



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 77 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL MUOKI KALUNGU.....ACCUSED

RULING

Background

This ruling is in respect of a Notice of Discovery filed by the accused through M/s Kilonzo & Co. Advocates. Ms Kethi Kilonzo presented and argued the Notice on behalf of the accused while the Republic was represented by Ms Mwaniki. The Notice is dated 22nd January 2015 and was filed on the same date. It is based on Article 50 of the Constitution of Kenya 2010. In it, the defence is seeking to be supplied with various items enumerated as follows:

- a. Certified copies of the Occurrence Book Record No. OB/24/7/7/2014
- b. Traffic Police Motor Vehicle inspection report for Toyota Rav 4 Registration No. KBT 545Y.
- c. A list of all movable items retrieved by the police on 7th July 2014 from the Motor Vehicle in (b) above.
- d. A list of all movable items retrieved by the police from the body of the deceased on 7th July 2014.
- e. Sketch map of the Scene of Crime where the Motor Vehicle in (b) above was found on 7th July 2014.
- f. Colored certified copies of Scene of Crime photos as listed in the letter dated 19th August 2014 by the Directorate of Criminal Investigations.
- g. Safaricom Short Message Service (SMS) records of the deceased from 7th May 2014 to 7th July 2014.
- h. Airtel Short Message Service records of the deceased from 7th May 2014 to 7th July 2014.
- i. Airtel mobile subscriber data for the deceased.
- j. Safaricom mobile subscriber data for the deceased.
- k. Safaricom mobile subscriber data for Peter Mwangi Muchekehu.
- l. Airtel mobile subscriber data for Peter Mwangi Muchekehu.
- m. Safaricom mobile subscriber data for mobile No. 0723606842.
- n. Airtel Short Message Service records for Peter Mwangi Muchekehu from 7th May 2014 to 7th July 2014.
- o. Safaricom Short Message Service records of Peter Mwangi Muchekehu from 7th May 2014 to 7th July 2014.
- p. Safaricom Short Message Service records for mobile No. 0723606842.
- q. Certified copy of the diary found in the bag of the deceased that was in Motor Vehicle Rav 4

Registration No. KBT 545Y.

- r. List of the contents of the bag of the deceased that was in the said Motor Vehicle.

Submissions by defence

Counsel for the accused submitted that the State is enabled with resources to conduct investigations and obtain any information while the accused does not enjoy such facilities; that it is because of lack of resources and facilities by an accused that the law comes in to protect him; that Article 25 of the Constitution of Kenya 2010 (the Constitution) provides that the right to a fair trial cannot be limited by any other constitutional provision and that Article 20 (3) (b) of the Constitution provides that in applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Counsel further submitted on the two distinct rights under Article 50 of the Constitution; that is the right for the accused person to have adequate time and facilities to prepare a defence under Article 50 (2) (c) and the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence under Article 50 (2) (j).

Counsel submitted that the High Court in **George Ngodhe Juma & Others v. Attorney General (2003) eKLR** defined “facilities” found under Section 77 (2) (c) of the former Constitution of Kenya to mean, *inter alia*, the resources, conveniences or means which make it easier to achieve a purpose and unimpeded opportunity for doing something. In reference to the **George Ngodhe case** above, Counsel submitted that the fruits of an investigation in possession of the prosecution are not the property of the prosecution to use in securing a conviction but the property of the public to be used to ensure that justice is done. She submitted that the prosecution is under an obligation to provide the defence with all the material in their possession both the material they intend to use and that they do not intend to use (see **Criminal Appeal No. 116 of 2007 Thomas Patrick Gilbert Cholmodeley v. Republic (2008) eKLR**)

It was further submitted that the scene of crime where Motor Vehicle KBT 545Y was found is at the heart of investigations and according to the photos provided by the prosecution there are items that the defence require hence the request for a full inventory of those items. Counsel pointed out that Detective Clement Mwangi has stated on oath that there was no handbag in the motor vehicle when the photos disclose a handbag and that there was no diary in the handbag when PC Indeche who was the first police officer at the scene stated that he found a diary with telephone numbers which he used to call people known to the deceased. Counsel submitted that the defence is seeking evidence of scene of crime and mobile data of the deceased which evidence is in the possession of the prosecution.

Submission by prosecution

Miss Mwaniki opposed the application. She submitted that the Evidence Act does not provide for Notice of Discovery and that Section 69 of that Act only provides for Notice to produce a document; that the prosecution is only obligated to provide to the defence materials it intends to use in its case; that the prosecution has given the defence all that was in its possession and that the defence is trying to recreate the scene which is unconstitutional.

Prosecution counsel further submitted that the defence has not demonstrated that they have attempted to get the Safaricom data and failed while the prosecution has demonstrated why the data cannot be availed and that the defence has not demonstrated that the prosecution has failed to provide them with facilities they require for the defence.

Counsel submitted that the authorities submitted by defence in support of their case are not relevant to this case because they were based on the old constitution; that Article 50 (2) (j) is clear in its provisions; that the accused has not demonstrated that the prosecution has failed to provide him with the information he is seeking and that he has not laid the basis for seeking mobile data for the period before the offence was committed; that the bag and its contents shown in the photos is not relevant to prosecution case. Counsel submitted that the defence can cross examine on anything they term relevant in the course of the

trial. Counsel urged the court to dismiss the application stating that the defence has not demonstrated that the prosecution has infringed any constitutional provisions.

In reply counsel for the accused said that all the accused is seeking in respect to the scene of the crime is an inventory of the items found in the motor vehicle and on the body of the deceased; that the accused has a constitutional right to recreate the scene by seeking information in respect of what was found in the car; that the prosecution must preserve evidence relevant to an investigation and it is not correct to say mobile data cannot be available after 90 days.

Analysis and determination

From the outset, I wish to determine two issues raised by the prosecuting counsel in her opposition to this application before determining the other issues in this matter. I understood the prosecuting counsel to say and mean that the authorities cited by defence are not relevant to this case because they were based on the old constitution and secondly that in our law, Evidence Act, there is no provision for Notice of Discovery.

It is true the cases cited by defence in support of their case especially those originating from this country, were decided during the old constitutional regime. That Supreme Law, as it was then, had its Bill of Rights under Chapter 5 entitled Protection of Fundamental Rights and Freedoms of the Individual. Section 77 (1) thereof provided that **“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”**

Section 77 (2) (c) states that **“Every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence.”**

Article 50 of our current constitution, which has been hailed as being progressive, provides for a fair trial. Article 50 (2) provides and explains what the right to a fair trial includes. Specifically, Article 50 (2) (c) is couched in almost similar terms as found in Section 77 (2) (c) that **“Every accused person has the right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence.”**

In resolving the issue that the authorities are not relevant to this case I wish to state that this is not the case in my view. The authorities are relevant. The protection of an accused person’s right to a fair trial as provided for in our law remains a fundamental right in our Bill of Rights now as it was then (during the former constitution).

On the issue of Notice of Discovery not being provided for in our Evidence Act, I wish to state that the practice of Discovery is not common in our criminal law practice as it is in our civil procedure. However, it is not out of ordinary and to some extent in my view it is just a matter of semantics. Our law allows disclosure of material in a criminal trial (**see Article 50 and the authorities cited above**). The Black’s Law Dictionary 9th Edition defines Discovery as a compulsory disclosure, at a party’s request, of information that relates to the litigation. In my view and in reference to the matter before me, I understand it to simply mean a request for a pre-trial full disclosure of information in the possession of the agents of the state that is relevant to the defence case. It is what the court in the **George Ngodhe case** referred to when it stated that **“It is a question which is at the centre of a fair hearing within a reasonable time by an independent and impartial court established by law, being given adequate time and facilities for the preparation of one’s defence.....”**

This court also recalls Article 159 (2) (d) of the Constitution which urges courts to administer justice without undue regard to procedural technicalities. This court is therefore persuaded that the Notice of Discovery filed by the accused is not out of order.

The prosecution and the defence have taken their stand. The prosecution maintains that it has provided the defence with all the material necessary for their defence. It maintains that all the evidence relevant to their case and which they intend to use has been availed to the defence and therefore the defence is not entitled to evidence that is not relevant to the prosecution and which the prosecution does not intend to use in their

case. In other words, the only evidence the defence is entitled to be provided with is the evidence that is relevant to the prosecution and which the prosecution intends to use in their case.

The defence on the other hand maintains that they are entitled to all the evidence surrounding the circumstances of this case whether relevant to the prosecution case or not and whether the prosecution intends to use it or not. They maintain that this material is vital to them for they are entitled to formulate their own theory of the case just as the prosecution is entitled to theirs.

In the replying affidavit by Detective Clement Mwangi, the crime committed was murder and therefore police did not cause the motor vehicle No. KBT 545Y to be inspected since the scene was not that of a road traffic accident; that the police have supplied to the defence all the relevant exhibits they intend to rely on in respect of the scene of crime and from the body of the deceased; that the deceased's mobile handset was not recovered to retrieve the short message service data; that the police and the family of the deceased are not aware she owned an Airtel number; that the statement of one Peter Mwangi Muchekehu was availed to the defence and that they did not retrieve the Airtel data of the said witness and the same cannot be retrieved after the lapse of 90 days; that the owner of mobile number 0723 606 842 is not known to the prosecution and is not a witness; that prosecution does not intend to use short message service data of Peter Mwangi Muchekehu; that the diary said to belong to the deceased and contents of the bag are unknown to the investigating team and that the only relevant provision of the constitution in respect of this matter is Article 50 (j) (I think he means Article 50 (2) (j)) and the prosecution has complied with it.

The prosecuting counsel understands the constitutional obligation of disclosure of information to the defence to mean only information relevant to the State as the prosecutor and which the State intends to use during trial. This is the reason the prosecutor maintains that they have complied with Article 50 (2) (j) of the Constitution and that this is the only relevant article in terms of disclosure of material to the defence.

Among the rights to a fair trial guaranteed under Article 50 (2) of the Constitution are the right to have adequate time and facilities to prepare a defence under Article 50 (2) (c) and the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence under Article 50 (2) (j). Does sub-article 2 (c) place an obligation on the prosecution to facilitate the defence in any manner?

As submitted by the defence, which this court agrees with, the right to a fair trial cannot be limited (see Article 25 of the Constitution). Further, as submitted by the defence a court in applying the Bill of Rights shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom (see Article 20 (3) (b) of the Constitution).

In interpreting Section 77 (2) (c) of the former Constitution of Kenya which is similar to Article 50 (2) (c) of the current Constitution in reference to the right of an accused to a fair hearing, the High Court in the **George Ngodhe case** had this to say:

“..... In general terms, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case.”

The court in the above case went further to state that:

“In an open and democratic society based on freedom and equality, with the Rule of Law as its ultimate defence, such as ours, the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type, courts cannot give approval to trials by ambush, and in

criminal litigation the courts cannot adopt a practice under which an accused person will be ambushed.”

The Court of Appeal in the **Cholmondeley case** while relying on **R. V. Stinchcombe [1992]** a Canadian case on the issue of disclosure of information had this to say:

“Our understanding of this Canadian decision is that there is a duty on the part of the 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. That duty continues during the pre-trial period and during the trial itself, so that if any new information is obtained during the trial, it must be disclosed.”

This court totally agrees with the two decisions above and having considered the court’s interpretation of what “facilities” means and the legal obligation placed on the prosecution towards the defence, this court’s view is that the prosecuting counsel misapprehended the issues when she submitted that the prosecution does not have a duty to disclose to the defence evidence the prosecution does not consider relevant and which the prosecution does not intend to use in their case. In line with the Court of Appeal in the **Cholmondeley decision** above, the prosecution has a legal duty to disclose to the defence not only the evidence the prosecution does not consider relevant to its case but also evidence the prosecution does not intend to use. As submitted by defence counsel, each party is entitled to formulate its own theory in a trial.

This court, as legally bound, favours an interpretation that most favours the enforcement of a right or fundamental freedom and for that reason find that the prosecution has a legal duty, just as this court, to facilitate the accused in terms of affording him adequate time and facilities to prepare his defence. The facilities here include full disclosure of all relevant information as shown in this ruling.

After careful analysis of the issues raised in this application for disclosure and having considered submissions from both parties I wish to resolve the issues as follows:

- i. In respect to motor vehicle inspection report which the prosecution says is not available this court will and does hereby give the prosecution the benefit of doubt.
- ii. In respect of an inventory of all the items found in the Motor Vehicle Registration No. KBT 545Y and those found on the body of the deceased this court hereby orders the Investigating Officer(s) to prepare an inventory of these items including and not limited to the items found in the vehicle and those found on the body of the deceased and a sketch plan of the scene of crime which Detective Clement Mwangi refers to in his affidavit and which he says is attached to that affidavit but is not. This inventory shall be availed to defence.
- iii. In respect to Airtel mobile subscriber and short message service data for the deceased, Safaricom and Airtel mobile data for Peter Mwangi Muchekehu and for mobile number 0723606842 this court will give the prosecution the benefit of doubt. It is expected that if such information exists and/or comes to prosecutor’s possession in the course of this trial, the same shall be disclosed and supplied to the defence.
- iv. In respect of deceased’s Safaricom mobile data I order that the prosecution discloses and supplies the defence with all the data received by SGT James Mwaura from PC Indeche and the additional data he applied for as stated in his statement, if this data does not form part of the data already supplied to the defence. I wish to clarify that the deceased’s mobile phone data to be disclosed and supplied to the defence are the dates covering 5th, 6th and 7th July 2014. The defence did not lay basis for data covering dates prior to the ones mentioned here.
- v. In addition to the inventory of all the items mentioned in (ii) above, the prosecution shall supply the defence with a certified copy of the deceased’s diary and/or notebook. This court has noted that although Detective Clement Mwangi denies existence of any diary or notebook, the photos of

the scene of crime show a notebook. Further, Police Constable Indeché in his statement mentions a diary from where he obtained telephone numbers to call people known to the deceased.

vi. This information shall be supplied to the defence within three weeks from today's date and not later than 14th April 2015.

Needless to say, I wish to state that there is nothing to stop the defence, and it owes a duty to its case, to carry out its own investigations over and above what the police did in order to fill up the gaps that the prosecution may have left including visiting the scene of crime, interviewing their own witnesses, engaging expert witnesses if needed etc. I need not belabor the point that this is crucial to any party because gathering information is an integral part of pre-trial preparation.

I wish to reiterate that whatever information/evidence that may come into the possession of the prosecution in the course of this trial ought to be disclosed and supplied to the defence to avoid trial by ambush.

I make orders accordingly.

Dated, signed and delivered this 24th day of March 2015.

S. N. MUTUKU

JUDGE