



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA, AT NAIROBI

ANTI-CORRUPTION & ECONOMICS CRIME DIVISION

ANTI CORRUPTION CRIMINAL REVISION NO. 9 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

SIMEON LEMMINTE OLE KIRGOTTY

SIMEON LEMMINTE & 20 OTHERSRESPONDENTS

(From the Ruling of Hon. D. Ogoti (CM) dated 4th March 2019 in ACEC No. 48 of 2019)

RULING ON REVISION

1. The Director of Public Prosecutions filed the application dated 5th April 2019 seeking revision of the ruling of Hon. Ogoti (CM) dated 4th March 2019. The application, which is premised on the provisions of Articles 50, 157, 159, and 165(6) of the Constitution and sections 362 and 364 of the Criminal Procedure Code is supported by an affidavit sworn on the same date by Victor Juma Owiti.
2. In his ruling, the Chief Magistrate directed that the DPP should supply the accused persons with hard copies, rather than scanned copies, of all the documentary evidence that forms part of the evidence the prosecution intends to rely on in its prosecution of the accused persons, the respondents in this application. It is the DPP's case that the trial court erred by reaching a finding that supply of scanned documents does not meet the requirements under Article 50(2)(j) on reasonable access to evidence the prosecution intends to rely on. It is argued further that the trial court erred by rejecting use of technology in conducting a trial where the evidence is so bulky but has been reduced to practical digital form and which will be availed to the defence and complemented by a few hard copies in court during the hearing to enhance accessibility and ensure authenticity. The DPP indicates in the affidavit in support of the application that the documents in question are around 10,000 pages.
3. When the matter came up before me on 9th April 2019, Counsel for the accused persons, with the exception of the 1st, 6th, 7th and 14th respondents who had not been served as the DPP did not have the contacts of their Advocates, indicated that they had consulted on the matter and did not oppose being supplied with scanned copies of the documents. Learned, Counsel, Mr. Theuri who represents the 3rd respondent in the criminal proceedings indicated that he had consulted with the other Counsel present in court and had no objection to being supplied with electronic copies of the bank statements subject to being supplied with an inventory of the pages which the prosecution intended to rely on to enable them prepare their defences.
4. The respondents were however, opposed to disclosure in electronic form of the Board Minutes referred to in the affidavit of Victor Juma Owiti. The basis of their objection was that there are issues related to the signatures and the sequencing of the minutes, and also for the consistency of the evidence. The respondents were of the view that since the Board Minutes were likely to be produced as hard copies, they would require hard copies even if they are given electronic copies in order to confirm that they are in order. Supply of the documents in digital form, in their view, would lead to delay as they would need to consult with their clients. Mr. Theuri indicated that this was the position taken by the 2nd, 3rd, 5th, 11th, 12th, 18th, 19th, 20th, and 21st accused persons.
5. Mr. Ochanda for the 10th respondent submitted that the DPP should serve the bank statements to be relied on in hard copy, while the rest of the statements could be served in digital form. He agreed with Mr. Theuri that the Board minutes should be served in hard copy.
6. Ms. Kimiri for the DPP indicated that the Board Minutes are available in hard copies. While the Investigating Officer had retrieved Board Minutes for the period 2013-2018, the minutes that were relevant for the purposes of the prosecution were only three and would be supplied in hard copy. For purposes of full disclosure, however, the DPP would serve the rest of the minutes in digital form. The bank statements had been retrieved in digital form, and the DPP did not intend to change the form in which they were retrieved. An inventory would however be prepared of the documents.

7. The provisions of the Evidence Act allow for the production of digital evidence, subject to such evidence meeting certain criteria. This is provided for under section 78A of the Evidence Act. However, the relevance and admissibility of such evidence has to be determined by the trial court.

8. In this case, the parties, with the exception of the 10th respondent, are in agreement that the bank statements that were retrieved in electronic form should be supplied in such format. No reason was advanced by Counsel for the 10th respondent to support the demand that the bank statements intended to be relied on should be supplied in hard copy.

9. With regard to the Board Minutes, the DPP indicates that the minutes to be relied on will be supplied in hard copy. The rest of the minutes will, for purposes of full disclosure, be furnished to the respondents in digital form.

10. I have considered the application by the DPP and the brief submissions made before me by Counsel for the respondents. Article 50(2)(j) provides that an accused person has the right:

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
(Emphasis added).

11. In the circumstances of this case, and I believe the respondents recognise this, “**reasonable access**” to evidence will be best served by the supply of electronic documents in the case of the bank statements. This is also the format in which the prosecution indicates they were retrieved in, and the demands of expedition and access to justice without undue delay will be best served by supplying the documents, said to be around 10,000 in number, in electronic format, rather than in bulky paper form.

12. With respect to the Board Minutes, the prosecution indicates that it will supply hard copies of those minutes it intends to rely on, and digital copies of the other minutes.

13. In essence therefore, the parties to this application are in agreement that the requirements of Article 50(2) (j) will be met by the supply of bank statements in digital format, subject to provision by the DPP of an inventory of the statements to be relied on. They are also in agreement that the Board Minutes to be relied on by the prosecution should be supplied in paper format.

14. I accordingly revise the orders made by the trial court on 4th March 2019 and direct as follows:

i. That the DPP shall supply the respondents with digital copies of the bank statements that his office intends to rely on at the trial of the respondents;

ii. That the DPP shall supply the respondents with an inventory of the bank statements that he intends to rely on at the trial;

iii. That the DPP shall supply the respondents with hard copies of the Board Minutes that he intends to rely on at the trial;

iv. Other minutes retrieved by the investigating officer shall be supplied to the respondents in digital format.

15. Orders accordingly.

Dated Delivered and Signed at Nairobi this 23rd day of April 2019

MUMBI NGUGI

JUDGE