



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO.228 OF 2016

MARIAM MOHAMED SALIM wife of

MOHAMED SHEIKH ABDULLAH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Miriam Mohamed Salim filed an application dated 9th March 2016 by way of a Notice of Motion in terms of **Article 35** of the **Constitution** against the Respondent, the State. The Application is concerned with the right to obtain information under the **Constitution**. The Applicant seeks to invoke the provisions of the **Constitution** to access telephone communication details on mobile number [Particulars Withheld] from the period 23rd June 2015 to 3rd October 2015. The Application is supported by the affidavit of the Applicant in which she deposes that Safaricom Limited has failed to comply with the order of this court issued on 14th October 2015. In response to the application, the Respondent relies on the replying affidavit dated 24th February 2016 sworn by Mark Muia Lavi, a Senior In-House Counsel, Finance and Financial Services in the Legal and Secretarial Department of Safaricom Limited. In his affidavit, Mr. Mark Muia Lavi deposes that Safaricom Limited has complied with the order of court in question.

The proceedings of this court leading to the court order of 14th October 2015 began as an application by the Applicant seeking details from Safaricom Limited of telephone interactions between mobile numbers [Particulars Withheld] said to belong to Mohamed Sheikh Abdullahi, the subject of these proceedings and [Particulars Withheld] said to belong to Daniel Korir from the period 23rd June 2014 and 23rd June 2015. Safaricom Limited is a public limited liability company incorporated in Kenya which runs the business of telecommunication services operating amongst others the said mobile numbers. The court directed Safaricom Limited to supply the Applicant with the information requested. The Applicant is the wife of Mohammed Sheikh Abdullahi who is said to have disappeared since 23rd June 2015. An urgent application for a writ of *habeas corpus* was filed by the Applicant against the Respondent, the State. The Applicant claimed that her husband had confided in her that one Daniel Korir, an officer of the Kenya Wildlife Service had been trailing him. She claimed that her husband had told her that the said Daniel Korir should be held responsible were anything adverse to happen to him. She therefore believes that the said Daniel Korir is involved in her husband’s disappearance. It is common ground therefore that the Applicant sought the details of telephone interactions between her husband and the said Daniel Korir.

During the hearing of the Appeal, the Applicant was represented by Learned Counsel Mr. Njoroge. The Learned State Counsel, Ms. Aluda appeared for the State whereas Mr. Kobia, Learned Counsel appeared on behalf of Kenya Wildlife Service. Learned Counsel, Ms. Rweya appeared on behalf of Safaricom Limited. In his submissions on behalf of the Appellant, Mr. Njoroge submitted that the Applicant's application seeks an order from this court to compel Safaricom Limited to provide telecommunication details of mobile number [Particulars Withheld] including details of the location from which the said mobile phone number was operated from the period 23rd June 2015 to 3rd October 2015. Counsel for the Applicant submitted that the Applicant is seeking to enforce her right to information under **Article 35** of the **Constitution**. He urged the court to invoke its jurisdiction under **Article 3** of the **Constitution** to compel Safaricom Limited to disclose the information requested. In this regard, counsel for the Applicant relied on the case of **Nairobi Law Monthly Company Limited –versus- Kenya Electricity Generating Company & 2 Others [2013] eKLR**. He submitted that the core of the Applicant's case is that the information is essential for the determination of the Applicant's application for the writ of *habeas corpus*.

Counsel for the Applicant was of the view that the information supplied by Safaricom Limited relating to telecommunications on the mobile number [Particulars Withheld] in the period 16th September 2015 and 3rd October 2015 is scanty. He made submission to the effect that the Applicant was pressing for more information, in particular, details of the location from which the mobile phone number was operated from. Counsel for the Applicant informed the court that the information supplied by Safaricom Limited had revealed that the said mobile number was still active three (3) months after the disappearance of Mohammed Sheihk Abdullahi. He informed the court that the police in its investigation of the case was keen on telecommunications on mobile phone numbers 0721XXXXXX, 0727XXXXXX, 0725XXXXXX and 0720XXXXXX from 20th June 2015 to 1st October 2015 as evidenced in the letter dated 1st October 2015.

He submitted that the information supplied by Safaricom Limited only related to telecommunication on mobile numbers 0720XXXXXX and 0721XXXXXX. According to Learned Counsel for the Applicant, the Respondent has failed to fully fulfill its obligation under the **Constitution**. He relied on the cases of **Shabalala & Others -versus- Attorney General of Transvaal & 1996 [1] SA 725 [CC], 1995 [12] BCLR, 1995 [2] SACR 761 [CC], Cape Metropolitan Council -versus- Metro Inspection Services [Western Cape] CC and Brummer –versus- Minister of Social Development & Others [CCT 25/09] ZACC21; 2009 [6] SA 323 [CC] 2009[11] BCR 1075 [CC] [13 August 2009]**. He therefore urged the court to find Safaricom Limited culpable for non-disclosure.

In her response on behalf of Safaricom Limited, Learned Counsel Ms. Rweya submitted that the company had fulfilled its obligation as requested by the Respondent. She submitted that the information supplied to the Applicant was what was available from the company's server. According to learned counsel, due to the limited storage space, the company's server can only contain or store data for duration of three (3) months from the date the communication was made. She submitted that the company was not able to supply information on the location from where the mobile numbers were operated from in the period due to breakdown in the company's data system. Ms. Rweya, nonetheless, submitted that the Applicant's application is defective in that it does not demonstrate which right under the **Constitution** the Applicant seeks to enforce. In this regard, she relied on the cases of **Benson Wachira Muthiga –versus Nairobi City County Public Service Board & Another [2015] eKLR** and **Nairobi Law Monthly Company Limited –versus- Kenya Electricity Generating Company & 2 Others [2013] eKLR**.

On her part, Ms. Aluda submitted that Safaricom Limited was only able to give information within their possession. She submitted that Safaricom Limited being a private entity, the Applicant's demand for a right to information is not absolute as provided under **Article 24(1)** of the **Constitution**. She therefore urged the court to dismiss the Applicant's application.

In a rejoinder, learned counsel for the Applicant submitted that Safaricom Limited cannot run away from its obligation to supply the Applicant with information for reason that it suffered a system's failure. He therefore urged the court to compel the company to provide the information sought by the Applicant.

This court has carefully considered the rival submission made by the parties to this application. The issue

for determination by this court is whether the Applicant has made a case for this court to grant her the orders that she craves in her application. That the Applicant has the right to be given the information that she seeks is without dispute. Although Safaricom Limited is a Public Limited Liability Company, the services that it offers and the dominant position that it has in the telecommunication sector, elevates it to the unique position where it is the keeper of crucial information in form of telecommunication data that no other organization has. **Article 35(1)(b) of the Constitution** confers a right on any citizen to obtain information held by **“another person”** when such information is required **“for the exercise or protection of any right or fundamental freedom”**.

In the present application, Safaricom Limited qualifies as **“another person”** which is obligated to provide information that is sought by the Applicant. The Applicant requires the information in possession of Safaricom Limited within the specified period so that she can ascertain who communicated with the subject in the period in which he disappeared. In response to the application, Safaricom Limited did not question the propriety of the Applicant’s application. Indeed, Safaricom Limited supplied the information which was within its possession at the time the request was made. However, the Applicant is dissatisfied that the information given to her is scanty and insufficient. The Applicant urged the court to take into consideration that the information supplied did not include the location where the calls were terminated. On its part, Safaricom Limited explained that its equipment is designed to store data only for a period of three (3) months due to the huge data traffic that it handles by virtue of its large customer base. Safaricom Limited further explained that at the material time, it had a breakdown in its data storage system that meant that it could only supply the information that it has already supplied to the Applicant. It explained that this was the very same information that it had supplied to the police.

On evaluation of the facts of this application, this court is of the considered view that Safaricom Limited can only be compelled to provide information that it has in its possession. This court agrees with the Applicant that the information supplied by Safaricom Limited is not useful for the purpose that it was sought i.e to establish where the subject of this application was at the time the particular mobile communication was being made. This is because the information supplied did not include the location where the calls terminated. This court is satisfied that Safaricom Limited provided all the information within its possession at the time and within its technical ability. The challenges that Safaricom Limited faced at the time has been explained to the court. This court is satisfied that the explanation is reasonable in the circumstances of this case. As a sign of good faith, Safaricom Limited explained that the information given to the Applicant is the same information that was given to the police who are investigating the disappearance of the subject to this application.

In the premises therefore, this court holds that Safaricom Limited has substantially complied with the order issued by this court that it supplies the information sought by the Applicant. Safaricom Limited established to the satisfaction of this court that it has provided the information that was in its possession. The application filed by the Applicant therefore cannot be allowed. It fails. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF MAY 2016

L. KIMARU

JUDGE