REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION CASE NO. 202 OF 2015

THUITA MWANGI……...…1ST APPLICANT

ANTONY MWANIKI MUCHIRI…….2ND APPLICANT

ALLAN WAWERU MBURU……....…….……...3RD APPLICANT

VERSUS

REPUBLIC ……..……..RESPONDENT

RULING

Pursuant to **Section 363 of the Criminal Procedure Code**, the Lower Court proceedings have been forwarded to this court in order to satisfy itself as to the correctness, legality and/or propriety of the decisions made by Hon. D. Mulekyo on 29th April, 2015 and 10TH August, 2015 respectively or the regularity of the proceedings in Nairobi ACC No. 2 of 2013.

The Court was moved by way of Notice of Motion dated 1st September 2015 brought under **Section 362 , 364(1)(b)(2) and 365 of the Criminal Procedure Code**. The DPP who is the applicant has urged the court to revise the orders of the learned magistrate Hon. Doreen Mulekyo, Chief Magistrate dated 29th April and 10th August 2015 in the following terms:-

1. **That** the court vacates the order dated 29th April, 2015 barring the prosecution from calling Mr. Kiptooo to testify as a witness in **ANTI CORRUPTION CASE. 2 OF 2013 – REPUBLIC VS THUITA MWANGI & 2 OTHERS.**
2. **That** the Court revises the learned trial magistrate's finding that the trial court has no jurisdiction in Japan and substitutes it thereof with a finding that the trial court is properly vested with the powers to issue the said commission.
3. **That** the court revises the finding of the learned trial magistrate that the court is not competent to initiate or seek mutual legal assistance by issuing of a commission under the provisions of Law and substitute it thereof with a finding that an MLA request can be initiated by the court for purposes of hearing of the application hereof.

I have accordingly examined the Lower Court record. On the issue of calling one Vincent Kiptoo as a prosecution witness, the application was made on 28/04/2015 by learned State Counsel Mr. Ondari. He made the request before the learned trial magistrate stating that Mr. Kiptoo was a valuer who valued the property that is the subject of the case.

The application was vehemently opposed by the defence who argued that from the outset, the prosecution had disclosed that they would be calling 29 witnesses whose names and statements were disclosed to

them and the said Mr. Kiptoo was not one of them. Both learned counsel, Mr. Kilukumi and Mr. Nderitu argued that the request by the prosecution amounted to an ambush of evidence which violated the right of the accused persons to a fair trial.

In dismissing the application vide the ruling of 29/04/2015, the learned trial magistrate noted that the application by the prosecution went against the tenet and spirit of **Article 50(2)(j) of the Constitution** which provides that;

> ***"Every accused person has the right to a fair trial which includes the right-***
>
> > ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence"***

I am in total agreement with the findings and conclusion of the learned trial magistrate. Clearly from the record, the prosecution had never disclosed that the said Vincent Kiptoo was one of the witnesses who the prosecution had lined up to call. They had provided the list of their witnesses alongside their statements and exhibits well on time. Kiptoo had never been a witness in this case. Moreover, as stated by the learned magistrate, the disclosure of the witness appears to have been a second thought upon realizing that his name featured in the investigation diary. To the Court's dismay, this diary was furnished to the defence a day before the prosecution made its application at the castigation of the Court.

The Law as written in the Constitution was not made in vain. It cannot aid the indolent. It is neither at disposal for misuse. The prosecution had the investigation diary way at the commencement of the trial being a key component of investigations. The name of Kiptoo was thus at their glare all along. It was not therefore by surprise that they realized they needed to call him as a witness towards the end of the trial. In restating what the learned trial magistrate observed, the need for availing in advance the list of witnesses and their statements to the defence is so as to afford an accused sufficient time and facilities to prepare for his/her defence. The subject trial is a complicated matter which required comprehensive preparations. Based on the evidence that the defence were availed, they charted their line of defence. The witness mentioned as Kiptoo, being a surveyor is a key witness, who, if called to testify, would distort the applicant's tone and mode of defence. It is therefore untenable to state, as submitted by learned state counsel that the prosecution can call their witness at this stage when only the investigating officer is their remaining witness. That would not only make a mockery of the provisions in the Constitution but would also amount to an abuse of the court process. It is untenable, in the circumstance, to assume that sufficient notice is not a pre-requisite to the process of a fair hearing.

In as much as the Court should be guided by the overall interest of administering justice, the instant scenario deviates from this cardinal principle. It cannot be deemed as sufficient notice to require that a witness whose evidence is unknown testifies when only the investigating officer is the remaining witness. After all, the evidence and the exhibit that this witness was expected to adduce had not and has not been furnished to the defence.

I do accordingly rule and hold that on account of failure to give sufficient notice to the defence, the intended prosecution witness one Vincent Kiptoo cannot testify.

I will combine the 2nd and 3rd requests as they are both subject of the learned trial magistrate's ruling of the 10th August, 2015. The same followed a Notice of Motion application by the DPP dated 28th April 2015 seeking the following major prayers

1. ***That this honourable court be pleased to call for and examine the record and proceedings in ANTI CORRUPTION CASE 2/2013 – Republic V Thuita Mwangi & 2 others to satisfying itself as to the correctness, legality or propriety of the finding and orders of the Learned Magistrate, Hon. Doreen Mulekyo Chief Magistrate dated 29th April, 2015 and satisfy itself as to the regularity or otherwise the said proceedings and rulings.***
2. ***That pending the hearing and determination of this case, the hearing of ACC. 2/2013 set for further hearing on 7th and 9th September 2015 be stayed.***

3. ***That this honourable court be pleased to vacate the orders made on barring the prosecution from calling Mr. Vincent Kiptoo dated 29th April 2015 and order that the Chief Magistrate proceed to receive the testimony of the said witness without further delay.***
4. ***That the honourable court be pleased to revise the finding made by the Learned Chief Magistrate Hon. Doreen Mulekyo that the trial court has no jurisdiction to issue commission for the taking of evidence by a court of competent jurisdiction in Japan and substitute thereof a finding thereof that the trial court is properly invested with the powers to issue the said commission.***
5. ***That this honourable court be pleased to revise the finding of the Learned Chief Magistrate Hon. Doreen Mulekyo that the court is not competent to initiate or seek MLA by issuing of a commission under the provisions of law and substitute it thereof a finding that an MLA request can be initiated by the court for purpose of hearing of the application hereof.***
6. ***That this court be pleased to hear the parties hereto.***
7. ***That there be no orders as to cost.***

The DPP relied on the provisions of **Sections 154, 155, 157 of the Criminal Procedure Code**, **Section 1** of the **Evidence by Commission Act, 1859 (UK) Section 3** of the **Judicature Act, Cap 8 Laws of Kenya, Section 7** and **14** of the **Mutual Legal Assistance Act No. 36 of 2011.**

I have appraised myself with the rival submissions made before the learned magistrate together with the ruling of the court and I take the following view on the issues raised.

Sections 154, 155 and 157 of the Criminal Procedure Code provide for issuance of commissions for examination of witnesses by both the High Court and magistrate within the local jurisdictions of the respective court. They do not empower either court to commission for examination of witnesses outside the boundaries of our Republic. **Section 154** thereof sets the motion in this regard, whereas **Section 155 and 157** are subject to **Section 154**. I duplicate the entire provisions hereunder as follows:-

> 154 ***"(1) Whenever, in the course of a proceeding under this Code, the High Court or a magistrate empowered to hold a subordinate court of the first class is satisfied that the examination of a witness is necessary for the ends of justice, and that the attendance of the witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the court or magistrate may issue commission to any magistrate within the local limits of whose jurisdiction the witness resides, to take the evidence of the witness.***
>
> ***(2) The magistrate to whom the commission is issued shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers as in the case of a trial.***
>
> ***155. (1) The parties to a proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the court or magistrate directing the commission may think relevant to the issue, and the magistrate to whom the commission is directed shall examine the witness upon those interrogatories.***
>
> ***(2) Any such party may appear before the magistrate by advocate, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the witness.***
>
> ***157 (1) After a commission issued under Section 154 or Section 156 has been duly executed it shall be returned, together with the deposition of the witness examined thereunder, to the High Court or to the magistrate empowered to hold a subordinate court of the first class (as the case may be), and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may,***

subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) A deposition so taken, if it satisfies the conditions prescribed by Section 34 of the Evidence Act may also be received in evidence at a subsequent stage of the case before another court."

Turning on to the **Evidence by Commission Act, 1859**, the same was repealed under Schedule 2 of **Evidence (Proceedings in Other Jurisdictions) Act 1975**. The Act had been amended by **The Evidence by Commission Act, 1885** which was also repealed under Schedule 2 of the **Evidence (Proceedings in Other Jurisdictions) Act 1975**. Effectively, this Court cannot make reference to a statute that is not in force. Even assuming that the referred to statute were in force, its Section 5 provided that not all courts in Her Majesty's Colonies and possessions at the time had jurisdiction to issue a commission. Any court conferred with such authority had to be so appointed or hierarchically had the authority from the order of Her Majesty.

The above notwithstanding, the Applicant did not demonstrate that by virtue of Section 3(1) (b) of our **Judicature Act**, the **Evidence (Proceedings in Other Jurisdictions) Act 1975** is applicable in reference to the instant case.

Turning on to the **Mutual Legal Assistance Act No. 36 of 2011** which the applicant heavily relied on, I begin by referring to its preamble. It states as follows:-

"An Act of Parliament to provide for mutual legal assistance to be given and received by Kenya in investigations, prosecutions and Judicial proceedings in relation to criminal matters and for connected purposes."

The Blacks's Law Dictionary, 9th Edition at page 1115 defines "mutual" as:-

"generally directed at each toward the other or others; reciprocal; belonging to two parties; reciprocal."

While "reciprocal" at page 1384 is defined as:-

"directed at each other toward the other or others"

And "reciprocity as;

"Mutual or bilateral action; the mutual cancelations of advantages or privileges for purposes of commercial or diplomatic relations"

Flowing from the above definitions vis-à-vis the provisions of the Act, the latter does not contemplate judicial intervention when the states are mutually dealing. It contemplates a give and take situation, implying that the assistance offered by one jurisdiction must be capable of being effected/accepted by the reciprocating country.

Section 7 which the applicant's counsel heavily relied on provides as follows:

"(1) A request for legal assistance from Kenya shall be made by the Competent Authority.

(2) A request made under subsection (1) may be initiated by any law enforcement agency, or prosecution or judicial authority competent under Kenyan Law.

(3) In the event of urgency or as permitted by any written law, requests may be sent by direct transmission from a Competent Authority to a competent authority of a

requested state for execution subject to domestic law of the requested state.

(4) Where further information is required before a request under this Section is executed, in so far as practicable, such information shall be provided for and within any deadlines as may be set by a requested state.

Sub-sections (2) and (3) envisage a situation in which judicial authority may be exercised under Kenyan law. These sub-sections may be thus read together with Section 21 which provides as under:

"(1) ***Where criminal proceedings have been instituted in Kenya against a person, or where a person is joined in such proceedings as a third party, the Competent Authority may, on application to the court by either the said person or his legal representative, issue a request for legal assistance to a requesting state.***

(2) The fact that a request under subsection(1) originates from a person charged or his legal representative shall not be a ground for refusal by the Competent Authority to execute the request.

My understanding of the two sections is that if a Kenyan Court were to order for the commissioning of witnesses outside its jurisdiction, then those witnesses must be compellable by the Law under their jurisdiction to give statements of their evidence as requested. In the present scenario, the converse is the case. It is not contested that a Mr. Nabuhiro Oiwa, an inspector with Tokyo Police interviewed all the witnesses the applicant intended to take their statement from and he was candid that none of the witnesses was willing to give his/her statement and was willing to travel to Kenya at any given time. He gave a report in that regard.

It follows then that the intended witnesses are not compellable witnesses in so far as they can testify in the Kenyan case. Respectively, this court cannot give an order in vain. The learned trial magistrate did not therefore misdirect herself in holding that she had no extra-territorial jurisdiction to compel the witnesses to testify in the case.

Let me also emphasize that **under Section 7(1) of the MLA Act**, a request for mutual legal assistance from Kenya must be made by the Competent Authority. Competent Authority is defined under Section 2 as:

"Means the Attorney General of the Republic of Kenya, any criminal investigation agency established by Law or any other person designated as such by the Attorney General by notice in the gazette."

Under **Sub-section (2) of Section 7**, the request for legal assistance may be initiated by any law enforcement agency or prosecution or Judicial authority competent under Kenyan Law (emphasis mine). In this application, the court was asked to invoke the provisions of **Section154, 155** and **157 of the Criminal Procedure Code** in issuance of a commission. Those Sections do not however apply extra-territorially. As I had said earlier, had the intention of the Legislature been that they apply extra-territorially, that provision would have been legislated. As such, learned trial magistrate could not confer jurisdiction upon herself as a Competent Authority as defined under Section 2.

Needless to say, from the facts laid before the learned trial magistrate, the applicant went to court in his application dated 28/04/2015 after exhausting all means in an attempt to avail the intended witnesses. He had information that none was willing to come to Kenya to testify, facts of which are borne in the magistrate's file. The filing of the application for orders of issuance of commission was a last straw. But on evaluation of the cited Law the applicant relies on, this court cannot come to his aid. It is my view then that the learned magistrate did not misdirect herself in finding that she had no jurisdiction as a Competent Authority to invoke **Mutual Legal Assistance** under the **MLA Act, No. 36 of 2011**. She also properly directed herself that **Sections 154, 155** and **157** of the **Criminal Procedure Code** only apply intra-territorially in respect to the jurisdiction of Kenyan Courts.

As I wind up, let me comment on what learned state counsel, Mr. Ondari termed failure by the learned trial magistrate to adhere to the doctrine of precedence. Mr. Ondari submitted that Hon. D. Mulekyo had, in Nairobi Anti-corruption case No. 37 of 2011 given a contrary direction that the prosecution can disclose its witnesses at any stage of a trial. He also submitted that that direction was subject of **NAIROBI CONSTITUTIONAL PETITION NO. 317 OF 2012 –DENNIS EDMOND APAA & 2 OTHERS VS ETHICS AND ANTI-CORRUPTION COMMISION & DPP**. The petitioners who were the accused in the Anti-Corruption case were aggrieved that the prosecution had failed to inform them in advance of the evidence and witnesses they intended to call in their case, thus violating their Constitutional rights under Section 50 (2) (j).

The facts of that case are clearly distinguishable from the present one. In that case, the witness who the defence contested should testify as PW 10 had already recorded his statement. The problem was with furnishing the defence with the statement too late in the day. In the present case, the prosecution's witness Vincent Kiptoo has never recorded his statement. The exhibits he intends to rely on have never been furnished to the defence. The prosecution's case is also coming to a close and for reasons I have aforestated, his evidence would completely distort the defence case which ultimately would be prejudicial.

That said, Mr. Ondari did not furnish this court with the judgment in the Anti-Corruption case. I am unable to ascertain that the ruling that was subject of the Constitutional Petition was given by Hon. D. Mulekyo. There are however proceedings of 4/4/2012 replicated in the judgment of the High Court which show that the case was at that time being conducted By Hon. L. N. Nyambura, PM, now a Judge. Be that as it may, I have been able to demonstrate that the magistrate did not in any way flout the principle of the doctrine of precedence.

In the end, it is the view of this court that the applicant has not demonstrated that the rulings of the learned trial magistrate should be revised. I find the application without merit and the same is dismissed with no orders as to costs.

DATED and **DELIVERED** at **NAIROBI** this **22nd Day of September, 2015**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Ondari for the Applicant.*
2. *Mr. Marete holding brief for Muturi for the 1st Respondent.*
3. *Mr. Nderitu for the 2nd Respondent and holding brief for Kilukumi for the 3rd Respondent.*