REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYACRIMINAL REVISION

HIGH COURT CRIMINAL APPEAL NO.105 OF 2014

(Being an appeal from a ruling by Hon. G. Gitonga (Mr) Resident Magistrate in Criminal Case No. 1623 of 2012 in Chief Magistrate's Court at Nairobi delivered 23rd July 2014)

ROBERT MULI MATOLO……APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENTS

JUDGMENT

This appeal arose from a ruling by the learned trial magistrate after an objection by the defence counsel in the trial to the introduction of PW3, Police Constable Hannington Chumba from CID Headquarters. He had been called by the prosecution as an expert witness who examined the mobile phone set that was purportedly used by the Appellant in the event leading to the charges facing him. He was charged with three counts of sending offensive text messages contrary to Section 29(a) of the Kenya Communication Commission Act No. 4 of 1998. The particulars of the offences are as follows:

> Count I: On the 11th September, 2012 at around 1.00 pm at unknown place within the Republic of Kenya by means of a licensed telecommunication system, namely, Safaricom Limited through telephone number 0712-418426 sent an offensive text message to mobile number 0722-374737 belonging to John Kikunzi Kivanga using abusive language to wit:***"your sum is equal to zero and a minus, yes bar zero, below many zeros. You have nothing to offer at all at all, even nzeve (cold air). You are only 38 years old with nothing to offer only as a tenant in this world. See you in court bye for now."***
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> Count II: On 13th September 2012 at around 6.29 am, at unknown place within the Republic of Kenya by means of a licensed telecommunication system namely, Safaricom Kenya Limited through telephone number 0712-418426 sent an offensive text message to mobile phone No. 0722-374737 belonging to John Kikunzi Kivangato wit: ***"a curse of God is already upon you and your mother for eating Kivanga's wealth. Drunkards. Kivanga did not drink like you and your mother, he cursed drunkards like you."***
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> Count III: On 13th September 2012 at around 6.36 am at unknown place within the Republic of Kenya through a licensed Telecommunication system namely, Safaricom Kenya Limited through telephone number 0712-418426 sent an offensive text message to mobile phone No. 0722-374737 belonging to John Kikunzi Kivanga to wit: ***"the truth is better, very very bitter, yes drunkard, eat WETINA (his late sister) as well."***

Learned Counsel for the Appellant Mr. Mbulo raised the objection that the said witness PW3 would not

testify because the defence had not been furnished with his statement. In response, the prosecutor submitted that PW3 was an expert witness who ordinarily would not be required to record a statement prior to his testimony. In any event, the prosecution had supplied the report that the witness was to produce way back in April 2014. He submitted that the defence was therefore aware of the evidence the witness was to adduce. In rejoinder, Mr.Mbulo submitted that the defence had not been supplied with the document as alleged by the prosecution and that the introduction of the witness and the documents was against the Appellant's Constitutional right to a fair trial as envisaged under **Article 50 of the Constitution**. He urged the court to take into account that it had issued an order that the defence be supplied with all the evidence that the prosecution intended to rely on and that that direction had not been obeyed. He urged the court to exclude the report that PW3 intended to produce.

In dismissing the objection by Mr.Mbulo, the learned trial magistrate noted that the evidence sought to be adduced by PW3 did not fall under **Article 50 (4) of the Constitution** which provides that;

> ***"evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."***

The learned magistrate observed that this provision envisages exclusion of evidence which is illegally obtained, say by way of torture, coercion or entrapment. He found that the evidence intended to be produced by PW3 was not one obtained by either means and therefore the court did not think that it was just to exclude it. The learned trial magistrate directed that the prosecution supplies the defence with all the material that they intended to rely on through PW3 or any other intended witness. He allowed more time to the defence to prepare and interrogate the said evidence after which the trial would resume at a later date.

Being dissatisfied with the ruling, the Appellant in his petition of appeal dated 4th August 2014 raised the following grounds of appeal:

> 1. **That** the magistrate erred in law and fact in declining to order for the exclusion of the evidence of PW3, Police Constable Hannington Chumba.
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> 2. **That** the magistrate erred in law in failing to hold that the Appellant's right to a fair trial had already been violated and prejudiced by the failing of the prosecution to supply all necessary evidence at the point of the commencement of the trial.
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> 3. **That** the magistrate erred in law in failing to hold that the Appellant's right as set out in Articles 50(2) of the Constitution had been violated.
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> 4. **That** the magistrate erred in law in misdirecting himself regarding the provisions of Article 50(4) of the Constitution.

In written submissions by counsel for the Appellant dated 10th August 2015, grounds 1,2 and 3 were condensed into one namely; that the court should determine whether based on Article 25(c) and 50(2) (j) and (k) of the Constitution, the Appellants right to a fair trial was violated and prejudiced by being denied access to PW3's statement and exhibit in advance prior to his adduction of evidence. According to the Appellant, the failure to furnish such statement and document grossly violated his Constitutional right to a fair trial as he would not be in aposition to prepare for his defence. It was submitted that the trial commenced on 15th February, 2013and it was not until 26th March, 2013 when the prosecution introduced a witness, PW2 without notice to the defence. The defence accommodated the prosecution and the court in addition ordered that the prosecution furnishes the defence with all its witness statement that it intended to rely on. That was not done until after one year when on 30th April 2014, the statement was furnished to the defence after another order of thecourt of 22nd April, 2014. To the mind of the defence, the only evidence that the prosecution remained to call was that of the Investigating Officer. However, the prosecution again introduced another witness PW3 without furnishing his statement to the defence in

advance. It is the introduction of this witness that triggered this appeal.

Learned counsel Mr. Mbulo has urged the court to find that the Appellant's Constitutional right under Article 50(2)(k) was violated as a result of which the court should direct that PW3 should not testify. Pursuant to Article 50(4) he has also urged the court to find that the learned trial magistrate erred in his interpretation and application of Article 50(4) of the Constitution.

The respondent opposed the appeal vide written submissions filed on 24th September, 2015 by learned counsel, Ms. Linda Nyauncho. She submitted that the learned trial magistrate made an order that the defence be furnished with all the materials that the prosecution intended to rely on to enable them prepare for their defence. She indicated that notwithstanding that the name of PW3 did not appear as one of the witnesses who the prosecution intended to call, in the charge sheet it was shown that other than the complainant there were other witnesses to be called. For that reason, the calling of PW3 as a prosecution witness did not prejudice the Appellant's right to a fair trial. She further submitted that the learned trial magistrate gave the correct interpretation of Article 50(4) of the Constitution in holding that the court would only have rejected evidence that had been obtained in a manner that violated any right or fundamental freedom in the Bill of Rights. She stated therefore that the provision was not applicable to the instant case as the evidence sought to be adduced did not violate the Appellant's Constitutional right under the Bill of Rights.

I have considered the grounds of the appeal and the respective rival submissions. I find the issues for determination to be as follows:

> **1. Whether the Appellant's right to a fair hearing was violated by virtue of the prosecution not having furnished him with the evidence of PW3 in advance prior to his testimony.**
>
> **2.Whether the learned trial magistrate correctly interpreted Article 50(4) of the Constitution in dismissing the Appellant's application.**

Under the first issue for determination it calls on this court to duplicate the provisions of Article 50(2)(j) which provides as follows;

> ***50(2) ''any 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"***

This provision correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence. The sole purpose of doing so is so as to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with **Sub-Article 2(c)** which provides that every accused person has right to a fair trial which includes the right **to have adequate time and facility to prepare a defence.**

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the accused's rights are not violated.

In the present case, there is no doubt that PW3 was to testify as an expert witness. Ordinarily, expert witnesses do not record statements. Nevertheless, it is a trend that has no basis in law or in criminal procedure save that it hastens the disposal of cases as most expert witnesses deal with a bulk of files.Where a witness is intended to adduce evidence that analyses a crucial document that shapes the prosecution's case, no excuse can be tenable that the witness ought not to recordhis statement. This may

however exclude statements of obvious witnesses who produce documents such as Medical Examination Reports(P3 Forms), Treatment Notes and Post Mortem Reports. The scenario presented by the present case is such that PW3 would analyse the mobile phone call data from the accused's phone. His evidence would not be tendered in court in a flash of a second. He would give a detailed account of the information in the data report and what conclusions he arrived at. That is evidence that cannot be wished away or assumed. Simply said it was important that he recorded his statement. In the absence of his statement, the expert report (data analysis) ought to have been furnished to the defence at the commencement of the trial, or, as ordered by the court, before PW3 testified.

I now grapple with the question of whether the failure to furnish the Appellant with the witness statement and the expert document prejudiced him.

Suffice it to say, it was in contention before the learned trial magistrate whether or not the expert report had been furnished to the defence way back in April, 2014. The accused's right as provided under Article 50(2)(j) is not one of those rights that can be limited under Article 24 of the Constitution. On evaluation of the entire case and the charges facing the Appellant it is this expert evidence that would determine the destiny of the case. While bearing in mind the cardinal principle in criminal justice that an accused person is presumed innocent until proven guilty, in giving regard to the application of Article 50 (2)(j) the court must look at the circumstances of each case. That is to say, whether or not it was deliberate not to furnish the evidence as required and whether the failure to do so prejudiced the Appellant.

As at the date the objection was raised by the defence, two prosecution witnesses had testified and the Investigating Officer was yet to be called. As noted above, the evidence of PW3 would shape the prosecution's case and the nature of the defence the Appellant would adduce in combating it. My strong view however, is that that anomaly would be curable by a recalling of PW1 and PW2 for purposes of further cross examination by the defence. The length of time that it would take in further cross examining the two witnesses would be too short as notto prejudice the Appellant and the entire process of a fair trial. The further cross examination would serve the purpose of testing the veracity of the content of the expert document by the two witnesses. That is to say that the circumstances of this case do not, of themselves, bar the prosecution from furnishing the documentary evidence at this stage. Indeed, doing the contrarymay be a rather drastic option that may not meet the ends of justice.

On the second issue for determination, Article 50(4) of the Constitution provides that;

> ***''Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."***

In interpreting this provision, the learned magistrate stated as follows:

> ***''my reading of this provision is that it envisages exclusion of evidence which is illegally obtained, say by way of torture, coercion or entrapment. The said provision cannot therefore apply in obtaining circumstances of this case…''***

My view is that the learned magistrate gave a very narrow interpretation of the aforesaid provision. He narrowed down the evidence that cannot be admitted in his own words to be the ***evidence that is illegally obtained by way of torture, coercion and entrapment.*** Had the Constitution intended that the provision be limited to the evidence as interpreted by the magistrate, nothing was easier than putting it in writing. Hence, courts must give a broader interpretation of the same. The Bill of Rights which is enshrined in Chapter 4 of the Constitution is quite broad and not only includes the right to a fair trial but, *inter alia, rights to life, right to equality and freedom from discrimination, right to human dignity, right to privacy, right to labour relations, right of an arrested person and right to access to justice.* It follows then that while considering the application of each of the rights and freedoms as enshrined in the Bill of Rights,courts must broadly address its mind to what would hinder effective administration of justice. That is why each case must be considered on its own merits and circumstances.Whilst evidence obtained by torture, coercion and entrapment may be one of the pieces of evidence that may be envisaged under the

provision that does not exclude the consideration of other material factors and circumstances of each given case.

Narrowing down to the present case, I need not belabour, for the afore stated reasons, that the Appellant would not be prejudiced if PW3 testified.

On the whole, I find that this appeal has no merit and the same is dismissed with the following orders:

a) That the prosecution be and is at liberty to call PW3 as their witness.

b) The prosecution must furnish the defence with the witness statement and the documentary evidence that they shall rely on within seven days of delivery of this judgment.

c) The defence be and is at liberty to apply to recall PW1 and 2 for purposes of further cross-examination either before or after the testimony of PW3.

d) The lower court file shall be forthwith remitted to the trial court and the matter mentioned on 27th October, 2015 before the Chief Magistrate, Nairobi for purposes of fixing a hearing date.

It is so ordered.

DATED AND DELIVERED THIS 22nd DAY OF OCTOBER, 2015.

G. W. NGENYE – MACHARIA

JUDGE

1. Mr. Mbulo for the Appellant

2. M/s Aluda for the Respondent