



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC MISC APPLICATION NO 27 OF 2019**

**JAMES MWANGI & OTHERS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the ruling of E. Juma (CM) in ACEC No. 35 of 2018 dated 7<sup>th</sup> June 2019)

**REVISION No 26 OF 2019**

**JULIUS MAINA NJOKA & OTHERS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an application for revision of the ruling of E. Juma (CM) in ACEC No. 35 of 2018 dated 17<sup>th</sup> June 2019)

**RULING**

1. I have before me an appeal from and an application for revision of a ruling by Hon. E. Juma dated 17<sup>th</sup> June 2019. In the ruling, Hon. Juma partly dismissed an application by the accused, the appellants in this case, James Mwangi Gakuya & Others, and the applicant, Julius Maina Njoka and their co-accused dated 7<sup>th</sup> June 2019. The appellants and the applicants had sought to be supplied with the investigations diary, the investigations report sent to the Director of Public Prosecutions (DPP) by the Ethics and Anti-corruption Commission (EACC) in compliance with section 35 of the Anti-corruption and Economic Crimes Act (ACECA) as well as a copy of the occurrence book report (OB) in **Anti-Corruption Case No. 35 of 2018** which is ongoing before the Chief Magistrates Court at Milimani.

2. The appellants and the applicants are charged with offences of abuse of office and conflict of interest under section 42(3) as read with section 48 of the Anti-corruption and Economic Crimes Act (ACECA) and fraudulent acquisition of public property contrary to section 45(1) as read with section 48 of ACECA. The trial court acceded to the demand for the investigations diary and the occurrence book. The court however, declined to make an order for the prosecution to furnish the accused with a copy of the investigations report. It is this aspect of the ruling that is the subject of both the miscellaneous criminal appeal and the application for revision.

3. In the application for revision, No. 26 of 2019, the applicants, and in the application dated 18<sup>th</sup> June 2019, the appellants, seek orders to stop proceedings in the criminal case and for the setting aside of the orders of the trial court declining to order the prosecution to furnish the investigations report. They contend that the trial magistrate failed to consider their submissions and authorities in reaching her decision. The appeal and the application were argued together before me.

**The applicant's and appellant's submissions**

4. Mr. Okatch presented the appellants' appeal dated 18<sup>th</sup> June 2019. He submitted that the issue before the court was whether the defence is entitled to the investigations report and the investigations diary in relation to the rights of an accused person under Articles 50, 35, 48 and 49 of the Constitution. His submission was that these documents should be supplied to an accused person. He relied in this regard on the decision in **Emilio Gitonga Mutegi & Others v Republic [2013]eKLR** in which it was held that the documents should be provided to an accused person, and that it was not enough for the prosecution to say that it does not intend to rely on them.

5. Mr Okatch further relied on the case of **Moses Kinyua Nyoro v R [2015] eKLR** and **Simon Okinda v R Petition No. 51 of 2014** to

submit that the same point with respect to disclosure of evidence was made. He submitted that this latter decision speaks of the importance of the investigations report at the hearing of the case but because it also supports other constitutional rights of the accused. His submission was that the investigations report is critical for an appellate court and may be important for an accused person who feels that the prosecution was malicious. It is also his contention that it is important for the court which may try a suit for malicious prosecution as it will assist such a court to make a considered decision on the issue. Mr. Okatch conceded that the report contains the process of investigation and may not contain the evidence.

6. In his submissions in support of the application for revision, Mr. Magal associated himself with the submissions of Mr. Okatch made in support of the appeal. Like the appellants, the applicants had also applied for the investigations report, the investigations diary, and the occurrence book. The court had made an order for the latter two but not the first. Mr. Magal argued that the court should consider, first, whether there was a duty of disclosure placed on the prosecution and whether the applicants had a right to a fair hearing; whether there was a limitation of the applicants' right to a fair hearing and whether such limitation was legitimate, proportionate and lawful; and finally, whether the applicants were entitled to the orders that they were seeking.

7. According to Mr. Magal, under Article 50(2) (b), (c), (j) and (k), the prosecution's duty of disclosure extends to both the material intended to be used for the prosecution as well as any other relevant material gathered in the course of investigation. In his view, this was the interpretation that accords best with Article 20(1), (2), and (3). He submitted that should this court find this to be the correct position, then, by failing to order the prosecution to provide the investigations report, the trial court had abrogated the applicant's right to a fair hearing. Mr. Magal urged the court to apply the criteria in Article 24 with respect to the failure by the prosecution to provide the investigations report as, in his view, the limitation was not constitutional.

8. Mr. Magal submitted further that the trial court had placed the burden of proving the need for the report on the defence; that the court had said that the defence did not show why it needed the report and had observed that the prosecution did not intend to rely on it. Further, that the court had made this decision without scrutinizing the report and assessing its contents. Counsel relied on the decision from the European Court of Human Rights in **Rowe and Davis v. The United Kingdom (Application No. 28901/95)** at paragraphs 53-72 to submit that the issues that were raised in the case were similar to the issues in the present matter. He urged the court to be guided by the decision and allow the application for revision.

### **The response**

9. The state opposed both the appeal and the application for revision. In her submissions, Ms. Sigei observed that the investigations diary the OB extracts and the four hand written witness statements had been supplied to the appellants and their co-accused. What had not been supplied was the investigations report which the court had declined to make orders in respect of. According to the prosecution, the investigations report was a report given to the DPP by the EACC which discloses the manner of investigation and the documents, witness statements and exhibits that will be relied on, as well as the recommendations to the DPP when making the decision to charge. Her submission was that a reading of section 35 of ACECA shows that this is internal communication between the EACC and the DPP. Nowhere is it stated in ACECA that the report should be given to the defence.

10. The report, according to the state, was in relation to a process done before the decision to charge is made. It was not a report recovered in the course of investigations, nor does it form part of the exhibits which the prosecution intended to rely on. The state relied on **R vs Josphat Sirma and 5 Others (2017) eKLR** to submit that the obligation to disclose is not absolute and is subject to the discretion of the trial court. In the impugned ruling, the trial court had applied its mind to the **Sirma** case and was in compliance with Article 50(2) (j). It had not in any way denied the appellants their right to a fair trial, and the prosecution urged the court to dismiss the appeal.

11. With regard to the application for revision, Ms. Sigei observed that the applicants had not demonstrated the illegality or the impropriety that they face. They had also not demonstrated the gross and unjust nature of the ruling delivered by the trial court. Ms. Sigei adopted her submissions with respect to the appeal and urged the court to dismiss the application for revision as it lacks merit.

12. In his submissions in reply, Mr. Okatch noted that while the prosecution had submitted that the investigations report was an internal communication, it had admitted that it contains a summary of the investigations leading to the charge. It therefore, for that reason alone, attaches to the right of an accused person. To the argument that section 35 of ACECA does not say that the report can be given to the defence, his submission was that conversely, nowhere does the section say that it cannot be given to an accused person. Even if it had so stated, such a provision would be an affront to Article 25 on the non-derogable right to a fair hearing.

### **Analysis and Determination**

13. In order to succeed in an appeal, the appellant must show that the court made an error of law or fact and as a result arrived at a wrong decision. To succeed in an application for revision, the applicant must meet the requirements of section 362 of the Criminal Procedure Act which provides that:

***The High Court may call for and examine the record of 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.***

14. At section 364, the Criminal Procedure Code gives the High Court power in a revision to, among other things, alter or reverse the order revision of which is sought.

15. I have considered the appeal and the application for revision. While the two are distinct in nature and in the manner in which the aggrieved party, to be successful, must establish their grievances, they revolve around the decision of the trial court to decline to require the prosecution to provide the defence with the investigations report sent to the DPP in compliance with section 35 of ACECA.

16. I have called for the record of the lower court revision of which is sought and considered the ruling in contention. The appeal and the application for revision are anchored on Article 50(2) of the Constitution. The crux of their grievance is the alleged violation of the right to a fair hearing under Article 50(2) which provides, so far as is relevant for present purposes, as follows:

***(2) Every accused person has the right to a fair trial, which includes the right—***

***(a) to be presumed innocent until the contrary is proved;***

***(b) to be informed of the charge, with sufficient detail to answer it;***

***(c) to have adequate time and facilities to prepare a defence;...***

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

***(k) to adduce and challenge evidence;***

(Emphasis added)

17. I will deal first with the question whether the impugned ruling is properly a subject for revision. I have read and considered the ruling. The trial court was concerned with the question whether the investigations diary, the OB and the investigations report should be furnished to the defence. I am unable to find any illegality or impropriety in the ruling, and indeed, none has been pointed out by the applicant. What arises from the application and the appeal, I believe, is the question whether the trial court erred in finding that the investigations report should not be furnished to the defence if it does not form part of the evidence that the prosecution intends to rely on.

18. The investigations report is provided for in section 35(2) of ACECA in the following terms:

***(1) Following an investigation, the Commission shall report to the Director of Public Prosecutions on the results of the investigation.***

***(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.***

19. The prosecution argues that a reading of the section does not disclose a requirement that the report furnished to the DPP should also be supplied to an accused person. It submits that once the DPP considers the report and forms the opinion that the person concerned should be charged with an offence, the accused person would then, in accordance with Article 50 of the Constitution, be supplied with sufficient particulars for him to answer and understand the charges against him. The prosecution's case is that the accused person is not entitled to administrative correspondence between the DPP and EACC.

20. I believe that the answer to the appeal and the application for revision lies in what is understood to be meant by 'evidence' under Article 50(2)(j) and (k). From the record, the defence in the two matters before me which arise from the same case were supplied with witness statements and all the documents that the prosecution intends to rely on at the trial. Upon their application, the state agreed to supply the defence with a copy of the investigations diary and extract from the OB, but declined to supply the investigations report.

21. Article 50(2) requires that an accused person is informed and supplied in advance with ***'the evidence the prosecution intends to rely on, and to have reasonable access to that evidence'*** as well as the right to ***'adduce and challenge evidence.'***

22. From the provisions of section 35 of ACECA and the submissions made before the trial court and this court, it seems to me that, as the prosecution contends, the investigations report is not 'evidence'. The term 'evidence' is defined in the Cambridge English Dictionary as ***'one or more reasons for believing that something is or is not true.'*** In **Black's Law Dictionary**, 10<sup>th</sup> edition 'evidence' is defined as something ***(including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact.***

23. Under section 35 of ACECA, the investigation reports, as I understand it, is a statutory report submitted to the DPP by the EACC on the results of the investigations carried out by the EACC. It is required to contain any recommendation that the EACC may have that a person be prosecuted for corruption or for an economic crime.

24. In my view, the prosecution is correct in its assertion, and the trial court was correct in reaching the finding, that the investigations report is not one of the documents required under Article 50(2)(j) and (k). It is not 'evidence' on the basis of which the trial court could make a finding on the guilt or otherwise of an accused person.

25. In **Republic v John Njoroge Chege [2018] eKLR**, the accused had sought to be supplied with email correspondence between the office of the DPP and the officer investigating an offence in which the DPP instructed the officer to charge the accused with an offence. In revising and setting aside an order of the trial court that the email be supplied to the accused, Ong'udi J observed that:

***"The email is said to have contained the approval by the DPP. So what is the issue the Respondent wishes to raise about the email?"***

**14. It is not every document or statement referred to by a witness that must be produced. The prosecution supplies the documents that it intends to rely on to establish its case.”**

26. In my view, the trial court was correct in declining to order the prosecution to furnish the defence with the investigations report. It is not ‘evidence’ that the prosecution would be relying on to prove its case against the appellants and the applicants in this matter. It is internal communication between the investigation and prosecution bodies, the EACC and the DPP respectively, required under ACECA, containing the recommendations of the one to the other, with respect to an investigation that it has carried out and its recommendations with respect thereto.

27. In **Republic v Josphat Koech Sirma & 5 others [2017] eKLR** Achode J observed as follows:

*“The Investigation Report is an assessment prepared by the investigating officer of the material gathered during the investigation. It is based on the witness statements and the documentary evidence that the Applicant has already made available to the Respondents herein. Furthermore, the Applicant is not bound by the assessment or recommendations contained in the report, or any other agency and neither is the court. The Applicant has expressly indicated that the report in question does not form part of the evidence which the State shall rely on at the trial. As such, it is my considered opinion that it does not form part of the evidence referred to in Article 50(j).*

*21. Whoever comes to court requiring the court to assert a right or fundamental freedom, must do so with precision and place material before the court to demonstrate why the court is called upon to enforce the right or fundamental freedom, or how the right of fundamental freedom will be infringed or threatened if the orders sought are not granted. The Respondents have not demonstrated how this document which is an internal memo between two institutions is crucial to their defence, bearing in mind that the recommendations therein are not binding on the ODPP or the court, and the ODPP has stated categorically that it is not part of the evidence.*

28. I agree with the sentiments expressed by my sister judges in the above matters. The investigations report is an internal administrative report which the EACC is mandated by statute to provide to the DPP. It is not evidence that the prosecution is required to provide to the defence. There is therefore no duty of disclosure in respect thereto, and the trial court properly declined to make an order for its disclosure.

29. Counsel for the applicant argues that such a report may be required for the purpose of carrying out a case for malicious prosecution. Perhaps. In that event, the party seeking to use the report to prosecute such a case or to enforce a fundamental right or freedom would have to, as Achode J held at paragraph 21 of the Sirma case which I have set out above, demonstrate why the report is required for such enforcement. However, for the purposes of a criminal prosecution, it is not ‘evidence’ that falls within the ambit of Article 50(2)(j). Its absence does not in any way impact on the right to a hearing of the appellants or the applicants in this case.

30. Counsel for the applicants cited the case of **Simon Okinda v R Petition No. 51 of 2014**, the proper citation of which is **Mwanahawa Anyona Chiyayi & 5 others v Swaleh Aura & 3 others [2015] eKLR**. This was a constitutional petition in which the petitioners sought to stop their prosecution following an assault and destruction of property belonging to the complainant, with whom they had had a protracted court battle. Mrima J, rightly so in my view, relied on the contents of the investigations diary, not the investigations report- none was required in that case- to establish the events that took place after the eviction of the petitioners on the basis of an order of the court. He proceeded to dismiss the petition. This decision does not therefore assist the applicant in this case.

31. Indeed, the authorities relied on by the applicants and the appellants -among them the decision of Lesiit J in **Emilio Gitonga Mutegi & Others v Republic** (supra) in which the applicants had also applied for the investigation diary, not the investigations report, are distinguishable from the present case in which the document sought to be availed is a statutory document that does not form part of the evidence in the prosecution case. In **Rowe and Davis v. The United Kingdom** (supra) the decision turned on the duty of disclosure of evidence, which was recognised as not being absolute, and the failure of the prosecution to disclose certain evidence relating to the prosecution of the applicants. Its facts and decision are clearly also distinguishable from the facts in the present case.

32. Finally, it is not clear what principle the appellants wanted to be culled from the case of **Moses Kinyua Nyoro v R** (supra) in which the court only notes in passing that the appellant in the case did not request for the investigations diary at any time and the prosecution therefore did not find it necessary to produce it.

33. Accordingly, it is my finding that the trial court properly held that the investigations report is not one of the documents that was required to be supplied to the accused persons in the case from which the appeal and the application for revision before me arise. I therefore decline to exercise powers of revision in respect to the said ruling. Similarly, I find no basis for interfering with the decision of the trial court as no error of law or fact has been established. I accordingly dismiss both the application for revision and the appeal.

34. Orders accordingly.

**Dated and Signed at Nairobi this 24<sup>th</sup> day of September 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and signed at Nairobi this 24<sup>th</sup> day of September 2019**

**JOHN ONYIEGO**

**JUDGE**