REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO. 43 OF 2020

AS CONSOLIDATED WITH REVISION NO. 39 OF 2019 AND NO. 45 OF 2020

EVANS ODHIAMBO KIDERO.....1ST ACCUSED/ APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

LILIAN WANJIRU NDEGWA.....2ND ACCUSED/ APPLICANT

JIMMY MUTUKU KIAMBA.....3RD ACCUSED/APPLICANT

GREGORY MWAKANONGO.....4TH ACCUSED/APPLICANT

STEPHEN OGAGO OSIRO.....5TH ACCUSED/APPLICANT

LUKE MUGO GATIMU.....6TH ACCUSED/APPLICANT

MAURICE OCHIENG OKERE.....7TH ACCUSED/APPLICANT

JOHN GITHUA NJOGU.....8TH ACCUSED/APPLICANT

GRACE NJERI GITHUA.....9TH ACCUSED/APPLICANT

LODWAR WHOLESALERS.....10TH ACCUSED/APPLICANT

NGURUMANI TRADERS.....11TH ACCUSED/APPLICANT

RULING

1. The Applicants, EVANS ODHIAMBO KIDERO and LILIAN WANJIRU NDEGWA, together the other accused persons are charged before the Chief Magistrate Anti-Corruption Court at Milimani in ACC No. 32 of 2018, where they are being prosecuted by the Respondent and Applicant in Revision No. 39 of 2020.

2. In the course of the said trial, PW11 while being cross examined by Mr. Orengo (SC) referred to some document, which for the purposes of this ruling was marked as MFI 81, and which Mr. Nyachoti, Advocate for the 2nd Accused, objected to, on the ground that they had not been supplied with it during pre-trial conference/discovery.

3. That objection was supported by Mr. Orengo, who submitted before the trial court, that the said non-disclosure violated Article50(2)(j) of the constitution, and further stated that since the said statement was obtained outside the period authorized by the court, they were illegal and should be disallowed, and expunged from the court record.

4. The 2nd accused person, through her Advocate supported the said submissions and added that, EACC had misled the Court in obtaining MFI67 (ii) while they knew that they had the document and that the prosecution had hoodwinked the defence.

5. From the record, it is noted that Mr. Ochieng, for the 3rd – 11th accused also supported that line of argument and added that the evidence was extended to cover the account for 11th accused in violation of the rights under Article 31 of the constitution, as it was obtained without a court order.

6. The objection was opposed by the respondent, who submitted that it was not mandatory for a court order to obtain the said document.

7. The trial court rendered himself on the said objection and found that there was a requirement for a court order in order to obtain an entry of bankers books, but declined to expunge from record the proceedings in respect of the disputed statement, on the grounds that the said objection was raised by the admission to the record and there was no provision of law to give him the authority to expunge it from the record.

APPLICATIONS.

8. The 1st accused, not being satisfied by the said ruling, by a Notice of Motion dated 25th September, 2020 approached the court, to exercise its revision powers, to ensure the fair administration of justice and to issue the following orders:

a) an order striking out/or expunging the evidence and testimony of PW 11 from record.

b) an order that named documents referred to and or relied upon and marked during the testimony of PW11 were also obtained illegally and therefore inadmissible and are therefore expunged from the record.

c) an order striking out and/or expunging MFI81 entirely from record.

9. The application was supported by the applicant's own affidavit, in which he deposed that throughout the testimony of PW11, the defence had been labouring under the misconception that the document marked D12 which was supplied during pre-trial was MFI81, until objection was raised thereon, by the Advocate for the 3rd Accused.

10. He stated further that prior to the commencement of the trial, the court had conducted and concluded pre-trial, pursuant to which the respondent supplied him with all the witness statements and documents intended to be relied upon during the trial and therefore the non-disclosure of the complained exhibit contravened his rights under Article 50(2)(j) and 50(4) of the constitution, and should together with the testimony of PW 11 be expunged from the court record.

11. It was contended that the court in its ruling, held that the prosecution was barred from referring to the said document, but failed to expunge the same from the record, on the ground that there was no provision of the law cited to give the court the authority to expunge testimony on oath from the record, hence this application.

12. It was deposed further by the applicant, that he was dissatisfied with and aggrieved by the ruling of the trial court for failing to find that non- compliance with constitutional and statutory provisions on disclosure of MFI81, to the defence adversely affected and compromised his constitutional right to have adequate time and facilities to prepare for his defence, as he was not informed in advance of the evidence against him.

13. The 2nd defendant, was also dissatisfied by the said ruling and on 3rd October 2020, moved the court by way of a letter, seeking revision of the decision of the Trial Court, for failing to exercise discretion in the matter to expunge from records the said exhibit, having barred the prosecution from referring to it in further proceedings, on the basis that there was no provision of law cited to him, giving authority to do so.

14. It was stated that the trial court erred and misdirected himself by failing to appreciate that once he declared that MFI 81 was illegally obtained, all records of it had to be expunged.

15. The respondent, on the other hand, was also dissatisfied with the ruling by the trial court and by a Notice of Motion dated 19th September 2019, filed an application for revision, and sought that this court be pleased to review and set aside the order of the trial court barring the prosecution from referring to MFI81 in further proceedings.

16. It was grounded on the grounds that the court erred in law by barring the prosecution from referring to the bank statements of Nairobi City County contained in MFI81 and from disclosing the said Bank statement to all the accused persons, yet it was obtained in the course of investigations, and the excerpt thereof had been relied upon by the DPP in exercising his constitutional mandate in instituting the charges

17. The application was supported by the affidavit of JENNIFER KINUI, the Prosecuting Counsel, in which she deposed that during the testimony of PW11, she marked and identified MFI 81 as the Bank Statement belonging to Nairobi City County Operation account for the period from 1st January, 2014 to 16th April, 2016, generated on 19th April, 2016

18. She contended that the applicant had supplied to the defence MFI 81, as D12 in the inventory dated 27th August 2018. It was stated that it contained statements obtained during preliminary investigations, bearing statement dates of 2015. It was deposed that MFI81 was obtained through a court order in Misc. Criminal Application No. 201 of 2016 Kibera law court.

19. It was therefore contended that pursuant to the said court order, the bank statement in contention was generated on 19th April, 2016 for a

period between 1st January, 2014 to 19th April, 2016 and that it was similar to what had been supplied as D12. It was contended that they were under a duty to disclose all material in their possession and therefore the defendant will suffer no prejudice if MFI 81 is supplied to them.

20. To the application by the DPP, the 4th accused filed a replying affidavit and stated that on 22/8/2018, the court ordered that the applicants be supplied with all witness statements and exhibits, which order was reissued on 7th September, 2018, that it was only in the course of trial, when it was noticed that MFI 81 was different in content with D12, which the prosecutor conceded to, and stated that it was supplied to them by the Investigator after pre-trial.

21. The 5th Accused person filed grounds of opposition, to the effect that the applicant had misconstrued the ruling of 16/9/2019. The 8th to 11th accused persons also filed grounds of opposition and stated that the prosecution was barred from referring to MFI81 in further proceedings in the case and therefore the application before the court did not meet the threshold under Section 362 of CPC as it was disguised as an appeal.

22. It was contended that the applicant was seeking to micromanage the trial court and had failed to demonstrate issues of illegality, such as that the trial court lacked jurisdiction to make the ruling or acted in excess of jurisdiction or in violation of the principles of natural justice.

23. Directions were issued that the applications herein be heard by way of written submissions, which were duly filed and highlighted at the hearing.

1st ACCUSED/APPLICANTS SUBMISSIONS

24. On behalf of the 1st accused/applicant, it was submitted that the trial court declined to expunge the testimony of PW11 on the claim that once the testimony of witness had been taken by court as to form part of the proceedings, the said testimony cannot be expunged from the court record, which he submitted was not the correct legal position.

25. It was submitted that the prosecution MFI81 was different from the defence vision of MFI81 in terms of the period in question, it was contended that the period authorized by the court to be investigated was between 1st January, 2014 to 31st December, 2015, and therefore any period outside the said time was illegally obtained for which the case of **PHELOMINA MBETE MWILU v DPP PETITION No. 295 of 2018** was submitted in support.

26. It was submitted that the issue was not on disclosure perse but, that the prosecution was seeking to rely on statement which was illegally obtained and contrary to Article 50(4) of the Constitution. It was therefore contended that the trial herein will be rendered unfair if the prosecution was allowed to rely on a document which was not only illegally obtained but which was also not disclosed.

27. On the court's refusal to expunge the testimony of PW11 on record, it was submitted that the court had powers for which the following cases were submitted in support;

a) George Ochieng Olima v R [2019] eKLR the court may decide to expunge the evidence from record if justice demand.

b) Stephen Mburu Kinyua v R [2016] eKLR the effect of this decision is that the evidence of the one rebuttal witness who has already testified in the case shall be expunged from record and shall not be taken into account.

28. It was contended that the trial court was presumed to know the law, and therefore failure to cite authorities in support was not an escape route for the court from determining any legal question which was before him. In support of this preposition, the case of **PANCRAS T. SWAI v KENYA BREWERIES LTD [2014] eKLR** was submitted. These submissions were highlighted by Mr. Havi, the contents of which are clear from the court record.

2ND ACCUSED SUBMISSIONS

29. On behalf of the second accused, Mr. Ngarua, submitted that the issues were as regards MFI 81, which had been disclosed to the defence as D12, which was a bank statement, which according to him had been obtained without a court warrant. He submitted that was sufficient for the document to be expunged from the record.

30. He relied further on the submissions filed in court with the letter dated 3/10/2019 in which the right to pre-trial discovery was stated in the case **of DPP v MARIAS PAKINE TENKEWA T/A NARESHO BAR RESTAURANT [2017] eKLR and MUSHARAF ABDALLA v R [2017]** where evidence was expunged from the court record.

SUBMISSIONS BY DPP

31. It was submitted that revisionary jurisdiction of this court is provided for in Sections 362 and 364 of CPC as was stated in the case of **DPP v DAVID MWIRARIA & 6 OTHERS,** where it was stated that the High Court under Article 165 (6) may make any direction it considers appropriate to ensure a fair administration of justice.

32. On whether MFI81 was illegally obtained, it was submitted that the DPP can receive evidence from any source and not only the EACC before determining who to charge and with what offence as was stated in the case of **MICHAEL SISTU MWAURA KAMAU v EACC & 4 others [2017] eKLR**, it was contended that the document in question was legally obtained in the course of investigations and was disclosed

to the accused persons together with other evidence as a matter of its disclosure obligations.

33. It was submitted that disclosure was a continuous process as was stated in the cases of **KHALID & 16 OTHERS v AG, DENNIS EDMOND APAA AND ANOTHER v EACC [2012], THUITA MWANGI & 2 OTHERS VEACC [2013] eKLR and GEORGE TAITUMU v CMCC KIBERA & 2 OTHERS [2014] eKLR.**

34. It was contended that the exhibit had only been marked and was yet to be produced so as to form part of the court record, for which the case of **KENNETH NYAGA MWIGE v AUSTIN KIGUTA & 2 others [2015] eKLR** was submitted in support. Mr. Owiti submitted that even if the evidence was illegally obtained, that was not a bar to the testimony of PW11, it was contended that Article 54 only exclude the evidence, if it is unfair.

35. The first accused filed a rejoinder, which was highlighted by Ms Soweto who submitted that the parties were at the trial, looking at different documents and that it was clear that MFI 81 had not been forwarded to the DPP under Section 35 of ACECA and that the DPP had not asked the court to reverse the courts finding of fact that MFI 81 was not properly obtained and disclosed and were only asking that they be allowed to refer to a document which had been rejected.

DETERMINATION

36. The facts leading to these applications are not disputed, I have looked at the record of the trial court and for the purposes of this ruling will produce the relevant parts thereof, so that the scope of this application is placed in its proper place. In the course of Mr. Orengo SC cross examining PW11, Mr. Nyachoti made the following objection:

> ***"MFI 8's statement date is 19/4/16. The statement supplied by the prosecution has a statement date of 18/5/2018. There is another set whose statement is 10/3/2016. Another one of 19/4/16 about 3pages. it is the one we received during pre-trial. If we do not have a similar statement, the appropriate action need to be taken to expunge the record that was not supplied to us. We don't want to be seen to be petty but this bank statement touches all exhibits, we need to know what document to rely on, I need your direction."***

37. From the objection as raised, the issue which had been placed before the trial court for determination was purely an issue of disclosure. This was confirmed by Mr. Orengo, Mr. Ngarua and Mr. Ruingu. The trial court therefore invited the parties to make submissions on what he considered as "a concern."

38. From the record Prof Ojienda SC raised his objection purely on the issue of non-disclosure and based his submissions on the case of **Cholmondeley v Republic** and the right to fair hearing. The issue of how and when the statements were obtained only came out by way of submissions and were emphasised by Ms Soweto and Mr. Ngarua. They invited the court to expunge the said document from the court record, on the ground that it had not been supplied to the defense in good time and therefore their right to free and fair hearing was compromised.

39. Mr. Ruingu for the State took the opposite view and stated that the account in question did not belong to the accused person. He submitted that it belonged to Nairobi City County which was therefore a public document covered under Section 79 of the Evidence Act. He was of the view that since it had not been supplied to the defence, the remedy was for it to be supplied to the defence who should thereafter be given time to prepare.

40. The trial court in its ruling in issue had this to say;

> ***"It is clear up to this point that MFI81 was not forwarded to the DPP under section 35 of ACECA and was also not supplied to the DPP. Further it is clear that MFI81 was not supplied to the defence but only appeared in court. The court is left to wonder whether this was an oversight or was a voluntary oversight by the investigating officer who is lawyer…...***
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> ***Since it was neither disclosed to the DPP and to the defence and has not formally admitted as evidence and in order to ensure that the accused rights under section (sic)50 (2)(j) are protected I hereby do bar the prosecution from referring to MFI 81 in further proceedings in this case…….***
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> ***I have dealt with MFI81 and made observations of evidence given on oath in judicial proceedings and distinguished MFI81 from other pieces of evidence no sufficient reasons have been given to me and neither has the necessary authority been given to me to expunge the testimony of PW11. I so order"***

41. The revisionary powers of this court are given under Sections 362 and 364 of the Criminal Procedure Code and are given constitutional force under the provisions of Article 165(6) of the constitution, which is to call for and examine the record of any proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any findings of any such subordinate court.

42. The revision jurisdiction of the court is so wide as was stated by Mativo J as follows:

> ***"The issues raised by counsel for the third accused in this case calls for a close examination and understanding of the provisions relating to revision. In this regard reference can be made to a judgment delivered by the Indian Apex Court in the case of Krishnan and Anr. Vs. Krishnaveni and Ano[5] where the court extensively interpreted the relevant provisions of the Indian Criminal Procedure Code. Some of the observations made in this regard in the said case are reproduced herein below for the sake of reference: -***

"It is seen that exercise of the revisional power by the High Court .....is to call for the records of any inferior Criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders. ..... Section 397 gives powers to the High Court to call for the records as also suo motu power under Section 401 to exercise the revisional power on the grounds mentioned therein, i.e., to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court, and to dispose of the revision in the manner indicated under Section 401 of the Code. The revision power of the High Court merely conserves the power of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that its subordinates Courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of the process of the inferior Criminal Courts or to prevent miscarriage of justice.

The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to meet out justice. .....The power of the High Court, therefore, is very wide. However, High Court must exercise such power sparingly and cautiously .....However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior Criminal Court in its juridical process or illegality of sentence or order." (Emphasis added)

The basic object behind the powers of revision is to empower the high court to exercise the powers of an appellate court to prevent failure of justice in cases where the code does not provide for appeal. The power however is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to: - a defect in the procedure or a manifest error on the point of law, excess of jurisdiction, abuse of power, where decision upon which the trial court relied has since been reversed or overruled when the revision appeal is being heard.

The revisional powers though are quite wide, have been circumscribed by certain limitations. Such as (a) in such cases where an appeal lies but there is no appeal brought in, originally no proceeding by way of revision shall be entertained at the instance of the party who would have appealed.[6] (b) The provisional powers are not exercisable in relation to any interlocutory order passed in any appeal, inquiry and trial. (c) The court exercising revisional powers is not authorized to convert a finding of acquittal into one of conviction into one of convection.[7]

The revisional powers of a High Court are very wide. Such powers are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364 (1) (a) confers on the High Court all the powers of the appellate court as mentioned in Sections 354, 357 and 358.

The revisional powers are entirely discretionary. There is no vested right of revision in the same sense in which there is vested right of appeal. These sections do not create any right in the litigant, but only conserve the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts do not exceed their jurisdiction, or abuse the powers vested in them by the Code." See R vs ANTHONY THUO KARIM [2016] eKLR.

43. This court in the case of **REPUBLIC v GEORGE ALADWA OMERI [2016] eKLR** had this to say on the courts supervisory jurisdiction: -

"In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.

In VEERAPPA PILLAI v REMAAN LTD the Supreme court of India has this to say: -

"The supervisory powers are obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made…."

The above principle is applicable to the exercise of revision jurisdiction of the court wherein the court too cannot sit in appeal and re-appreciate the evidence. It is only exercised to correct the manifest error in the order of the subordinate courts but should not be exercised in a manner that turns the Regional court into appeal. The jurisdiction cannot be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered. See PATHUMMAA & Anor v. MUHAMMED 1986 (2) SCC 585 where it was stated that in revision jurisdiction the High Court would not be justified in substituting its own view for that of the magistrate on question of facts."

44. What this court is therefore called upon to do is to examine the record of the proceedings which was before the trial court and to be satisfied as to its correctness, legality or propriety and to make any such order or give directions it considers appropriate to ensure fair administration of justice. In exercising this jurisdiction, the court does not assume the appellate jurisdiction, which is much wider as stated in the authorities herein.

45. Whereas it was submitted by the accused persons that the right to free and fair hearing are accused centric, there is no constitutional and or statutory provision that bars the prosecution from approaching the court by way of revision if and when they feel that a decision made by the trial court is not correct, legal or appropriate.

46. It therefore follows that the application by the DPP is properly before the court, as they are seeking pronouncement on whether the order by the trial court barring them from referring to MI81 was correct and proper. I therefore find the submissions by the accused persons to the effect that the DPP misunderstood the ruling by the trial court and therefore did not have a right to revision to be without merit.

47. This therefore leaves the court with only two issues for determination; whether the court was right in barring the DPP from making reference to MFI 81 and whether he was wrong in failing to expunge the said exhibit from the record;

48. On the issue of MFI 81, from the objections taken, the response thereto and the ruling, it is not disputed that the said exhibit had not been supplied to the defense at the pre-trial stage and that it was different from what had been supplied as D12. It is therefore clear to me that what the court was confronted with, was what to do with a piece of evidence which had not been disclosed at the discovery stage.

49. The law on discovery is that it is throughout the trial and that what the defence is entitled to, is advance information or disclosure so as to enable him/her prepare for his/her defence, this is the import of Article 50(2)(j) of the constitution. This is the position this court took in the case of **REPUBLIC v MOHAMMED ISMAIL MADEY & 3 OTHERS [2016] eKLR,** thus:-

> ***"26. The right to witness statements is very fundamental to the criminal justice as it is through those statements that the accused person is placed in a level playing field with the prosecution and in a position to prepare his/her defense. This position was reinstated by the Court of Appeal in THOMAS PATRICK GILBERT CHOLMONDELEY vs REPUBLIC COURT OF APPEAL AT NAIROBI CRIMINAL APPEAL NO. 116/2007 in the following terms: -***
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> ***'To satisfy the requirement of a fair trial the prosecution is now under a duty to provide an accused person and to do so in advance of trial all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be provided at the trial……'***
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> ***The Court of Appeal went further and adopted the holding in the case of REPUBLIC VS WARD 1993 2 ALLER 557 where the Court of Appeal in England stated as follows: -***
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> ***'The prosecution's duty at Common Law to disclose to the defense all relevant material i.e. evidence which tended either to weaken the defense case or to strengthen the defense required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such statement and make copies unless there were good reasons not to do so. <u>Furthermore, the prosecution was under a duty, which continues during the pre-trial period and throughout the trial to disclose to the defense</u> all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defense case and whether or not the defense made a specific request for disclosure……'(Emphasis added)***
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> ***27. In the case of DENNIS EDMOND APAA & OTHERS vs ETHICS & ANTI CORRUPTION COMMISSION HIGH COURT AT NAIROBI PETITION NO. 317 OF 2012 reported in (2012) eKLR the court had this to say on the same: -***
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> ***'The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defense. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defense during the pre-trial stage and throughout the trial. Whenever a disclosure if made during the trial the accused must be given adequate facilities to prepare his/her defense. The obligation to disclose was a continuing one and was to be update when additional information was received.'***
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> ***28. This position that the right to supply the evidence continues throughout the trial was reinstated in the case of THUITA MWANGI vs THE ETHICS & ANTI CORRUPTION COMMISSION PETITION NO. 153/2013 where the court once again stated as follows:-***
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> ***'The duty to disclosure is a continuing one throughout the trial. The right to be provided with the material the prosecution wishes to rely on is not a one off event but is a process that continues throughout the process of trial from the time the trial states when plea is taken. The reality is that there will be instances when all the information relating to investigation may not all be available at the time of charging the suspect or taking pleas. The disclosure of evidence both exculpatory 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 fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defense.'***
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> ***29. In the case of GEORGE NGODHE JUMA & OTHERS vs THE ATTORNEY GENERAL in THE HIGH COURT OF KENYA AT NAIROBI MISC. CRIMINAL APPLICATION NO. 345 OF 2001 reported in (2003) eKLR and submitted by the applicants, Mbogholi and Kuloba JJ had this to say on the duty of the prosecution: -***
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> ***<u>'Always remember that the purpose of Criminal prosecution is not to obtain a conviction, it is to lay before the court what the court considers credible evidence relevant to what is alleged to be a crime. The prosecution has a duty to see that an available</u>***

proof of facts is presented and this should be done firmly and pressed to its legitimate strength but it must be done fairly……' (Emphasis added)

50. This position was further confirmed in the case of **JOSEPH NDUNGU KAGIRI v REPUBLIC [2016] eKLR** where the Court had this to say on discovery:-

"The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Article 50 which provides for the fundamental right to a fair hearing.

Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defense.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). [13]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.

The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In Thomas Patrick Gilbert Cholmondeley Vs. Republic,[14] (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-

'We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001).'

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defense.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of the Constitution. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of Natasha Singh v. CBI[15] where it was held as follows:-

"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."(Emphasis added)

In R v Ward [16] the Court of Appeal in England was unanimous that:-

"The prosecution's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. [Emphasis Mine]

As pointed out earlier, although the Cholmondeley case was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in the Constitution of Kenya 2010 as stipulated under Article 50(2)(j) cited above.

The case of R v Ward[17] is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defense."

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v STINCHCOMBE[18] where the Supreme Court of Canada observed,

"The obligation to disclose was a continuing one and was to be updated when additional information was received."

51. From the authorities submitted and from the objection, which as I understood it correctly was that the statements MFI 81, which PW11 was referring to, had not been disclosed to the defence during the discovery stages and which the trial court come to the conclusion and held that it had not, the most appropriate remedy in the circumstances, was to allow the prosecution to supply the document in question to the defence and give them time to enable them prepare for their defence thereon. In barring the prosecution from referring to the said document at that point in trial, the court acted in error thereby making its decision amenable to revision by this court.

52. The overriding concern of the Honourable magistrate was to ensure that the accused persons are accorded a fair trial by ensuring that they were provided with the statement which had not been disclosed and to be given an opportunity to prepare for their defence, without locking the prosecution from referring to the said statement in the proceedings , as the defence still had the opportunity to cross examine the said witness further thereon and to recall any witness who might have referred to the said statement in accordance with Section 150 of the Criminal Procedure Code.

53. On whether the court should have expunged the evidence of PW11 from the record, I take the view that the objection as to how the exhibit was obtained was taken prematurely and only came by way of submissions. As rightly pointed by the court, the said document had only been marked for identification. The witness on the stand was not the Investigating Officer but an officer from the bank. She was not in a position to know how the statement was obtained. The prosecution could not be condemned without being given an opportunity to lay basis on how the evidence was obtained. The court was therefore wrong in barring the prosecution from referring to the document in the future proceedings but right in declining from expunging this evidence from record at that stage of trial.

54. It is only the Investigating Officer who is better placed to answer all the questions the defence raised and only on the basis of his/her answer could the court make a determination thereof. From the record it is clear that the court did not make any determination on the legality of the said exhibit save that it had not been disclosed and I will therefore not make any finding thereon leaving the same to the trial court to determine.

55. Whereas the court has power and jurisdiction to expunge evidence and documents from the record and whereas there are authorities that support the said legal preposition, having come to the conclusion that the objection on the legality or otherwise of the said exhibit was pre-maturely taken, I will not make any comment thereon at this stage so as not to be seen to be "helicopter parenting'' the trial court.

56. From what I have said herein above, it follows that the application by the DPP is hereby allowed and the order by the trial court is hereby reversed and substituted with an order directed to the prosecution to supply the defence with the said statement, with leave to the Advocates for the 1st accused to cross examine the witness further on any aspect of the statement which he had not covered. Since the said witness was still on the witness stand being cross examined by the defence, I see no prejudice suffered by the defence as regards their right to fair hearing.

57. The application by the 1st and 2nd accused as supported by the other accused persons to expunge the evidence of PW11 on the ground that MFI 81 was illegally obtained is dismissed, the court having found that it was prematurely raised. I further decline to strike out or expunge the testimony of PW11 from the record for reasons stated herein.

58. In this I find support in the case **KENNETH NYAGA MWIGE (supra)** wherein the Court of Appeal set out the steps as regards the marking and production of documents in the following terms:

"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

59. The accused persons shall be at the liberty to raise objection on the said exhibit at the time of its production and I find no prejudice suffered by them at this stage and therefore allow PW11 to continue referring to the exhibit and to be cross examined and re-examined on the same as the trial proceeds. And it is ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF DECEMBER 2020.

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J WAKIAGA

JUDGE