



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.70 OF 2020**

**ANTHONY WATUKU KIBANDI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Anthony Watuku Kibandi, is facing various charges before the **Chief Magistrate's Court in Milimani Criminal Case No.166 of 2019 Republic vs Anthony Watuku Kibandi**. The charges include **stealing by servant contrary to Section 281 of the Penal Code, unauthorized access of industrial and commercial development corporation computer system** contrary to **Section 14(1)(b) of the Computer Misuse and Cyber Crime Act** and **unauthorized access of industrial and commercial development corporation computer system with intent to commit an offence** contrary to **Section 15(1)(2)(b) of the Computer Misuse and Cyber Crime Act**. When the Applicant was arraigned before the trial magistrate's court he pleaded not guilty to the charges. The case is pending before the trial magistrate's court. None of the prosecution witnesses have testified.

The Applicant filed an application before this court dated 20<sup>th</sup> February 2020 seeking to have this court revise an order made by the trial magistrate on 20<sup>th</sup> January 2020 relating to production of documents requested by the Applicant in the criminal case. The Applicant's case was that on diverse dates between 28<sup>th</sup> October 2019 and 5<sup>th</sup> December 2019, he requested the Prosecution to supply him with a number of documents that he reasonably believed to be in the possession of the Complainant, and that the Applicant intends to rely on in his defence. He annexed the various correspondence to the complainant. The Applicant averred that through a letter dated 11<sup>th</sup> December 2019, the Complainant did not confirm or deny being in the possession of the said documents. The Complainant indicated that it had supplied all the documents the Prosecution intended to rely on to establish the case against him. The Applicant deponed that on 20<sup>th</sup> January 2020, he appeared before the trial court and addressed the necessity and importance of the documents that were yet to be supplied to him by the Prosecution.

However, in its ruling, the trial court affirmed the position taken by the Complainant that all the documents that the Prosecution intended to rely on during trial had been provided to the Applicant. The trial court further held that if any other additional documents were mentioned during trial, the Applicant would seek production of the same during trial.

The Applicant asserted that the said ruling of the trial court is prejudicial to him as it denies him the chance to adequately prepare his defence. He averred that the said ruling further violates his right to a fair trial enshrined under **Article 25(c) of the Constitution**, which provides that the right to a fair trial shall not be limited. He stated that the prosecution has a duty to furnish the court with evidence that both incriminates and exculpates an accused person. In the premises, the Applicant urged this court to revise the order of the trial court and compel the complainant through the prosecution to avail documents requested by the Applicant.

During the hearing of the Application, this court heard oral submission made by Mr. Wepo for the Applicant and Mr. Momanyi for the State. Mr. Wepo submitted that the Applicant's application was anchored on **Articles 25 and 47 of the Constitution**, and **Section 362 of the Criminal Procedure Code**. He averred that some of documents that the prosecution intended to rely on during trial had been furnished to the Applicant by the investigation officer. He however stated that there was need for other requested documents to be provided by the prosecution. He told the court that the Applicant wrote letters to the Complainant dated 23<sup>rd</sup> October 2019 and 5<sup>th</sup> December 2019 requesting that various documents related to the trial be supplied to him. The Complainant, on 11<sup>th</sup> December 2019, wrote back to the Applicant and informed him that they had supplied him with all the documents in their possession that is intended to be relied on by the Prosecution during trial.

Counsel for the Applicant submitted that the Applicant intended to rely on the requested documents in preparing for his defence. He cited the cases of **George Ngodhe Juma & 2 others vs Attorney General [2003] eKLR** and **Samuel Otieno Bundu & 6 others vs Republic [2019]**

**eKLR.** The court in the stated cases appreciated the importance of discovery during the pre-trial stage in order to meet the ends of justice. Counsel for the Applicant asserted that the Complainant has refused to supply the Applicant with the requested documents despite being in possession of the same. He was of the view that there was a deliberate effort on the part of the Complainant to conceal evidence. In the premises, he urged this court to allow the Applicant's application.

Mr. Momanyi for the State opposed the application. He submitted that on 27<sup>th</sup> October 2019, the prosecution informed the trial court that it had supplied all the documents intended to be relied on during trial to the Applicant. He averred that the documents the Applicant is seeking are in the possession of the Complainant's Human Resource Department and not with the Prosecution. He stated that the letters annexed by the Applicant were addressed directly to the Complainant and not to the Prosecution. The Prosecution was not involved in the said correspondences. The Complainant wrote back to the Applicant and informed him that all the necessary documents had been provided to the Investigating Officer. Learned State Counsel maintained that all the relevant documents had been supplied to the Applicant by the Prosecution. He pointed out that the Complainant was not party to the Applicant's application before this court. He was of the view that the present application was a waste of time and an abuse of the court process. He therefore urged the court to dismiss the same.

This court has carefully considered the rival submission made by the parties to this application. The issue that the Applicant raises is indeed a fundamental one. It is an issue that goes to the root of what is considered to be a fair trial. The **Constitution**, specifically **Article 50(2)(j)** requires that an accused person has to be supplied in advance with all the evidence that the prosecution intends to rely on during trial. The reason for this is essentially two fold; to enable the accused to know in advance the evidence that will be laid against him so that he will not be ambushed or surprised when the prosecution will be tendering the evidence before the trial court, and secondly, to give the accused adequate time to prepare for his defence. Matavo J. in **Joseph Ndungu Kagiri Vs Republic [2016] eKLR held thus:**

**“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 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 a right to a fair trial which includes the right to have adequate time and facility to prepare a defence. The latter cannot be met if the accused is not furnished with the evidence 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 the rights of an accused person are not violated.”**

In the present application, the Applicant has complained that he has not been supplied with all the evidence that the prosecution intends to rely on during trial despite the fact that he has identified the evidence that should be supplied to him. The evidence that the Applicant wishes to be supplied with are essentially documentary which are allegedly in the complainant's possession. The Applicant listed the documents in a letter dated 5<sup>th</sup> December 2019 addressed to the complainant.

On its part, the prosecution is emphatic that it has supplied all evidence, the witnesses' statements and documentary, that it intends to rely on during the trial. It was the prosecution's case that the documents that the Applicant is seeking is not part of what the prosecution intends to rely on during trial. The prosecution pointed out the fact that the letter requesting for the documents was not addressed to the prosecution but was rather directly addressed to the complainant – the prosecution was not therefore aware of the request, and even if it did, the documents in question were not in its possession to enable the court to compel it to avail the same to the Applicant.

As noted earlier in this ruling, the supply of evidence to an accused person is an integral part of what is Internationally accepted as constituting the tenets of fair trial. In the present application, it was clear to this court that the Applicant is seeking documents which are beyond what the prosecution has in its possession. It was apparent that the Applicant wants to build a defence on the basis of the documents that he wishes to be availed to him with the court's assistance. What was not lost to the court is the fact that one of the charges the Applicant is facing is that of unauthorized access to the complainant's electronic database. There will be issues that may arise regarding whether such evidence constitutes illegally obtained evidence and whether it will be admissible.

As was held by the Court of Appeal in **Okiya Omtatah Okoiti & 2 others Vs Attorney General & 4 others [2012] eKLR**

**“78. That decision supports the argument that the overriding consideration when considering whether illegally obtained evidence is admissible is the relevance of such evidence. It has been followed, for example, in **John Muriithi & 8 others Vs Registered Trustees of Sisters of Mercy(Kenya) t/a “The Mater Miscencordliae Hospital & Another [2013] eKLR** where the ELRC (Wasilwa J.) pronounced that, “in Kenya, illegally obtained evidence is admissible so long as it is relevant to the fact in issue or its admission would not affect the fairness of the trial” and after making reference to Article 50(4) of the Constitution concluded, on the facts of the case, that:**

**“In determining whether to allow evidence being sought to be expunged, I am guided by the fact that the primary duty of this court is to do justice. If justice will be done using available documents and evidence not obtained in breach of the Constitution and the law, then this court would admit such evidence in order to have the right resources before it to enable determination of the issues in a just matter.”**

**79. This court had occasion again to consider the matter of admissibility of illegally obtained evidence in the case of **United Airlines Limited Vs Kenya Commercial Bank Limited [2017] eKLR** where the court rejected the contention that illegally obtained evidence is admissible in criminal law as long as it was relevant. The court stated that the Constitution of Kenya 2010 had changed that position and that such evidence is not admissible by dint of Article 50(4) of the Constitution which provided:**

**“50(4) evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded**

if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.....”

In that case, the court stated:

“As submitted by learned counsel for the Respondents, illegally obtained evidence was for a long time admissible in criminal law as long as it was relevant (See Kuruma S/O Kaniu Vs R [1995] 1 ALLER 236). However, the Constitution of Kenya 2010 has now shifted the paradigm and Article 50(4) of the Constitution now disallows such evidence.....”

It is therefore evident that the Applicant, if he desires for the particular documents to be produced into evidence during trial (and it appears that the Applicant has copies of the particular documents in his possession), will first have to overcome the hurdle on whether such evidence was illegally obtained. This court agrees with the prosecution that it cannot be **compelled** by this court to avail to the Applicant evidence which DOES NOT constitute part of the evidence that it will rely on to prosecute its case against the Applicant. The prosecution can only avail to the Applicant what it is under constitutional and legal obligation to provide. If the Applicant wishes to rely on other evidence which is not within the prosecution’s possession, he has to lay sufficient basis for the trial court to consider whether or not such other evidence has any relevance to the case at hand.

This court cannot therefore fault the trial court’s decision in declining to grant the order sought by the Applicant. The request for documentary evidence not in the possession of the prosecution cannot be granted. The Applicant is at liberty to pursue the avenues available to him under the **Evidence Act** to have the said documents adduced into evidence at the appropriate time.

The upshot of above reasons is that the Applicant’s application for revision of the trial court’s said decision lacks merit and is hereby dismissed. The trial court’s file shall be returned to that court so that the trial may continue to its conclusion.

It is so ordered.

DATED THIS 16<sup>TH</sup> DAY OF DECEMBER 2020.

L. KIMARU

JUDGE