's interpretation and application of the law was correct which can only be done in the exercise of the court's appellate jurisdiction. It is thus my finding that the learned trial magistrate's decision did not amount to an error of the sort envisaged in *section 362* of the *Criminal Procedure Code* and could only be challenged on appeal.

25. My above finding is fortified by the applicant's complaints that the WhatsApp communication lacked accuracy and was not authentic given *inter alia* that the communication was extracted in the complainant's premises and that the phone from which it was extracted was not produced in evidence. These complaints go to the credibility and probative value of the evidence and cannot form the subject of review under *Section 362* of the *Criminal Procedure Code.*

26. In exercising its supervisory mandate by way of revision, this court is only mandated to scrutinize the proceedings of the trial court to satisfy itself as to the correctness, legality or propriety of the impugned decision or the proceedings leading to the decision. Unlike an appellate court, a revisional court does not have power to weigh evidence adduced before the trial court or to determine its probative value nor can it substitute its own view with that of the trial court on the facts: See - ***Pathummaa & Another V Muhammed 1986 (2) SCC 585***.

27. After examining the trial court's record and the decision subject of this application, I am not persuaded that there is any manifest error, illegality or impropriety that would justify interference by this court in the exercise of its revisional jurisdiction.

28. Secondly, I find no basis for the applicant's argument that if the application was dismissed, his right to a fair trial is likely to be violated. As held by *Hon. Onyiego J* in ***Njuguna Mwangi & Another V Republic, [2018] eKLR***, the applicant cannot suffer any prejudice if the application was refused because he has the remedy of challenging the decision on appeal in the event that he is convicted at the end of the trial.

29. I also echo *Hon. Onyiego J's* sentiments in the above case that parties aggrieved by decisions of subordinate courts as a result of interlocutory applications made in ongoing trials should desist from challenging those decisions in revision applications before the High Court but should instead challenge them on appeal at the conclusion of the trial to avoid causing unnecessary delay in the finalization of criminal trials.

30. As officers of the court, advocates in the conduct of cases on behalf of their clients are enjoined to assist courts in applying the principles

that guides them in the administration of justice which includes the principle that justice shall not be delayed.

31. Regarding prayer 4 in the motion, I must say that this prayer is not only misplaced but is also misconceived as the court cannot make declaratory orders in an application for revision. It can only reverse or set aside the offending order, finding or sentence and substitute it with what is in compliance with the law.

32. For the foregoing reasons, I have come to the inevitable conclusion that the application herein lacks merit and it is hereby dismissed. I consequently direct that the original file be returned to the trial court to proceed with the trial expeditiously.

33. As the application was filed within criminal proceedings, I will not make any order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kiprotich for the applicant

Ms. Mutellah for the respondent

Ms. Aluoch holding brief for the complainant

Ms. Karwitha: Court Assistant