



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 236 OF 2019

PETER NGANGA KINUTHIAAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. Through a letter dated 11th September 2019, the Office of the Director of Public Prosecutions through Prosecuting Counsel *Ms Zaphida Chege* applied for revision of a ruling delivered by the trial court in Makadara Criminal Case No. 3065 of 2016. The applicant sought the following reliefs:

i. Spent

ii. That the prosecution be allowed to produce two documents subject of the impugned ruling, namely an application for a firearm and a civilian firearm certificate.

iii. That the applicant be allowed to recall PW1 to identify the documents and produce their originals in court.

2. The application is contested by the respondent. The respondent swore a replying affidavit on 16th July 2020 in which he narrated the proceedings before the trial court prior to the date the prosecutor (the applicant) sought to produce the aforesaid documents in evidence. He averred that production of the documents as exhibits by the investigating officer when they were not disclosed to him during pretrial and were not referred to by the complainant in the course of his testimony would occasion him prejudice as it would violate his right to a fair trial guaranteed under *Article 50 (2) (c), (j) and (k) of the Constitution*; that introduction of the documents during the hearing amounted to an ambush and the trial court was correct in upholding the defence's objection to their production in evidence. He urged the court to dismiss the application and allow the case to proceed for hearing.

3. By consent of the parties, the application was prosecuted by way of written submissions. In her submissions filed on 3rd June 2021, *Ms Chege* conceded that under *Article 50 of the Constitution*, the applicant had an obligation to disclose evidence it intended to rely on in support of its case to the defence but that the requirement for disclosure was continuous and no prejudice would be suffered by the respondent if he was supplied with the documents and was given sufficient time to instruct his advocate on the same. She urged the court to allow the application.

4. On his part, the respondent through his advocates *Kimani Kagwima & Company Advocates* filed his written submissions on 26th May 2021. In his submissions, the applicant contended that it was unfair for the prosecution to seek recalling of a witness to produce documents after the prosecution had closed its case; that the application did not meet the threshold for revision under *Section 362 of the Criminal Procedure Code*; that the court cannot compel the prosecution to produce documents in support of their claim against the respondent; that recalling the witness envisioned by the prosecution would be tantamount to allowing the prosecution to re-open its case to cure perceived defects or shortcomings in its case.

5. I have considered the application and the rival submissions made by both parties. I have also read the record of the trial court. The brief background against which the application was filed is that the respondent was charged with the offence of threatening to kill contrary to *Section 223 (1) of the Penal Code*. The particulars therefore alleged that on 25th November 2016 at Kasarani area, without lawful excuse, he uttered the following words directed at one *Shoko Beko* "I will snatch your firearm and use the same to kill you".

6. The respondent denied the charges and the trial commenced on 16th November 2017. Three witnesses including the complainant testified in support of the prosecution case. The prosecution through its fourth witness who was the investigating officer applied to produce in evidence copies of an application for a firearm and a civilian firearm certificate which he had allegedly obtained from the complainant. The respondent objected to production of the two documents on grounds that the same had not been referred to by the complainant in his evidence and they had not been supplied to him during pretrial.

7. The prosecution in response asked the court to step down PW4 to enable it recall PW1 to avail the original documents.

8. In its ruling upholding the objection, the learned trial magistrate stated as follows:

“It is firmly established that an accused needs to be made aware of all the evidence to be adduced against him. The certificates in court today were never mentioned by the complainant. To produce them at this stage through the investigating officer or the complainant amounts to an ambush. I think that this is a case where the state failed to put its house in order in advance. They cannot be allowed to prejudice the accused this late in the day. I sustain the objection to exclude the documents in question.”

9. As the application invokes the revisional jurisdiction of this court, I find that the key issue for my determination is whether the application meets the threshold prescribed by the law for the exercise of that jurisdiction.

10. The revisional jurisdiction of the court is donated by *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. *Section 362* empowers the court to call for and examine the record of the lower court to satisfy itself as to the correctness, legality or propriety of orders, findings or any decision made by the trial court and if so satisfied, make any of the orders provided for under *Section 364* of the *Criminal Procedure Code*.

11. In this case, I find that it is not disputed by the prosecution that it did not supply the documents in issue to the defence before commencement of the trial and although I agree with the respondent’s submissions and the finding by the trial court that the prosecution had a constitutional obligation to furnish to an accused person all the evidence to be adduced against him during the trial, it is my finding that the said duty is not limited to disclosure during pretrial only though ideally, this is the time it is most desirable or helpful.

12. *Article 50 (2) (j)* of the *Constitution* imposes on the prosecution the duty to disclose evidence to the defence by guaranteeing to an accused person the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. It does not prescribe a timeline within which disclosure should be made.

13. In my view, *Article (50) (2) (j)* should not be read in isolation but should be read together with *Article 50 (2) (c)* of the *Constitution* which bestows on an accused person the right to have adequate time and facilities to prepare his defence. My reading of these two constitutional provisions reveal that disclosure of evidence can still be done even after the commencement of a trial provided that after the disclosure, an accused person either directly or through his advocate is given sufficient time to study it in order to sufficiently prepare for cross-examination of the witness scheduled to produce the documents when hearing resumed.

14. I therefore agree with *Ms Chege’s* submissions that disclosure is a continuous process provided that where there is late disclosure, adequate safeguards are put in place by the court to ensure that it does not prejudice the accused person’s ability to prepare for his or her defence. It is however important to add that disclosure can only be made before close of the prosecution case.

15. In this case, contrary to the respondent’s submissions, the prosecution had not closed its case by the time the two documents were introduced in the proceedings. The documents were introduced by PW4 in the course of his evidence. It is true that they had not been disclosed to the defence before and they had not been identified by the complainant and for this reason, I wholly agree with the learned trial magistrate that the attempt to have them produced as exhibits by PW4 on the date they were introduced for the first time amounted to an ambush on the respondent.

16. However, it was not entirely correct for the learned trial magistrate to find that disclosure could not be done at that stage of the proceedings allegedly because it was late in the day and if allowed the respondent would be prejudiced. It was not late in the day since the prosecution had not yet closed its case. Besides, the learned trial magistrate did not state how the respondent would be prejudiced by the late disclosure given that the appellant had applied to have PW4 stepped down and offered to have PW1 recalled to produce the original documents. The learned trial magistrate in his ruling did not address his mind to the application made by the applicant and the prejudice the applicant stood to suffer if the window of producing the documents was closed.

17. The court as a custodian of justice was duty bound to consider the interests of both the prosecution and the defence and balance their respective interests by making a decision that allowed the applicant to produce the documents without prejudicing the respondent’s right to a fair trial. This could easily have been done if the trial court considered the applicant’s application to step down PW4 which it failed to do. This was an error on the trial court’s part which must be corrected on revision.

18. For the foregoing reasons, I find that the application has met the threshold set out in *Section 362* of the *Criminal Procedure Code* and it is hereby allowed on terms that the trial court’s ruling/order made on 5th August 2019 is hereby set aside. It is substituted with an order directing the applicant to serve the subject documents on the respondent’s counsel within 7 days of today’s date.

19. The issue regarding whether or not the subject documents should be admitted in evidence or whether PW1 should be recalled are matters within the province of the trial court and I refuse to accept the applicant’s invitation to make orders in that regard. The prayer to order admission of the documents in evidence and to recall PW1 should be canvassed before the trial court.

20. Finally, I direct that the original file be returned to the trial court to proceed with the trial expeditiously.

It is so ordered.

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

C. W. GITHUA

JUDGE

IN THE PRESENCE OF:

MR. CHEBII FOR THE APPLICANT

MS WANJIRU HOLDING BRIEF FOR MR. KIMANI FOR THE RESPONDENT

MS KARWITHA: COURT ASSISTANT