REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC. CRIMINAL REVISION NO. 35 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

DAVID MWIRARIA *(Deceased)*.....1ST RESPONDENT

DAVE MUNYA MWANGI.....2ND RESPONDENT

JOSEPH MBUI MAGARI.....3RD RESPONDENT

DAVID LUMUMBA ONYONKA.....4TH RESPONDENT

RASHMI CHAMANLAL KAMANI.....5TH RESPONDENT

DEEPAK KUMAR KAMANI.....6TH RESPONDENT

INFOTALENT.....7TH RESPONDENT

(Being Revision of the Ruling of Hon. S. Mutuku (CM) delivered on 10th September 2019 in ACC No. 4 of 2015 Milimani CM's Court)

RULING

1. Vide Anti-Corruption Case No. 4 of 2015, the respondents in this case were jointly arraigned before the Anti-Corruption Chief Magistrate's Court on 4th March 2015 facing various corruption related charges. Since then, the trial has been going on albeit several challenges including but not limited to, adjournments occasioned by both the prosecution and the defence.

2. On 2nd September 2019, the matter was scheduled for further hearing of the prosecution case. When the file was called out for hearing, prosecution intimated of their intention to call four additional witnesses among them; Mr. Kahiga Anthony of EACC, Jacob Oduor (document examiner), Samuel Kariuki (Department of Immigration) and Esther B. James (Postal Corporation). Out of the four witnesses lined up to testify, two of them and whose statements had earlier on been supplied to the defence were present and ready to testify.

3. However, the defence raised an objection arguing that calling more witnesses would delay the matter further and infringe on the accused's right to a fair trial. The defence further argued that since they were expecting the investigating officer, they had prepared their defence documents earlier supplied. Lastly, they argued that the prosecution was hell bent to fill in gaps in their case.

4. In response, prosecution argued that; it had already disclosed the evidence in compliance with Article 50 of the Constitution; prosecution was still open; 45 witnesses have testified; there is no law prohibiting the prosecution from calling more witnesses; disclosure is a two stage process *inter alia*; at the pre-trial and during the trial; the defence will have a right to cross-examine the intended witnesses; if the defence was not ready, they were at liberty to seek an adjournment not to object to calling of witnesses and that; no prejudice would be occasioned to the defence.

5. Having heard both arguments with regard to the said objection, the court delivered its ruling on 10th September 2019 holding that; the prosecution's intention to call more witnesses was an afterthought; no explanation had been given for calling the witnesses at this advanced stage of the trial; the same was against the spirit of **Article 50** of the **Constitution** on the right to fair trial and, calling more witnesses fell short of decency of a fair trial.

6. Aggrieved by this ruling, the DPP moved to this court vide a letter dated 10th September 2019 and filed the same day pursuant to **Article 165(6)** and **(7)** of the **Constitution** seeking orders revising the aforesaid ruling. The DPP invited the court to call for and examine the record in the aforementioned proceedings for purposes of certifying and pronouncing itself as to the correctness, legality and propriety of the findings and orders recorded and issued, as well as the regularity of the proceedings and give directions it considers appropriate in order to ensure the fair administration of justice.

7. The application is anchored on the argument that, this court has the authority to revise the ruling / order on grounds that; the prosecution had disclosed in advance the evidence in compliance with **Article 50 of the Constitution;** there is no law prohibiting the prosecution from calling more witnesses and, disclosure is a two stage process, namely; at the pre-trial and during the trial.

8. In response, the 2nd and 4th respondents filed their written submissions on 30th September 2019. Equally, the 5th and 6th respondents filed their written submissions on 30th September 2019.

9. During the hearing, Mr. Mutuku learned State Counsel appearing for the applicant/republic, basically adopted the content contained in the letter seeking revision. He also adopted his submissions filed on 25th September 2019. Learned Counsel contended that this court has jurisdiction to revise the impugned orders. Counsel placed reliance on the decision in the case of **Prosecutor v Stephen Lesinko (2018) eKLR** where the court stated that, it was vested with wide revisionary powers to look into orders, decisions, proceedings and sentences where the decision is grossly erroneous, there is no compliance with the provisions of the law; the finding of fact affecting the decision is not based on the evidence or it is a result of misreading or non-reading of evidence on record; where the material evidence on the parties is not considered and, where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

10. Learned Counsel further referred the court to the holding of the court in the case of **Dennis Edmond Appa and 2 others -vs- EACC and Another (2012) eKLR** where it was held that:

> **"…the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial and throughout the trial."**

11. The court was further referred to the decision in the case of **Thuita Mwangi and 2 others v Ethics and Anti-corruption Commission and 3 others (2013) eKLR** in which the court held that the right to be provided with material the prosecution wishes to rely on is not a one off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. That when the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.

12. It is Mr. Mutuku's contention that to lock out such crucial evidence would amount to a miscarriage of justice and that the defence will have an opportunity to cross-examine the witnesses. Regarding the trial court's remarks that the prosecution was conducting investigations when the trial was on going, Mr. Mutuku urged that there was nothing wrong in disclosing evidence at this stage. To buttress this proposition, counsel made reference to the decision in the case of **Republic v Raphael Muoki Kalungu (2015) eKLR** where the court held that whatever information or evidence that may come into the possession of the prosecution in the course of the trial ought to be disclosed and supplied to the defence to avoid trial by ambush.

13. Mr. Mutuku further urged that no prejudice would be suffered by the respondents *(accused persons)* by the prosecution calling additional witnesses and the evidential material as the same has been disclosed in advance and there are sufficient safeguards in the constitution, Evidence Act and the CPC.

14. On their part, the 5th and 6th Respondents through senior counsel Ahmed Nassir submitted that the prayer to call additional witnesses at the last stage of the trial is tantamount to introducing new evidence which was not disclosed to the defence in advance.

15. It was further stated that, according to the earlier list of the remaining witnesses, only Mr. Ramachanandran Srinivasan and Mr. John Mwangi Kiilu were scheduled to testify. That an additional list of witnesses and inventory of statements dated 30th August 2019 that the DPP intended to introduce were served upon the defence on 30th August 2019 at 2.30 p.m. That the court was not aware of these developments nor was the defence hence practice by ambush.

16. Learned Counsel further submitted that he who seeks equity must practice equity. That the order of the court issued on 24th October 2018 directing the prosecution to supply the defence a schedule of witnesses and documentary exhibits was not complied with until 30th January 2019 when they did yet without the names now being introduced. That the accused and their counsel were denied an opportunity to be supplied with the documentary materials to enable them prepare their case in advance considering the complexity of the matter. To bolster this argument, counsel referred the court to the case of **Thuita Mwangi and 2 others v R (2015) eKLR** where the court held that;

> **"…it is untenable to assume that sufficient notice is not a pre-requisite to the process of affair trial''**

17. Senior counsel submitted that the prayer to call additional evidence without advance notice was in contravention of **Article 50(2)** which provides that every person has the right to a fair trial which includes, the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. That those rights are protected as against the state in favour of the accused. In support of that proposition, the court was referred to the decision in the case of **Thomas Patrick Cholmondeley v Republic (2008)Eklr** where the court held;

> **"The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of the constitution. Against whom are those rights protected? The answer to this question is**

obvious…it is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by sections 70-80 of the Constitution''.

18. It was further submitted that to allow additional witnesses and oral evidence is a matter of discretion by the trial court. In support of this argument the court was referred to the finding in the case of **Ferdinand Ndung'u Waititu baba Yao & 22 others v Republic (2019) eKLR.** That before an appellate court interferes with the decision of the lower court, it must be satisfied that the lower court must have acted on a wrong principle in arriving at an incorrect, illegal or improper decision or order.

19. Several authorities in support of this proposition were referred to among others; **Njuguna Mwangi & Ano. v Republic (2018) Eklr; Republic v SosPeter Odeke Ojaamong & 8 others (2019)eKLR** and, **Republic vs David Mwiraria & 6 other (2018) eKLR.** Senior counsel Mr. Ahmed Nasir's view was that additional evidence and witnesses at this stage is meant to fill the gaps which had been poked by the defence and after the prosecution realized the weaknesses in their case. It was counsel's assertion that to allow admission of further evidence will delay the case as the defence may be forced to recall several other witnesses who have already testified some of whom are non-citizens living outside Kenya and who may not be available thus jeopardizing the accused's fundamental rights on a fair trial.

20. On their part, the 3rd and 4th Respondents filed their submissions on 30th September, 2019 through the firm of Were & Oonge Advocates. Mr. Muriungi appearing for the two respondents basically associated himself with the submissions of senior counsel Ahmed Nassir in its entirety. On behalf of the 2nd Respondent, Mr. Kimani also associated himself with the 5th and 6th Respondents' submissions.

Analysis and determination

21. I have considered the application herein, the original court record and rival submissions by parties' respective counsel. The only issue that arise for determination is whether the trial court properly exercised its discretion in rejecting the application for additional witnesses and evidence.

22. This court's jurisdiction has been invoked pursuant to **Article 165(6) and 60** of the **Constitution** as well as **Section 362** of the **CPC. Article 165(6)** confers supervisory jurisdiction upon the High Court over subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a Superior Court.

23. Sub-Article 7 further provides that, for purposes of Clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause 6, and may make any order or give any directions it considers appropriate to ensure a fair administration of justice.

24. To operationalize the above constitutional provision, **Section 362 of the CPC** comes to play thus providing as hereunder;

"The High Court may call for and examine the record for 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."

25. This court has been invited to determine whether the trial court misdirected itself and or erred or committed any illegality or impropriety in rejecting the application for admission of additional evidence or documents.

26. It is trite that, revision is a discretionary power exercisable by the High Court in situations where the impugned decision is arrived at based on the application of wrong principles or legal standards. In support of this proposition I am guided by the holding in the case of **Republic v Muhammed Abdallah Swazuri and 16 others (2019) e KLR** where the court stated that;

"Although clothed with these immense powers, the high court is also subject to the observance of certain legal parameters which guides the process of revision. In other words, before discharging such function, the High Court must be satisfied that the subordinate court acted on a wrong principle in arriving at an incorrect or improper decision or order."

Similar position was held in **Samuel Njuguna Githinji v Republic (1992) eKLR and Joseph Waweru v Republic (2014) eKLR.**

27. There is no dispute that the criminal proceedings the subject of this revision application commenced way back in the year 2015 when the accused persons took plea. Since then 45 witnesses have testified. It is on record that during the course of the trial, the prosecution kept updating a list of its witnesses to suit the circumstances of its case.

28. That at the request of the defence, on 30th January 2019, prosecution gave a list of 7 witnesses who were yet to testify. Out of the seven, five have already testified except two namely; Ramachandran Srinivasan and John Mwangi Kiilu whose testimony was scheduled for 2nd September 2019. It was on this day that the prosecutor informed the court that he had four (4) more witnesses to call besides the two that were remaining originally. According to mutuku, it was new evidence discovered during the trial.

29. Was there justification to call for additional witnesses / evidence at the tail end of the trial when the last two remaining witnesses were due to testify? Was the disclosure made in advance? Was there sufficient notice given to call additional witnesses or evidence? Is there a law governing the process of calling for additional evidence or documents?

30. I wish to state that, despite the process of disclosure being a continuous exercise, the same is subject to certain limitations or parameters. Disclosure cannot be endless without justification. The process of disclosure during the trial must meet certain criteria inter alia;

i) The additional evidence is not intended or likely to ambush the defence;

ii) It is not intended to fill in the gaps created by the defence;

iii) The notice is sufficient for the defence to prepare adequately;

iv) The intended evidence could not have been reasonably available or foreseeable before commencement or early stages of the trial .

31. The fact that disclosure is continuous is not an open ended cheque subject to abuse. See **Republic –vs- Sospeter Odek Ojaamong & 8 Others** (supra).

32. Although there is no express statutory provision governing the timelines and the process of disclosure, there are sufficient guidelines put in the Constitution and case law. The key provision underpinning the process of a fair trial is **Article 50(2)** which provides that every accused person has the right to a fair trial which includes the right-

(a) …….

(b) ……

(c) To have adequate time and facilities to prepare a

defence;

(d) …..

(e) To have the trial begin and conclude without

unreasonable delay;

(f) …..

(g) …...

(h) ……

(j) To be informed in advance of the evidence the

prosecution intends to rely on, and to have

reasonable access to that evidence;

33. According to the prosecution, they supplied the intended additional evidence in advance i.e 30th August, 2019 ahead of the hearing day 2nd September 2019. Was the notice sufficient or reasonable? The word reasonable has been defined in the Black's Law Dictionary10th Edition as;

"1. Fair, proper, or moderate under the circumstances; sensible 2. According to reason."

34. It is the respondent's argument that 30th August, 2019 was a Thursday and 2nd September, 2019 was a Monday hence the notice was not sufficient. Obviously from the timelines, the defence had only a Friday to prepare. Definitely the notice was not sufficient but it did not amount to an ambush as the defence was notified in advance despite the short notice.

35. Was the disclosure necessary? Both parties are in agreement that disclosure is necessary. They are also in agreement that there was advance notice given though not sufficient. To that extent Article 50 (2) (j) is to some extent satisfied. The essence of disclosure at the pre-trial stage and advance notice during trial is to enable the accused understand what he/she is accused of and the evidence relied on to enable him/her to prepare adequately for the defence. It is trite law that disclosure of evidence is a continuous process right from the pre-trial stage up to the close of the case depending on the nature of the evidence or documentary evidence sought to be produced. It is also clear that besides article 50(2) of the constitution, there is no express provision governing timelines in disclosure of material evidence. It is at the discretion of the trial court to determine on what to or not to admit or allow as evidence. Although, in this case the court correctly and adequately addressed her displeasure regarding the indolent manner in which prosecution was conducting itself as though they were in control of court's time, shutting out available evidence already served would be more prejudicial to the complainant in this case the Kenyan people on whose behalf these proceedings are being conducted by the state.

36. In the case of **Thuita Mwangi and 2 others v Ethics and Anti-corruption Commission and 3 others (supra)** the court held that:

"The right to be provided with material the prosecution wishes to rely on is not a one off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the subject or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the Magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided the accused is entitled to have the time and opportunity to prepare their defence."

37. I am fully aware that the court in Thuita Mwangi case did reject the prayer by the prosecution to call an additional witness after giving a one day notice before the hearing of the only remaining witness who was the investigating officer. Unlike Mwangi Thuita case where all along the intended witness was known from the investigation diary and nobody bothered to have him call as a witness well in advance, the situation here is different as the intended witnesses were not in the picture from the word go until discovery of new evidence.

38. In this case, the respondents were supplied with additional documents and list of witnesses in advance although the notice was short. In the circumstances, the only remedy that will serve the interest of justice by both parties is to give the defence an opportunity or sufficient time to study the evidence and then prepare for cross examination of the witnesses. Although the case has delayed, both parties have a share of blame as they have before contributed to adjournments in one way or the other and the fact that the trial has taken long alone does not perse justify the court to lock out otherwise crucial evidence which would assist the court in arriving at a fair and just decision. It would be a greater injustice when weight along other constitutional rights accruing to an accused including expeditious trial, to shut out new evidence that has been discovered during the trial and supplied to the defence before the trial resumed. **See Republic v Mohammed ismail Madey and 3 others(supra).**

39. I do not think the additional evidence was intended to fill in the gaps as none was specified nor is it intended to ambush the defence considering that there was advance notice. Although the trial court was concerned and properly so with the maxim that justice delayed is justice denied, it misdirected itself by locking out witnesses who intended evidence was already in the hands of the defence and which would assist the court make a just decision. This court in exercise of its discretionary mandate conferred under Article 165(7) of the Constitution is empowered to give or make appropriate directions to meet the fair administration of justice in the circumstances of this case. Accordingly, the revision application is hereby allowed with orders that;

a) The orders of the trial court made on the 10th September 2019 be and are hereby set aside

b) That the prosecution's application to call four additional witness and documentary evidence is allowed subject to such conditions that the trial court may attach regarding attendance of those witnesses and production of those documents in a timely manner without further adjournments.

c) The Deputy Registrar to remit the original court file back to the trial court for proceedings to continue.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY, 2020.

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J.N. ONYIEGO

JUDGE