



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION CASE NO. 2 OF 2018

STANLEY MUTUA TITUS.....1ST APPLICANT

JOHN KIMEE JOSHUA.....2ND APPLICANT

DANCAN MWENDWA MARIMBU.....3RD APPLICANT

PETER KIVUNGI KIMULI.....4TH APPLICANT

MESHACK KATUNGA KIMWENYE.....5TH APPLICANT

FRANCIS MAHUNYO KATHINGO.....6TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from the an order in Kitui Chief Magistrate's Court

Criminal Case No. 377 of 2018 by J. Munguti P M on 22/03/18)

R U L I N G

1. By a letter dated the 10th day of April, 2018, the firm of M. M. Kimuli & Co. Advocates who have been retained by the Applicants seek Revision of an order by Hon. Munguti P M in the Kitui Chief Magistrate's Criminal Case No. 377 of 2018.
2. The Applicants are charged with the offence of Stealing contrary to Section 268 as read with Section 275 of the Penal Code. They were arraigned in Court on the 17th March, 2018 in Miscellaneous Application No. 24 of 2018 where the State through the Investigating Officer sought custodial orders pending investigations. The Applicants objected vehemently to the orders being granted. Hon. Munguti P M who was seized of the matter considered the application, dismissed it and granted the Applicants bond.
3. Subsequently, the Applicants appeared in Court on the 22nd day of March, 2018 for purposes of plea taking. Having denied the charge the Investigation Officer was given audience by the Court where he sought orders for the Applicants to appear before him in the presence of their lawyer to aid in investigations.
4. The application was opposed by their Advocate. His argument was that having responded to the plea, any evidence extracted from them would be irregular and was contrary to Article 49 and 50 of the Constitution.
5. In his Ruling the learned Magistrate opined that being charged in Court was not a basis for a party to refuse to co-operate with the Investigation Officer. He ruled thus:

“The Investigating Officer has indicated he want the accused person to be questioned in the presence of their lawyer over certain issues touching on their phones which have been confiscated by police in the court of investigations. The mere charging of somebody cannot be the basis of him/her refusing to co-operate with investigating agencies. The Investigating Officer has invited the defence counsel to be present and since this court cannot delve on the issues they will be questioned over. I find any arising issues can be addressed as they arise by defence counsel. On the issue of bond, I find the accused persons are alleged to have stolen a colossal amount of money. I find bond terms of Kshs. 300,000 plus surety to be commensurate to the charge they are

facing.”

6. It was the contention of learned Counsel for the Applicants that the order was unconstitutional and it infringed on the rights of the Applicants as provided by **Article 49(1)(d)** of the **Constitution**. That an Accused person is insulated against self incriminating by **Article 50(2)(1)** of the **Constitution**. He also relied on the case of **Robert Julo vs. Republic (2011) eKLR** where it was held that the police ought not to be continuing with the investigations once a suspect is charged.

7. Further, the learned Counsel also argued that the police have a duty to investigate and prove their case and the order amounts to delegation of the duty to the Accused persons. That it presumptively shifts the burden of proof to the Accused persons and the freedom to have their lawyers present does not cure the unconstitutionality.

8. The State through **No. 92377 P C Kennedy Balaka**, by a response dated **16th May, 2018** stated that he realized the discrepancies in books of accounts and **Till No. 833396** after the Applicants were released on bail though their cellphones had been retained for investigations and are pending cyber analysis. That **Section 194** of the **Criminal Procedure Code** provides that evidence be taken in the presence of the Accused, or, when in personal attendance is dispensed with, in the presence of the Advocate if any. That **Section 65(a)** and **(b)** of the **Evidence Act** on digital evidence point out, require suspects to disclose their mobile phone numbers and other password on their devices and **Article 35(1)(b)** of the **Constitution** guarantee every citizen a right to information held by one or another person that can be used to protect another person's right.

9. This Court has a mandate to make appropriate orders in ensuring justice is administered fairly and in accordance with the law (**See Article 165(6)(7) of the Constitution**). I did call for the record of the Lower Court, presided over by the **Hon. Munguti P M** for purposes of satisfying myself of the correctness and legality of the order passed. (**See Section 362 of the Criminal Procedure Code**).

10. The impugned order requires the Applicants to present themselves before the Investigation Officer for purposes of further interrogation/investigations. It is argued that a discovery was made after their release on bail that requires them to give some information in the course of investigations.

11. When the Applicants appeared in Court at the outset in **Miscellaneous Criminal Application No. 24 of 2018** the Prosecution sought to have them detained at Kitui Police Station for a period of fourteen (14) days to enable **P C Kennedy Balaka** complete his investigations. An elaborate affidavit was deposed in support of the application where it was clearly stated that the Applicants were suspected to have stolen a huge sum of money by altering **Till Number 833396** using their Safaricom Sim Cards and also cashing money on their own. He pointed out that the investigation was complex and the matter was wide which called for forwarding the sim cards to the Safaricom Kenya Limited Headquarters Nairobi and the mobile phones for further forensic analysis.

Article 49(1)(f)(g)(h) of the **Constitution** provides thus:

“(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”

The trial Magistrate considered the application and in his wisdom disregarded the averments. He released the Applicants on bail even before the plea was taken.

12. Consequently the Applicants were arraigned in Court for plea taking on the **22nd March, 2018**.

13. The Applicants having been charged in Court, it may be envisaged that investigation were carried out and concluded. They, therefore expect a fair hearing as provided by **Article 50** of the **Constitution**.

14. The application to have the Applicants report to the Investigation Officer was made to enable him “extract some information from them.”

Article 50(2)(l) provides thus:

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

(l) to refuse to give self-incriminating evidence;”

In the case cited of **Robert Julo vs. Republic (2011) eKLR** that is persuasive, **Odero J.** stated that:

“... It is presumed that once a suspect is charged before a court of law, investigations into all aspects of the offence have been concluded..... The police ought not be continuing with investigations once a suspect has been charged and further it is not the business of the court (who ought to be a neutral arbiter) to compel a suspect to assist the police to conduct investigations against him.”

15. The Investigation Officer by seeking to extract some information from the Applicants suggested that he was to use some special effort, skill or force to get the information from them. This would be tantamount to making them expose themselves by making statements to involve themselves in the criminal prosecution. Every person has the right to refuse to give self incriminating evidence (**See Article 50(2) (l)**). In the case of **Saunders vs. United Kingdom A/702 (1997) 23 EH RR 313** the Court stated that:

“... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence....”

16. From the foregoing, it is apparent that the order of the learned Magistrate compelling the Applicants to present themselves before the Investigation Officer to enable him obtain information from them was erroneous and unconstitutional. Therefore, I do set it aside the order and direct the trial Court to proceed with the trial.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of May, 2018.

L. N. MUTENDE

JUDGE