



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CR. REV. NO.179 OF 2017**

**MAURICE KHAYESI IMBALE ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

The Applicant, Maurice Khayesi Imbale is facing the charge of **interfering with election materials without authority** contrary to **Section 13(d)** of the **Elections Offences Act No.37 of 2016** and a second count of **malicious damage to property** contrary to **Section 339(1)** of the **Penal Code**. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. At the time the Applicant filed the application, seven prosecution witnesses had adduced evidence. The Applicant objected to the investigating officer producing certain exhibits because he claimed that the complainant had not come to court to identify the exhibits before its production. The Applicant's objection was disallowed by the trial court provoking the present application. The Applicant seeks to have the said order revised and set aside.

In the application predicated upon **Sections 362 and 364(1)(b)** of the **Criminal Procedure Code**, the Applicant argues that he would be prejudiced if the said exhibits are produced by the prosecution without the complainant being first called to appear before the court to confirm if it owned the exhibits in question. The Applicant was of the view that his rights to fair trial as guaranteed by **Article 50** of the **Constitution** would be infringed if the said exhibits are produced before the complainant is called to testify in court. Mr. Thuku for the Applicant amplified the grounds put forward by the Applicant by stating that the charge upon which the Applicant was called to plead stated that he damaged the property of the Orange Democratic Movement Political Party (ODM). He submitted that ODM was the complainant and therefore the prosecution could not purport to have the investigating officer produce the exhibits before ODM testified as a party in these proceedings. Ms. Aluda for the State opposed the application. She submitted that the application lacks merit because the Applicant had the right to cross-examine the investigating officer on the validity or otherwise of the exhibits that were sought to be produced before court. She urged the court to disallow the application.

This court has carefully considered the rival submission made by counsel for the parties to this application. The issue that the Applicant has brought forth for determination is essentially an issue touching on the merits of the charges brought against him by the State. This court formed the view that it cannot interfere with the trial because the Applicant has the opportunity to interrogate the exhibits that the prosecution seeks to produce by cross-examining the investigating officer. If this court were to give an opinion while the case is still being tried before the trial court, it would prejudice the prosecution's ability to effectively present its case for determination by the impartial tribunal.

This court was not persuaded that the Applicant's right to fair trial as enshrined in **Article 50** of the **Constitution** would be infringed by the production of the said exhibits by the investigating officer. In any event, the Applicant is not barred or prohibited by law from calling ODM to testify in the case on his behalf if the trial court were to put him on his defence.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**