



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION & ECONOMICS CRIMES DIVISION**

**ACEC REVISION NO. 15 OF 2018**

**REPUBLIC.....APPLICANT**

**VS**

**JOHN NJOROGE CHEGE.....RESPONDENT**

**RULING**

1. The State through the Director of Public Prosecutions (DPP) brought this application by way of Notice of Motion under Article 165(6) & 7 of the Constitution of Kenya and section 362 & 364 of the Criminal Procedure Code seeking the following orders:

*2. That this Honourable court be pleased to call for an examine the record of the proceedings in the Anti- Corruption Chief Magistrate Court Nairobi at Milimani Anti – Corruption Case number 5 of 2013 Republic vs John Njoroge Chege for the purpose of satisfying itself and pronouncing the correctness, legality or propriety of the order issued on 17<sup>th</sup> September, 2018 by Hon. L. Mugambi as well as the regularity of the proceedings giving rise thereto.*

*3. That the Court be pleased to review, vary reverse and/or alter the said orders of the Anti-corruption Chief Magistrate’s Court Nairobi at Milimani Anti – Corruption case Number 5 of 2013 Republic vs John Njoroge Chege*

2. The application is supported by the grounds on the face of the application plus the supporting and further affidavits of Hellen Mutellah. She has averred that she is the one in conduct of the case **ACC NO 5 of 2013 – Republic vs John Njoroge Chege** which is the subject of this application. In her affidavit she has explained how this matter has proceeded from inception to where it is. It is the investigating officer (who is the last witness) who was testifying when the issue came up.

3. She has averred that during the testimony of the investigating officer the defence requested to be supplied with an email from the DPP to EACC in regard to the prosecution of the accused person. That the prosecution objected to its production but it was over ruled by the court which ordered for the production of the email.

4. She further averred that the email referred to was not among the exhibits the DPP intended to rely on to prove its case. She deponed that the prosecution had discharged its duty by supplying the defence with all material documents, it intended to rely on.

5. In her submissions M/s Kimiri for the State told the court that the email in question was in regard to completion of investigations and consent for charging the Respondent. This was therefore internal communication between the two agencies. She referred to two authorities to support her submissions that the order by the trial magistrate was prejudicial to the State.

**(i) Josephat Koech Sirma & 5 Others [2017] eKLR**

**(ii) Diana Kethi Kilonzo v R [2015] eKLR**

6. The respondent **John Njoroge Chege** filed a replying affidavit and grounds of objection to the application through his counsel Mr. Wandugi. He argues that the application seeks to obstruct the cause of justice and defeat the Respondent’s right to disclosure under Auricle 50 of the Constitution.

7. He further contends that the application does not meet the conditionality for Revision under sections 362 & 364. Counsel has deponed that the issue of the email was first introduced by the witness (Investigating Officer) otherwise the Respondent had had no knowledge of it. He therefore averred that the Respondent has a right to cross examine the witness on the email which is part of disclosure under article 50 of the Constitution.

8. The Respondent did not make any submissions but relied on the grounds of objection and replying affidavit. The reason being their unexplained absence from court when the matter was fixed for interpartes hearing in their absence.

### **Determination**

9. Section 362 Criminal Procedure Code provides:

**“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.”**

Section 364 Criminal Procedure Code provides:

**(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—**

**(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**

**(b) in the case of any other order other than an order of acquittal, alter or reverse the order.**

**(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic**

**Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.**

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.**

**(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.**

**(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.**

In line with the above provisions this court has called for the lower court record. **ACC No 5 of 2013 – R V John Njoroe Chege** and read through the proceedings of 17<sup>th</sup> September 2018. The witness who was testifying is Charles Samiji (PW8) an investigator with EACC

10. As he testified he stated as follows:

**“At Kilimani Police station I booked him for the offence of receiving and soliciting a benefit contrary to section 39 (3)(a) as read with section 48(1) of ACECA. Same day at around 5.47 p.m after sending report to DPP, I received an email instructing us to prosecute the accused.”**

11. It was at this point that Mr. Wandugi raised the issue of being supplied with a copy of the email. The trial court agreed with him and directed that the witness supplies copy of the email.

12. Article 50(2) which the Respondent has relied on provides as follows:

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

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

**(e) to have the trial begin and conclude without unreasonable delay;**

**(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**

13. Is the email part of such evidence as is mentioned in Article 50(2) (j)?

The Respondent was charged and arraigned in court on 4<sup>th</sup> July 2013. The case has been prosecuted by the DPP throughout. This clearly shows that the DPP approved his prosecution otherwise the DPP would not have sent his officers to come and prosecute. 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. The prosecution clearly indicated that it did not supply the email because it was not going to rely on it.

15. In the case of **R v Josphat Koech Sirma** (supra) Justice Achode stated thus in a similar matter:

**“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)”**

16. And Justice Ngenye in **Diana Kethi Kilonzo v R** (supra) stated

this of such documents.

**“It may be true that the documents referred to are in their nature related to the trial, but that fact, of itself does not imply that they are documents that the prosecution will require for their case. The prosecution is not obliged to go out of its way to seek documents that are irrelevant to their case.**

17. I agree with what my sister Judges held in the above cases. The issue of the prosecution of the respondent has been a non-issue and the email is of no relevance. The learned trial magistrate should not have called for its production.

18. I therefore set aside the order by the trial magistrate in ACC NO 5/13

**R Vs John Njoroge Chege** dated 17<sup>th</sup> September 2018 directing PW8 to supply the email from the DPP. Let the matter proceed to its conclusion without any further delay.

Orders accordingly.

**Signed, dated and delivered this 25<sup>th</sup> day of October 2018 in open court at Nairobi.**

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**HEDWIG I. ONG’UDI**

**JUDGE**