



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION 131 OF 2016**

**SIMON MAINA MUTHEE..... APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

Simon Maina Muthee, the Applicant herein, filed the present application by way of a letter dated 15<sup>th</sup> June, 2016. The application was filed under Sections 362,364 and 367 of the Criminal Procedure Code together with Articles 22,23,35,47,48 and 50 of the Constitution. The application sought an order, *inter alia*, that the Applicant be supplied with the original cheques that were exhibits in the lower court so that he could have them re-examined by a document examiner, an order Hon. Gandani(S.P.M) refused to grant on 14<sup>th</sup> June, 2016. Needless to say is that the Applicant is the accused in the trial. He submitted that failure to grant the order prejudiced him as it would negatively impact on his defence. He sought the reversal, review and substitution of the order in question. He attached the charge sheet in Milimani Criminal Case 953 of 2012 and copies of the cheques whose production he sought.

The application was canvassed before me on 14<sup>th</sup> March, 2017. The applicant was represented by learned counsel, Mr. Okello. Counsel submitted that the application arose from rulings made on 26<sup>th</sup> February, 2016 and 26<sup>th</sup> May, 2016 in which the trial court breached the Constitution, rules of procedure and the law thus compromising the Applicant's right to a fair trial. He submitted that the Applicant was charged with issuing bad cheques that were produced as computer printouts whose production they objected to on 26<sup>th</sup> February, 2016 as it did not conform to Section 65A of the Evidence Act and also because the person who certified them did not testify. He relied on **Republic v. Mark Lloyd Steveson[2016] eKLR** in which the procedure for the production of computer printouts was laid out.

He further submitted that on 26<sup>th</sup> May, 2016 the trial magistrate refused to afford the Applicant the opportunity to re-examine the cheques which also violated his constitutional right to a fair trial. He submitted that the trial magistrate's conduct was clearly biased against the Applicant which resulted in him making a complaint against her to the Judicial Service Commission.

In reply, learned State Counsel Ms. Aluda submitted that the matter had been tried for the last five years and that in the year 2012 the Applicant was furnished with all prosecution statements and exhibits. She submitted that the Applicant had raised concerns regarding the document examiner's report seeking to have a different examiner examine the exhibits. She submitted that this request needed to be raised at the earliest opportunity. She submitted that the Constitution provided for expedited hearings and given the lapse of time in the present case the prosecution's case would be prejudiced. She further submitted that

the competence of the document examiner had not been challenged.

With regard to the computer printouts, she submitted that they were produced through the correct legal procedure; and in any case the defence did not challenge the production. She concluded by submitting that the printouts in question had all the cheque details distinguishing the present case from that in **Mark Lloyd Steveson(Supra)**.

In reply, Mr. Okello submitted that the Applicant was challenging the dates on the cheques. That is to say that the document examiner did not examine whether it was the Applicant who wrote the dates on the cheques.

### **DETERMINATION**

The trial before the lower court involves several counts of issuing bad cheques. Therefore, the cheques in question form the cornerstone of the trial. On 9<sup>th</sup> December, 2014 the prosecution sought an order allowing them to rely on images of the original cheques as the originals could not be traced, a fact confirmed by the Head of Security at Diamond Trust Bank. The trial court ordered that the matter should proceed and that the prosecution could rely on the certified images of the cheques. The trial went on until the prosecution closed its case on 26<sup>th</sup> February, 2016. It was after the Applicant was put on his defence that his advocate issued ‘**A notice to produce the original cheques**’ so that he (Applicant) could have his document examiner also examine them.

In response, the prosecution submitted that the non-availability of the cheques had been explained to the Applicant and the issuing of an order would be in vain. The court ordered that the cheques be produced on 22<sup>nd</sup> March, 2016. I noted that at this stage the presiding magistrate was different from the magistrate who made the initial order. When the matter next came up for hearing on 11<sup>th</sup> May, 2016 the complainant, PW1, was called to produce the cheques and he testified that he was issued with certified copies by the bank, which he produced. The Applicant’s advocate then applied for the certified copies to be examined by another document examiner on the issue of the date. The prosecution submitted that if the Applicant’s application was allowed the examination had to be carried out by the same document examiner who had examined the cheques. He was also of the view that a second examination was impossible given that no sample dates had been taken. The prosecutor submitted that the application had come too late in the day as the defence was given the documents in question four years earlier.

The Applicant’s advocate, in reply, submitted that the specimen dates were given but that the document examiner had incompetently failed to compare them.

A ruling on the arguments was delivered on 26<sup>th</sup> May, 2016. The trial magistrate held that she was satisfied that the examiner had examined the dates in question. She therefore saw no need for a second examination.

In view of the foregoing, I would wish to first address the issue relating to the production of computer printout cheques as exhibits. Counsel for the Applicant submitted that their production did not conform to Section 78A of the Evidence Act.

The record of proceedings shows that PW4, an employee of K-Rep Bank produced the printouts in question alongside a Certificate under Section 65(8) of the Evidence Act. Accordingly i find that, *prima facie*, there is evidence that the proper procedure was followed in adducing the said documents. In any case, if the correct procedure was not followed, the Applicant will have recourse in an appeal if he is convicted. This aspect of proceedings does not constitute a reason that would warrant a revision as spelt out under Section 362 of the Criminal Procedure Code. It cannot also form the basis of the present review application.

The next issue revolves around the re-examination of the printouts in question by a different document examiner. The Applicant submits that the document examiner who initially examined them did not take

into account the dates in question which the prosecution denied and which the trial court found was done. It is clear from the cross examination of the document examiner that he did not examine the dates. He testified that, **“was to ascertain handwriting and signatures. I was not told to check the dates I don’t know about the dates.”** This appears to form the basis for the Appellant’s assertions.

In promoting the purpose of doing justice, this court must consider substantial reasons why it should review the decision of the trial court. Does the admission by the document in cross examination amount to a substantial reason in light of all the surrounding factors? The answer is No. This is so because, the issue does not constitute an error, illegality, irregularity or impropriety on the part of the trial court record that would necessitate the revision of the trial court record. At best, it would amount to an insufficiency of the prosecution evidence. That is to say that, if the Applicant thinks that the trial court erred in not allowing a re-examination of the cheques, he would submit that the case was not properly investigated. If the court on the other hand holds that it properly arrived at the correct finding and convicted on the strength that the Applicant issued the cheques, he still would have recourse on appeal. Accordingly, this is not an omission that meets the threshold that would warrant a review of the trial court record. I emphasize that the purpose of a revise is so that the court can satisfy 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 subordinate court. Under Section 364(5) a revision of an order does not lie where a party can appeal. Clearly this is a case where redress lies in an appeal. The Applicant should do the needful.

Further, I align myself with the equitable principle that equity favors the diligent to the detriment of the indolent. The Applicant has had possession of the documents for more than four years and only raised the issue of their re-examination after the prosecution had closed its case. He had ample time to lodge the application in question. Besides, he still would have made the request when the document examiner testified on 25<sup>th</sup> February, 2014 but did not do so for reasons best known to himself. I find that the application is purely intended to derail the trial. He can do what is needful for purposes of mounting his defence and to dispel the evidence put forth by the prosecution. For this purpose, the Applicant may, on request, be furnished with the certified copies of the printout cheques if the copies he has are not certified.

The upshot of my observations is that the application lacks merit and the same is hereby dismissed. The trial court file shall be remitted back to the trial magistrate for mention on 5<sup>th</sup> April, 2017 for necessary directions on further hearing. It is so ordered.

**Dated and Delivered at Nairobi this 29<sup>rd</sup> March, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Mr. Okello for the Applicant.*
- 2. M/s Kimiri for the Respondent.*