REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

HIGH COURT REV. NO. 2 OF 2017

REPUBLIC…….....…..APPLICANT

VERSUS

PETER WAKABA MERIA.....1ST RESPONDENT

PETER MWEMA MBATHA.....2ND RESPONDENT

PETER KIOKO KIVELENGE.....3RD RESPONDENT

THERESIA NGINA MUINDE.....4TH RESPONDENT

JONATHAN MULATYA NZIOKA.....5TH RESPONDENT

EVERLYNE KIMOTE.....6TH RESPONDENT

NANCY WAMBUI WANGAI.....7TH RESPONDENT

RAPHAEL IAN MAKAU.....8TH RESPONDENT

NICHOLAS MUNYAO MUSYOKA.....9TH RESPONDENT

CHARLES KINYANJUI NJUGUNA.....10TH RESPONDENT

ANTMARK OFFICE TECHNOLOGIES LIMITED...11TH RESPONDENT

R U L I N G

1. The High Court has been moved to invoke the supervisory powers under **Article 165(6)** and **(7)** of the **Constitution of Kenya** and under **Section 362** of the **Criminal Procedure Code (CAP 75).** The Office of the Director of Public Prosecutions (ODPP) in their letter dated 21st February, 2017, requested the court to call for and examine the record in **Anti-Corruption Case No. 3 of 2014 Republic vs Peter Wakaba Meria** and **10 others.** They specifically prayed that the ruling delivered on 17th February 2017 be examined for the purpose of satisfying itself and pronouncing the correctness, legality or propriety of the findings and orders recorded and issued, as well as regularity of the proceedings giving rise thereto. Specifically in regard to and not limited to the following:

(a) The defence counsel in the matter objected to the investigating officer producing a document that had been marked for identification, which document authored by one of the accused persons in the trial, was obtained by the investigating officer in the course of her investigations.

(b) The investigating officer had informed the court during her testimony that she had obtained documents from the Machakos County Government and recorded witness statements relevant to the case, before the court and that the defence had been supplied with all the documentary exhibits including the marked document sought to be produced.

(c) The prosecution made it clear that various correspondences between the Ethics and Anti-Corruption Commission (Commission) and the Machakos County Government requesting for documents to assist in the investigation process were administrative documents between the two agencies and did not form part of the documents the prosecution relied on in their case.

2. The ODPP argued that the trial magistrate erred when she sustained the objections by the defence and held that the investigating officer should have laid a basis of how she came into possession of the documents yet it is on record that she had already informed the court that the documents were obtained in the course of investigations. This was sufficient basis to allow the investigating Officer to refer to and produce what she obtained while investigating the matter and the prosecution had at the start of the trial supplied the defence with all documentary exhibits and witness statements that the ODPP intended to rely on at the trial. The internal correspondence between the Investigating Agency and the Machakos County Government is not what the DPP relied on while making the decision.

3. The ODPP further argued that the trial magistrate erred when she held that the inventory was a crucial document that should have been given to the defence to allow them time to interrogate it, despite the prosecution having submitted that this was not part of their docket until the defence raised it at the trial. That the magistrate acknowledged the fact that the prosecution has a right to apply for revision as a number of documents that they intended to produce will be locked out.

4. The application was opposed by Peter Wakaba Meria, the 1st Respondent. He submitted that no proper foundation was laid with respect to how the Investigating Officer came across the letter and there was also no evidence before the court to demonstrate that the alleged letter was actually forwarded to her by the County Government of Machakos. Further that the decision of the trial court was sound and it should be upheld.

5. Learned Counsel Mr. Masika submitted for the 8th, 9th and 11th Respondents that the court has no jurisdiction to exercise its powers in Criminal proceedings involving Revisionary powers, where there is no order determining the Criminal Case with finality. That the issue before court involves, as of now an interlocutory order that was made in the middle of the trial regarding admissibility of documents that were not given to the defence at the beginning of the trial.

6. Counsel submitted further that the trial magistrate was dealing with an issue of admissibility of documents that were not given to the defence right at the beginning of the trial. One of the documents was an inventory that the prosecution admitted was not given to the defence among others at the beginning of the trial. He referred to the cases of **HCC Misc. Revision No. 604 of 2005 David Njogu Gachanja vs the Republic** and **Misc. Criminal Application No. 1161 of 2005 Samuel Chepkonga vs Republic.**

7. Counsel contended that since the Inventory was not supplied to the Defence before the trial, then the prosecution cannot produce it at the end of the Prosecution case. That the case cited simply says that the Investigation Report of the Commission should have been supplied to the Defence if the prosecution was to rely on it. Counsel argued that if the inventory was not supplied at the beginning of the trial the prosecution cannot be allowed to produce it as an exhibit at the end of the prosecution. He asserted that the ruling by the Senior Principal Magistrate was correct and there is nothing to revise.

8. Mr. Musyoka, learned counsel for the 10th Respondent submitted that pursuant to the position postulated hereinabove, it was fundamental for the Prosecution to demonstrate to the presiding Magistrate before production of the challenged documents by another witness, who was not the maker thereof the following:-

> a) To lay a foundation of how the documents came into the possession of the investigating officer through testimony and through reference to correspondences of how the documents were requested for and forwarded and also how the officer independently verified the authenticity of the subject documents.
>
> b) By thereafter producing certified copy of the same or the original of the document.
>
> c) Supplying the defence in advance of the documents which the prosecution intended to rely on to lay the foundation of how the documents came into the witness's possession.

9. Counsel submitted that the lower court record will further show that at the trial the Prosecution threw away all caution and proceeded with the hearing un-procedurally. That while the Prosecution was seized of all the documents they intended to rely on in prosecuting the 10th Respondent, they chose to withhold some documents until the last moment when they called the Investigating Officer. The 10th Respondent submitted that the Prosecution is not only trying to sneak evidence into the proceedings they are in gross contravention of express Provisions of the Constitution. Counsel urged that evidence cannot be used to ambush an accused person especially where the procedure is clearly laid down under the Provisions of Criminal Procedure Code.

10. Counsel contended that the record will show that majority of the Prosecution witnesses have since testified and have been cross-examined by the defence. They were cross-examined on and in respect of the cumulative evidence tendered by the Prosecution vide the witnesses and documents produced thereby. To produce new evidence at this stage without the benefit of testing all the witnesses being accorded to the defence and in particular the 10th Respondent is unfair and also grossly prejudicial.

11. I have perused the grounds of the application and those in opposition together with the rival submissions on record. The question that arises for determination is whether the impugned decision is a matter suitable for revision under **Section 362 Criminal Procedure Code.**

12. It has been argued that the matter is still on-going in the trial court and is therefore interlocutory and not suitable for revision. I will revisit the decision of Lesiit J in **Republic vs Kubwa Mohamed Silf & 2 Others - Criminal Revision No. 30 of 2004**, on when **Section 362 Criminal Procedure Code** is applicable. Lesiit J rendered herself thus:

> **"… … … … Section 362 of the Criminal Procedure Code applies only where a subordinate court has made a finding, order or sentence. It cannot be applied to interlocutory rulings made before the final decision of the Subordinate Court especially like in this case, it is shown that the trial is still proceeding on before the Court. It is impractical and improper for interlocutory orders made in the proceedings that are still pending before the lower Court to be the subject of revision."**

13. Counsel referred to the case of **HCC Misc. Revision No. 604 of 2005 David Njogu Gachanja vs the Republic** in which Makhandia J stated that:

> **"Interlocutory proceedings are those proceedings conducted in the main case while it is still pending for hearing and determination. The judge went onto state that the Application by the Applicant was in the nature of interlocutory proceedings."**

He also referred to **Misc. Criminal Application No. 1161 of 2005 Samuel Chepkonga vs Republic** where the judge said.

"… … … … … … … in my view section 362 of the Criminal Procedure Code can only be invoked where the subordinate Court has made a finding sentence or order.

"This presupposes a decision with finality. Revision jurisdiction cannot be invoked with regards to interlocutory ruling when the case is still on-going as in the instant case. Provisional jurisdiction of this Court should not be invoked so as to micro-manage the lower Courts in the conduct and management of their day to day proceedings. If every ruling of the Lower Courts and which went against a party were to be subjected to the Revision Jurisdiction of this Curt, we would have opened flood gates and this Court will be inundated with Applications and the Subordinate Courts may find it practically impossible to proceed with any case to its logical conclusion."

14. The decisions referred to above all speak in depth about interlocutory proceedings or rulings in proceedings which are still on-going. They all recognise that **Section 362 Criminal Procedure Code** can only be invoked where the subordinate court has made a finding, sentence or order. Section 362 provides thus:

"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."

With regard to the finding and order recorded or passed whose correctness, legality or propriety is to be ascertained. The law does not specify when the superior court may intervene to call for the record and whether this must only await the conclusion of proceedings.

15. In the end the best practice is as stated by Omolo, Okubasu and Onyango Otieno JJA in **Thomas Patrick Gilbert Cholmondeley v Republic** as follows:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

In the foregoing case the Court of Appeal quoted the English case of **Republic v Ward [1993]2 ALL ER 557,** Ward who was alleged to be a member of the Provisional Irish Republic Army, the IRA, was charged with very serious offences of having participated in a bombing spree between 1973 and 1974. Glidewell, Nolan, and Steyn, LJJ held thus:

"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure."

16. The Supreme Court of Canada took exactly the same stand in the case of **Republic v Stinchcombe [1921] LRC (Cri)68** where it held that:

"The obligation to disclose was a continuing one and was to be updated when additional information was received. The material to be disclosed include not only that which the Crown had intended to introduce but also that which it had not. All statements obtained by

the prosecution from persons who had provided relevant information were to be disclosed to the defence regardless of whether or not they were going to be called as Crown witnesses."

The judges understanding of this Canadian decision was that there is a duty on the part of prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced, weaken the prosecution's case and strengthen that of the defence; whatever may be its nature, the prosecution is still obliged to disclose it to the defence. The duty continues during the pre-trial period and during the trial itself, so that if any new information obtained during the trial, it must be disclosed.

17. It is my view that there may be times when the court is called upon and indeed it has been so called upon in cases such as those pertaining to bail applications to review the orders of a subordinate court where the main trial has not been concluded. The guiding principle is that the impugned decision should be one that was made with finality. It is my finding that the decision of the subordinate court in the matter before me was one that was made with such finality and it therefore qualifies to be considered by this court on revision.

18. I note three things from the submissions. The first is that the document adverted to had already been marked for identification in the proceedings. The second is that it is alleged to have been authored by one of the Accused persons in the proceedings. Lastly, the said document was obtained by the Investigation Officer in the cause of investigations and all the documents so recovered had already been supplied to the defence together with witness statements. This is therefore not a new document which the prosecution has belatedly stumbled upon and is trying to sneak into the evidence as it were.

19. From the foregoing I find that it is meet to order as I hereby do that copies of the documents referred to be supplied to the defence. Further that the Respondents be accorded sufficient time to interrogate them and the liberty to recall any of the witnesses if it shall be necessary.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 19th of September, 2017.

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L. A. ACHODE

JUDGE

In the presence of ……Advocate for the Applicant

In the presence of …….Advocate for the Respondents