REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 47 OF 2014

DIANA KETHI KILONZO……APPLICANT

VERSUS

REPUBLIC……..……..RESPONDENT

RULING

Diana Kethi Kilonzo is the 2nd Accused in the **Chief Magistrate's Court Milimani Cr. Case No. 1324 of 2013 Republic vs Godffrey Ninito Lemiso and herself**. She was charged with two counts as follows:

Count I: Stealing contrary to Section 275 of the Penal Code with an alternative charge of handling stolen goods contrary to Section 322(1) of the Penal Code.

Count II: Uttering a false document contrary to Section 353 of the Penal Code.

In the course of the trial, counsel for the Applicant applied that the Applicant be furnished with all the documents that the prosecution intended to use in the case. The defence outlined the particulars of the documents that they required from the prosecution. The prosecution on the other hand contended that some of the documents the defence required were not in their possession and would not be used in their case. That further they were not in a position to supply what they did not possess and what they did not require in prove of their case. On 3rd September, 2013, Hon. D. Mulekyo issued an order that the defence be furnished with the documents that the prosecution intended to rely on and in particular those particularized in a letter from Soweto & Co. Advocates and copied to the Office of the Director of Public Prosecutions dated 3rd September, 2013 within 14 days. The prosecution not being in a position to furnish all the documents outlined in that letter precipitated the revision application herein.

By a letter dated 28th May, 2014 by Soweto & Co., advocates for the Applicant it is requested that this court enforces the order of the learned trial magistrate Hon. D. Mulekyo of 3rd September, 2013 requiring the prosecution to furnish the defence with the documents itemized in the counsel's letter of 3rd September, 2013. It is contended that when the trial court issued the order the prosecution did not object to it. On 18th November, 2013 the trial was adjourned because the prosecution had not complied with the order of 3rd September, 2013. The prosecution was ordered to ensure they supplied the said documents within 14 days. Again, this order was not complied with. It prompted the counsel for the Applicant to file an application dated 13th March, 2014, which sought to enforce the trial court's order of 3rd

September and 18th November, 2013. The application was dismissed on 18th March, 2014. This meant that the court had refused to enforce its own orders issued on 3rd September, 2013. It is the Applicant's case then that the failure to oblige with the trial court's orders of 3rd September, and 18th November, 2013 infringed on her constitutional rights to a fair trial under Article 48 and 50 of the Constitution. Furthermore, the orders of the trial court of 3rd September and 18th November, 2013 remained in force because the prosecution did not apply to vary them. This court was moved under Section 326 of the Criminal Procedure Code and Article 165(6) of the Constitution. By this revision application, this court is asked to make the following orders:

1. ***That the order of the trial court given on 3rd September, 2013 be enforced and the documents sought be supplied by the Prosecution before the hearing proceeds failing which the charges against the 1st and 2nd Accused ought to be dismissed.***
2. ***Stay of the proceedings in the Lower Court pending the hearing and determination of this application for Revision.***

Prayer No. 2 is already spent because the original trial file was forwarded to this court for purposes of this court certifying itself as to the correctness, legality or propriety of the order sought to be revised.

The application was disposed of by way of filing written submissions. Those of the Applicant were filed by Soweto & Co. Advocates on 9th September, 2014. The gist of the submissions is that the trial court erred in dismissing the Applicant's application that the prosecution furnishes the Applicant with all the documents it had requested for. The reasoning of the trial court in dismissing the application was that:

a. The prosecutor had supplied all the documents that were relevant to the prosecution's case.
b. The documents requested by the Applicant were documents in the possession of the Independent Electoral and Boundaries Commission (IEBC). The Complainant and the Applicant could not ask the State to produce those documents.
c. These documents were not relevant to the prosecution.
d. The (trial) court would be opening a Pandora's Box were it to rule that the State produces every irrelevant document.
e. The (Trial) Court had no further orders to make.

In making the above findings, the trial court failed to address its mind that it had previously ordered that the Applicant be furnished with all the documents she had requested for. It also failed to address itself to the fact that it had previously adjourned the trial to enable the prosecution to comply with the orders. It was also an error on the part of the trial court to dismiss the application when the prosecution had not filed any Grounds of Opposition or a Replying Affidavit to the application. In that regard, it is the view of the Applicant that the trial court treated the Applicant's request in a casual manner whose effect has been to violate her constitution right to a fair trial.

Learned counsel submitted that under **Section 362 of the Criminal Procedure Code**, this court has powers to revise the orders of a trial court. In the instant case it is prayed that this court puts right or corrects the finding of the trial court dismissing the Applicant's application that the prosecution supplies her with all the documents she had requested for. It is contended that the ruling of the trial court was irregular, incorrect and contravened the Applicant's right under **Article 48 and 50 of the Constitution**. More importantly, rather than vary its own orders, the trial court ought to have enforced the orders it had issued on 3rd September and 18th November, 2014 ordering that the Applicant be supplied with all the documents she had requested for.

It was also submitted that **Article 50 of the Constitution** guarantees every accused person the right to a fair hearing, in particular to have any dispute resolved and decided in a fair and public hearing by an independent and impartial Tribunal or body. An accused also has right to have adequate time and facility to prepare a defence, have the trial begin and concluded without unreasonable delay, be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence and to adduce and challenge evidence. The court was referred to the case of **George Ngodhe Juma and 2**

others vs the Attorney General [2003] @KLR in which it was held that the right to a fair hearing is not satisfied if an accused person is not given and allowed or afforded everything which promotes the ease of preparing his defence, examination of his witnesses for prosecution and securing witnesses to testify on his behalf.

The court in that case went on to define what the word "***facilities***" under Article 51 should in its ordinary connotation mean. That is to say;

i. The resources, conveniences or means which make it easier to achieve a purpose;
ii. An unimpeded opportunity for doing something;
iii. Favourable conditions for the easier performance of something;
iv. Means or opportunities that render anything readily possible;
v. To render easy or easier the performance of doing of something to attain a result;
vi. To promote;
vii. To help;
viii. To forward;
ix. To assist;
x. To lessen their labour of one;
xi. To make lesser difficulty; or
xii. To free from difficulty or impediment.

It was urged that Article 51 must be interpreted against the duty of the prosecution to avail an accused person all the facilities that he requires for enabling him to conduct his defence. The prosecution should also facilitate an accused person from any difficulty or impediment from obstruction or hindrance in fighting a criminal case facing him or her.

Counsel for the Applicant also referred to the case of **Republic vs Ward, [1993] 2 All E.R, 557**, in which it was held that the failure for prosecution to disclose to the defence evidence which ought to be disclosed is an irregularity in the course of the trial. For that reason, it was the duty of the trial court to ensure that the prosecution met its obligation in providing the Applicant with all the documents she required in the trial. Counsel went on to explain that the documents sought were necessary not only for the prosecution's case but also the defence case. The court was referred to the case of **Thomas Patrick Gilbert Cholmondley vs Republic, [2008] KLR** in which the Court of Appeal held that;

> ***"such evidence may weaken the prosecution's case and strengthen that of the defence; whatever may be the nature, the prosecution is still obliged to disclose it to the defence. That duty continues through the pre-trial period, during the trial itself so that if any new information is obtained during the trial it must be disclosed."***

Referring to that case, counsel for the Applicant submitted that the duty of the prosecution does not only stop with furnishing the defence with the documents that would only secure a conviction. The prosecution was under a duty to furnish all the documents that would help the court arrive at a fair and just decision given the circumstances of the case. She urged the court to revise the decision of the learned trial magistrate in the court below that reviewed its orders whose effect was that the prosecution could not avail to the defence the documents that they were not using for their case.

The submissions for the Respondent were filed by James Mungai Warui, Senior Assistant Director of Public Prosecutions on 13th August, 2015. Mr. Warui submitted that the matter before the court was not one that was subject for revision since there was no error on the face of the record of the Lower Court proceedings. According to Mr. Warui, the trial court was right and within the confine of the Law in holding that the duty of the prosecution was limited to disclosing what was relevant in presenting their case. The court was also right in holding that the prosecution could not be asked to disclose materials they clearly stated were not in their possession. In that respect, the court was referred to the case of **Hassan Mahati Omar & Another vs Republic [2014] eKLR** in which the court stated as follows:

> ***"Section 362 of the Criminal Procedure Code is very specific. A party who approaches the***

court on this platform must demonstrate what the irregularity, illegality, impropriety or incorrectness was, in the lower court proceedings to warrant the court invoking its powers under Section 362 of the Criminal Procedure Code to reverse the orders issued in the lower court."

Similar sentiments were expressed by the High Court sitting in Mombasa in **Republic vs Yousuf Yaqoob & 11 others [2014] eKLR.** According to Mr. Warui, the prosecution had furnished the defence with all the witness statements and relevant documents that were within their possession and relevant to the case. In any case, under Article 51(2)(j)(which ought to be Article 50) of the Constitution, the right to the documents is restricted to those documents that the prosecution intends to rely on. The same provides as follows:

"every accused person has the right to a fair trial, which includes the right –

To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

The prosecution had met this requirement and the court cannot therefore order that they provide documents that were not in their possession. Mr. Warui went on to particularize the documents that the defence was referring to and what steps the prosecution had taken towards ensuring that Article 50(2)(j) had been complied with. Specifically, for the documents that the prosecution had not furnished to the defence were documents that were both not relevant to the prosecution's case and were not in the possession of the prosecution. On account of the latter explanation, it would be impossible for the prosecution to give what they do not own or is not in their possession. Mr. Warui urged the court to dismiss the application.

In addition to the written submissions, counsel for both parties made brief oral submissions before me on 16th September, 2015 in highlighting the submissions that were already filed. Learned counsel Mr. Ojiambo was in attendance on behalf of the Applicant. He submitted that the Respondent had relied on The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, commonly referred to as the **Mutunga Rules** in urging the court to dismiss the application. Mr. Ojiambo emphasized that the **Mutunga Rules** were applicable where a party was filing a Constitutional Petition and not a Revision. Under **Rule 4 of the Rules** there was no mandatory requirement that a Revision Application should be in the form of a Petition. Mr. Ojiambo also urged the court to broadly interpret Article 50(2)(c) in finding that the prosecution was under a duty to disclose all materials not only relevant to their case but that are relevant to the entire case even if it would weaken their case. In this regard, the court was urged to take note of the fact that the trial facing the Applicant related to an election offence and that the materials the Applicant was requesting for were relevant to the case.

Learned counsel Mr. Warui on the other hand emphasized that the Constitution being the supreme law of the land, mandated the prosecution to furnish the defence with only the evidence that they would rely on in their case. He submitted that that had been met and that the materials the Applicant was requesting for were not in the possession of the prosecution. He argued that the application herein was aimed at delaying the trial and the same ought to be dismissed.

I have accordingly considered the rival submissions by both parties and take the following view of the application. The application is premised under Section 326 of the Criminal Procedure Code and Article 165(6) of the Constitution. Section 326 of the CPC provides as follows:

"The court before which a person is tried for an offence may reserve the giving of its final decision on questions raised at the trial, and its decision whenever given shall be considered at the time of the trial."

This provision relates to passing of sentences and it provides that a decision of a trial court can be reserved at a later date rather than at the time the question is raised. This application being a revision has

no relevance to Section 326. The power of this court to review or revise an order of a subordinate court is provided under Section 362 of the Criminal Procedure Code which provides as follows:

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

I submit to the powers of this court vested in it under **Article 165(6) of the Constitution**. The same provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. The supervisory jurisdiction of this court over a subordinate court is in part effected through the powers of revision of orders made by the courts below. In that regard, at this point in time, it is the duty of this court to satisfy itself as to the correctness, legality, propriety or regularity of the decision of the trial court in its ruling of 18th March, 2014 in holding that the prosecution was only under a duty to provide those materials that were relevant in its case. The order was made in a ruling of Hon. Hannah Ndungu, Chief Magistrate which in effect reviewed an earlier order of Hon. D. Mulekyo of 3rd September, 2013. The latter order directed the prosecution to furnish the Applicant with all the documents which the Applicant had requested for in their letter dated 3rd September, 2013. At this point, I pose to make it clear that both learned magistrates were of concurrent jurisdiction and that it was in order when Hon. Hannah Ndungu reviewed the order of Hon. D. Mulekyo as explained here before. It then behooves this court to determine whether or not in the context of the ruling by Hon. Hannah Ndungu the same accorded with decided case law and above all, the Supreme Law of the land, being the Constitution.

Learned state counsel Ms. Soweto in her written submission cited **Article 50(1) and 50(2)(e)(j) and (k) of the Constitution**. She had also cited **Article 51** which I think is an error because the same deals with rights of persons detained, held in custody or imprisoned. It is Article 50 that governs the right to fair hearing. It is then important that I duplicated the provisions relied on as under:

> ***" 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right-***
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> ***(c) to have adequate time and facilities to prepare defence;***
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> ***(e) to have the trial begin and conclude without unreasonable delay;***
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> ***(j) to be informed in advance of the evidence prosecution intends to rely on, and to have reasonable access to that evidence;***
>
> ***(k) to adduce and challenge evidence;***

The obligation to furnish the defence with the evidence the prosecution intends to rely on as envisaged under **Article 50(2)(j)** is squarely on the prosecution. The obligation can never shift on the defence. The duty of the prosecution is to ensure that it facilitates the defence to have reasonable access to all the evidence that it shall rely on in their case. I therefore agree with the words in **R vs Ward (**Supra) that the failure of the prosecution to disclose to the defence evidence that ought to be disclosed is an irregularity in the course of the trial. That would be against the tenets of facilitating an accused person to have adequate time and facilities to prepare for his/her defence. It would also negate the spirit of having the trial begin and concluded without unreasonable delay. That then would infringe on an accused's constitutional right to a fair trial as provided under Article 50 of the Constitution. My understanding of **Article 50 (2)(j)** is that the evidence (which includes all exhibits and statements) that the prosecution should disclose is only that evidence that it shall rely on in its case. That evidence ought to be disclosed in the first instance prior to the commencement of the trial. That would enable the defence to adequately

challenge the prosecution's case and for an accused person to prepare for his/her defence.

In citing the case of **Thomas Gilbert Cholmondley vs Republic** (Supra), learned counsel for the Applicant argued that the prosecution is under a duty to disclose such evidence that would also be against his case. My understanding of the holding is that the prosecution ought to list down all the evidence that it has lined up for its case, that is to say; that the witness statements, the list of witnesses and the exhibits that it shall rely on should be made known to an accused person before the commencement of the trial. Such evidence should not be sieved for disclosure to the defence as the trial is going on so that the prosecution discloses only that evidence as would support its case. In simple words, all the evidence listed for adduction by the prosecution even if it is not necessary in their favour should be availed to the defence in the first instance. If this interpretation is read together with **Article 50(2)(j) of the Constitution**, means that the prosecution cannot be compelled to avail to the defence any manner of evidence that the defence would demand for.

In the present case, the Applicant had listed in a letter dated 3rd September, 2013 all the documents that it was demanding the prosecution furnishes. In the written submissions of the Respondent herein, learned counsel Mr. Warui has gone into great length to make a comment on what the Respondent (prosecution) has done towards ensuring that **Article 50(2)(j)** is complied with. For the documents that the prosecution has been unable to supply the Applicant, the Respondent is candid that they are documents that are not relevant to the case of the prosecution and are therefore not in the prosecution's custody. For that reason, the prosecution would not be in a position to furnish the Applicant with them. I need not list the documents referred to as they are already on the trial court record and within the knowledge of all parties to the trial.

It may be true that the documents referred to are in their nature related to the rial, but that fact, of itself, does not imply that they are documents that the prosecution will require for their case. The prosecution is not obliged to go out of its way to seek documents that are irrelevant to their case. As rightly conceded by both the Applicant and the Respondent that the subject documents are in the custody of the IEBC, if the Applicant would require them for her case, then she is at liberty to seek them from the IEBC. The trial court can also facilitate her to obtain them if she is intent on calling witnesses from IEBC in support of her defence. I am then inclined to concur with the learned trial magistrate that **Article 50(2)(j)** may be abused by parties if courts do not accord it its proper interpretation. It is also true and factual that this court must prevent the abuse of its process for the sake of executing justice. If the court were to allow that parties to a trial demand for any document that they think is relevant to a case but is not in possession of the prosecution, would not only be an abuse to the process of justice but would open an avalanche of situations that would delay the disposal of trials. The learned trial magistrate did not thus err in holding that courts would open a Pandora's Box if parties were allowed to be seeking irrelevant documents that would not be of any use to the case. The mere fact that a document broadly relates to a case does not mean that it would be relevant to the case or be used in the case.

In so far as adherence to Article 50(2)(c)(e)(j) and (k) of the Constitution vis-à-vis the application herein, the Respondent has done enough. It has facilitated the Applicant through the provision of all the documents it intends to rely on in its case. I am unable to hold that the prosecution has acted as an impediment to a fair trial or obstructed or hampered the Applicant from preparing for her defence. Having been furnished with the documents that the prosecution will rely on in the trial, the prosecution has afforded the Applicant all the facilities and means to enable her to combat the prosecution's case against her and to prepare for her defence. There was therefore no miscarriage of justice in the learned trail magistrate's finding that the prosecution was only obligated to furnish the documents that it would rely on in its case.

It is important at this point to emphasize that the Applicant is at liberty to oppose any adduction of evidence by the prosecution that has not been furnished to her as required by Article 50(2)(j). If indeed she is of the view that the prosecution has declined to furnish her with the subject documents, that would be to her advantage because the prosecution would not be in a position to seal its case against her without evidence that would support the charges facing her. Let me also emphasize that whether or not the subject documents were disclosed elsewhere in an election related case does not imply that they must be

disclosed in any case related to an election offence. Different materials for evidence are synonymous with a specific case. The prosecution in the trial facing the Applicant has chart out its case and properly organized its evidence. The Applicant cannot in that regard ask the court to compel the prosecution to fetch evidence that was produced in any other case for use in her case and is not relevant to their case. At the end of the day, what is paramount is whether the evidence that the prosecution will adduce supports their case. So far, this court thinks that the prosecution has adequately and reasonably facilitated the Applicant.

Finally, it is important to point out that there is no mandatory requirement that a Revision application should be in the form of a Petition. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are applied in the filing of Petitions. A Revision application is not a Petition and therefore the rules could not apply herein.

In the end, I find this application without merit and the same is dismissed with no orders on costs. The original trial court file shall forthwith be remitted to the Magistrate's court. There shall be a mention on 18th November, 2015 before the Chief Magistrate, Nairobi in the presence of the Applicant for purposes of fixing a hearing date. It is so ordered.

DATED and **DELIVERED** this **12th** day of **NOVEMBER, 2015.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss Soweto for the Applicant*
2. *Mr. Ondimu h/b for Warui Respondent.*