REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 19 OF 2016

RUTH WENDY WAMBUI…………………………………APPLICANT

-VERSUS-

REPUBLIC……………………………………………RESPONDENT

R U L I N G

1. This is the second Miscellaneous Criminal Application emanating from the trial in **Chief Magistrate's Court Criminal Case No. 752 of 2016 Republic –Vs- Ruth Wendy Wambui**. The Applicant is therein charged with Stealing by servant Contrary to Section 281 of the Penal Code. In that on diverse dates between 1st January, 2015 and 30th April 2016 at Mugwan Style Mart shop in Naivasha Sub County within Nakuru County, being an employee to **Gladys Wanjeri Mugo**, she stole cash Kshs 2,000,000/= the property of the said **Gladys Njeri Mugo** which came into her possession by virtue of her employment.

2. Ruling in respect of the first application to this court, being **Miscellaneous Criminal Application No. 11 of 2016** was delivered on 25th July, 2016. The present application was filed on 22/9/2016 and is expressed to be brought under Articles 25 (1); 49 (1) (b) and d; 50 (2) i) and (l) of the Constitution and Section 362 of the Criminal Procedure Code.

3. The live prayer is No. 4 which seeks that the lower court's order dated 18th August 2016 be set aside and/or varied. The application is supported by the affidavit of the Applicant which elaborates on the grounds on the face of the application.

4. The application was prompted by the order resulting from the trial court's ruling of 18/8/2016 requiring the Applicant to present herself at the CID Offices Naivasha, for purposes of submitting her handwriting and signature specimens for use in forensic investigations.

5. Through grounds of opposition and a Replying affidavit sworn by **Sebastian Nzomo Mutinda**, the DPP has opposed the application, terming it vexatious and frivolous, as it does not disclose how the Applicant's right to fair trial has been infringed upon. The Respondents reiterate the powers of the DPP under Article 157 of the Constitution in directing investigations and the control of prosecutions.

6. The argument of the Applicant in respect of the impugned order is that the lower court infringes upon her right to remain silent (Article 49 (1) b and 50 (2) (i) of the Constitution; and the right to refuse to give self-incriminating evidence under Article 49 (1) (d) and 50 (2) (l) of the Constitution.

7. Relying on the decision of **Ngugi J** in **Criminal Revision 1 of 2016 Republic -Vs- Mark Lloyd Stevenson [2016] eKLR,** the Applicant's counsel Mr. Wairegi argued that the protection in the stated rights extends to compulsion to testimonial and documentary evidence. Thus the lower court in making the impugned orders was in error.

8. Mr. Mutinda for the DPP was of the view that Article 49 relates to persons arrested. That the Applicant has not shown how her fair trial rights under Article 50 of the Constitution have been violated. Restating the powers of the DPP under Article 157 of the Constitution, Mr. Mutinda argued they do not lapse merely because a person has been arraigned in court. He distinguished the authority relied on by the Applicant [**Mark Lloyd Stevenson**] which he said related to the production of electronic evidence.

9. He placed reliance on the Court of Appeal decision in **Boniface Kyalo Mwololo –Vs- Republic [2016] eKLR.** Mr. Gichuki for the Complainant in the lower court supported Mr. Mutinda's submissions, pointing out that the lower court based its decision on **Mwololo's case** and that the specimens sought from the Applicant may infact exonerate her.

10. I have called for and perused the related proceedings in the lower court in Criminal Case No. 752 of 2016. And having considered the material canvassed before me, I think that what the current application calls for in the circumstances of this case, is the proper interpretation and application of the Articles cited by the Applicant, and an answer to the question whether the impugned order amounts to a violation of the said rights.

11. Article 49 (1) (b) and (d) of the Constitution which the Applicant has cited in her favour is in the following terms:

"An arrested person has the right—

> **(*a*) ……;**
>
> **(*b*) to remain silent;**
>
> **(*c*) ……;**
>
> **(*d*) not to be compelled to make any confession or admission that could be used in evidence against the person;**

12. The rights enshrined in Article 49 of the Constitution are titled in the heading **"Rights of arrested Persons"**. There is no doubt that arrested persons are those who have been apprehended by and are in the custody of police. The Applicant herein was most probably arrested by police before her arraignment in court pursuant to the provisions of Article 49 (1) f of the Constitution. Thus the protections in Article 49 of the Constitution regarding the right to remain silent and against incrimination for the purposes of this case ceased to apply to the Applicant upon arraignment. Of course if she was arrested midstream of her trial the article would apply.

13. The order of the lower court directed the Applicant "to avail herself at the CID offices to submit sample handwriting and signature for forensic examination……" That by no means can be construed to mean that she has been ordered to be placed in police custody as an arrested person. Thus in my view the provisions of Article 49 of the Constitution are improperly invoked in the current application.

14. Similarly, the right to remain silent under Article 50 (2) (i) relates to testimony during proceedings, such as defence statements. There is no indication that the Applicant has been forced to testify during any proceedings in the lower court. Thus sub article 2 (i) of the Article 50 of the Constitution also appears irrelevant for purposes of the present matter.

15. However, it is not in dispute that the DPP successfully applied in the lower court that the specimen signatures and handwriting of the Applicant be obtained in light of new evidence, namely documents

previously missing and an audit report which had not been available at the time she was charged.

16. As I understand, it the DPP's request was for the court's authority to facilitate the investigation regarding handwriting specimens in light of the audit report and recovered documents. It is not clear from the court's proceedings and ruling on what the provision of law the DPP's request was based. What cannot be doubted is that further investigations may and do sometimes become necessary even where a trial has commenced, as for instance where the prosecution becomes aware of new evidence or perceive the need to rebut certain evidence by the defence that could not have been anticipated.

17. What I hear the DPP say is that the twin powers of the DPP under Article 157 (4) and (6) of the Constitution to order police investigations and control prosecution, respectively remain with the DPP at all times, before and during the trial.

18. That to my mind is a proposition well supported by a plain reading of the provisions of Article 157 (4) and (6) of the Constitution as well as the provisions of the Criminal Procedure Code regulating the conduct of criminal trials.

19. In advancing his arguments, regarding the alleged infringement of the right against self incrimination, Mr. Wairegi relied on the decision of Ngugi J in **Stevenson** and the quotation therein from the decision of the European Court of Justice in **Saunders –Vs- United Kingdom A/702 (1997) 23 EH RR 313**. He however did not furnish the unit with the latter authority. Nor the provisions of Article 6 of the European Convention of Human rights that was at the core of that case. Furthermore this court, like the trial court is bound under the doctrine of *stare decisis* is by the Court of Appeal pronouncements in **Boniface Kyalo Mwololo** regarding the right against self incrimination.

20. Although the latter case involved the obtaining of DNA specimens from the Applicant which was allowed under Section 36 of the Sexual Offences Act, the Court of Appeal made useful observations therein, by stating *inter alia* that:-

> **"The interest of the Applicant and the victim must be considered within the law and within the overarching parameters the judicial authority is exercised according to the purposes and the principles set out in the Constitution. Justice is like a double edged sword, an instrument that cuts both ways and protects both the Accused and the victim in the sense that each and every piece of evidence is subjected to court room processes of examination and any dissatisfied party has the liberty to appeal.**

21. The Court after referring to Article 259 (1) of the Constitution on the proper interpretation of the Constitution, Section 36 (1) of the Sexual Offences Act and Article 53 (2) on the paramontex of the best interest of the child proceeded to state:

> **"In the face of the applicable provision of the Constitution and the law, is the Applicant's constitutional right to a fair trial going to be breached ……on our part at this preliminary stage, we are not convinced. This is because even in ordinary criminal matters, investigations are normally carried out and the outcome is used in evidence. Such investigations include, mentioning just a few; fingerprinting, sometimes items belonging to a suspect are taken away for further scrutiny which may include forensic examination, this is not always done with the approval of an accused person, but it is gathering of evidence to be used in a criminal trial. In this scenario it has never been alleged that, by a suspect availing their finger prints, they incriminate themselves in the trial. As we pen off this ruling, we may also add, all courts of law are created by the Constitution and unless a party can point out a blatant breach of the Constitution, a court of law that is mandate to undertake a prosecution cannot merely be stopped."**

22. The foregoing passage is to my mind relevant to this matter for two reasons. First, there is little practical difference between the evidence fingerprints of an Accused and that of his handwriting. Secondly, though permitted under the Sexual Offences Act, the procedure of extracting DNA samples,

obviously against the will of the Applicant, is a most invasive one. For instance the compulsory extraction of tissue, blood, urine etc is by itself an invasion of the will of the subject. The passage in Saunder's case cited in Stevenson declared such extraction to be excluded under the right not to incriminate oneself, under the European Convention of Human Rights. In other words the extraction was found to be proper under the convention.

23. Finally, the Court of Appeal in **Boniface Kyalo** exhorted that every case must be considered on its merit. I think a principle to be drawn from this exhortation and the passage I have quoted from **Mwololo's** decision is that the court must weigh all the circumstances and balance the Applicant's rights against those of the victim to see whether the Applicant will be unduly prejudiced.

24. I believe that principle underscores the provisions of Article 24 (1) of the Constitution which states:

> **"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-**
>
> **(*a*) the nature of the right or fundamental freedom;**
>
> **(*b*) the importance of the purpose of the limitation;**
>
> **(*c*) the nature and extent of the limitation;**
>
> **(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
>
> **(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

25. In the instant matter, a presumption appears to have been made by the Applicant that by giving the samples in question, she will be self incriminating. As the DPP and Mr. Gichuki have argued, the result of the forensic examination of the specimen may well exonerate the Applicant. Secondly the Applicant's rights while important do not entirely trump the rights of the victim of the alleged crime which under Article 50 (9) of the Constitution and the Victim Protection Act must be brought to bear on the matter. The Applicant will have an opportunity to challenge the evidence gathered subsequent to the impugned order in the course of the trial, and even on appeal as the court stated in **Boniface Kyalo Mwololo**.

26. For the foregoing reasons I agree with the DPP's submission that the Applicant has not shown that the impugned order represents a blatant breach of her rights and will occasion her disproportionate prejudice. The application must fail. The Applicant should avail herself, specifically to the investigation officer of the case as soon as possible and in any case within a period of fourteen days of today's date.

27. Last but not least the court must observe that as stated by Mr. Mutinda, the subject of these proceedings would have been better handled in an appeal or Constitutional Petition. As stated in **Stevenson** the power of this court on revision is sparingly exercised, especially where the effect would be to hobble the trial in the court below; the general rule being that appeals should not be entertained in a piece meal fashion in respect of interlocutory matters **(See Walhaus & Others –Vs- Additional Magistrate, Johannesburg & Another 1958 (3) SA 113 (A)).**

28. A reading of Section 347, 348 and 348 A, 362 – 367 of the Criminal Procedure Code supports that position. Trials in the lower court would never end if parties were to file interlocutory appeals or seek the revision of every order or ruling made by a court in the course of the trial that they feel aggrieved about. It is uncommon that such grievances are of such a nature that the affected party cannot wait to challenge such order on the main appeal upon the conclusion of the trial. Besides, a party who strongly feels that his/her constitutional rights have been or are threatened with violation has a direct route to the Superior

court via Article 22 and 23 of the Constitution.

29. Looking at the present application and the previous one, in **Miscellaneous Criminal Case No. 11 of 2016**, what the Applicant has done is to present mini-appeals cum-Constitional Petitions in the guise of a miscellaneous application for revision. That is unprocedural and should not be encouraged. The lower court file is herewith remitted.

Delivered and signed at Naivasha, this 20th day of December, 2016.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Obino holding brief for Mr. Wairegi for the Applicant

C/C - Barasa

Mr. Gichuki for Interested Party/Complainant

C. MEOLI

<u>JUDGE</u>