



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 71 OF 2010

ANNA WABILINDILA KASEKI.....APPLICANT

- VERSUS -

REPUBLIC.....RESPONDENT

JUDGMENT

The applicant moved the Court by Originating Notice of Motion dated and filed on **25th October, 2010**, which was brought under Articles 25 (d), 31 (c) and 50 (2) (c) and (j) of the Constitution of Kenya, 2010.

The application carried the following prayers:

(i) that, the Court do make a declaration that the applicant’s constitutional and fundamental rights under Articles 25 (d), 31 (c) and 50 (2) (c) and (j) of the Constitution have been violated: in that she has not, to-date, been supplied with any witness statements in Criminal Case No. 2617 of 2010, to enable her to prepare her defence — as a consequence of which she is denied the right to a fair trial/hearing;

(ii) that, the Court do declare that the prosecution of the applicant in Criminal Case No. 2617 of 2010, **Republic v. Anna Wabilindila Kaseki**, is illegal and a nullity, because despite taking her plea, the prosecution has admitted in open Court that it is still conducting investigations from its potential witnesses —which fact the applicant regards as a “*fishing expedition*” for evidence;

(iii) that, Mombasa Chief Magistrate’s Court Criminal Case No. 2617 of 2010, **Republic v. Anna Wabilindila Kaseki**, be terminated forthwith and the applicant freed from the prosecution process.

The application is founded on certain grounds:

- (a) that, the applicant's constitutional rights and fundamental freedoms have been violated and continue to be violated, even after she has taken plea in Criminal Case No. 2617 of 2010.
- (b) that, the trial Court has overlooked the applicant's preliminary objection founded on breaches of her constitutional rights which can only be redressed in the High Court;
- (c) that, the prosecution of the applicant in the lower Court is illegal and a nullity and should be terminated forthwith.

The applicant has sworn a supporting affidavit in which she deposes that she took the plea, in Criminal Case No. 2617 of 2010, on **26th August, 2010**, after which the hearing date was set as **6th September, 2010**; on that date her advocates sought the witness statements recorded; on that occasion, the matter was not heard, but hearing date was set for **18th October, 2010** and directions given that the witness statements be supplied to her advocates; as at **18th October, 2010** the said witness statements had not been supplied; so on that date, the applicant's advocates filed a preliminary objection — on the basis that her fundamental rights to fair hearing, as provided for in the Constitution, had been violated, since she was not in a position to prepare her defence; the prosecution had admitted in Court that delay in supplying witness statements was occasioned by on-going statement-taking from witnesses; the applicant believes the prosecution case to be *“oppressive, illegal, and [a] nullity”*.

On the occasion of hearing this matter, on **2nd November, 2010**, learned counsel, **Mr. Were** represented the applicant, while the State was represented by learned counsel, **Mr. Onserio**.

Mr. Were briefly presented his client's case, on the basis of the application as it reads on its face, and of the applicant's affidavit. Counsel asked the Court to declare the trial a nullity, for the reason that the prosecution was on a *“fishing expedition”* for evidence; it was urged that once the applicant took the plea, there could be no search for further evidence.

Mr. Onserio responded by conceding to the application at the very beginning: he said he had perused the proceedings, and on that basis, he urged that the investigations were deemed complete, at the time of laying charge, and so, no further statements could be recorded; and any further statements could only be taken on the basis of a Court order; moreover, counsel urged: *“the Court cannot order witness statements to be taken in the course of trial”*. **Mr. Onserio** urged that *“the applicant's constitutional rights were violated”*, and so *“the trial proceedings ought to be quashed”*; and he was in agreement that *“the immigration officer is on a fishing expedition”*. **Mr. Were** had *“nothing to add”*, given the submissions made for the State.

At the time of assigning a date for the delivery of judgment, this Court thus recorded:

“Even though both counsel support the application, I am convinced that this matter is too involved to lend itself to extempore orders”.

Although an important foundation had been laid for this matter, by invoking fundamental rights embedded in the **new Constitution**, learned counsel neither canvassed the principles of the Constitution, nor called in aid pertinent case law to buttress the applicant's case; they made only bare prayers for certain orders which, they must have assumed, were the natural course, as lighted by basic common sense. The approach of counsel in this matter raises problems for the judicial task: the Court has a duty to

give **reasons** for its decision, and to evince an appearance of judicial conscience, as the determinant of the outcome in a judgment. The expression of such a conscience conventionally takes the form of analytical treatment of the **evidence**; fundamental **argument** based on the relevant legal instruments; recourse to guiding or analogical **authority**; **logical reasoning**; and **judicial notice** of notorious scenarios.

I will start by briefly considering the relevant provisions of the Constitution.

It is not immediately clear how Article 25 (1) of the **Constitution of Kenya, 2010** relates to the instant application; for it relates to “*the right to an order of habeas corpus*”, which was not sought. It is the same with Article 31 (c) of the Constitution, which relates to the right of **privacy**.

Article 50 of the Constitution, however, is relevant, as it is concerned with rights to a **fair hearing**. Article 50 (2) (c) and (j) provides as follows:

“(2) Every accused person has the right to a fair trial, which includes the right —

.....
(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence

The charge brought against the applicant was in five counts, as follows:

1. *Obtaining a Kenya National Identity Card by false pretext, contrary to section 320 of the Penal Code (Cap. 63, Laws of Kenya);*
2. *Obtaining a Kenya Birth Certificate by false pretext, contrary to section 320 of the Penal Code;*
3. *Making a false declaration for procuring a passport contrary to section 321 of the Penal Code;*
4. *Misleading an Immigration Officer in the exercise of his/her power, contrary to section 13 (1) (b) of the Immigration Act (Cap. 172, Laws of Kenya);*
5. *Being unlawfully present in Kenya, contrary to section 13 (2) (c) as read with regulation 20 (3) of the Immigration Act.*

On **26th August, 2010** the applicant was formally charged in Court, and she pleaded “*not guilty*” to each of the five counts. The matter was again before the Court on **31st August, 2010** when the applicant was placed on bond, with a surety; and again on **6th September, 2010**, when the date **18th October, 2010** was set for hearing. On that occasion, the learned Magistrate ordered the prosecution to supply the applicant’s counsel with the recorded statements of witnesses. On **18th October, 2010** learned counsel who had a preliminary objection to raise, informed the Court that he had not been supplied with the statements of witnesses.

Why had **witness statements** not been supplied to counsel, as had been ordered by the Court? The prosecutor, **Mr. Migiro**, thus stated in Court:

“We are still doing the investigations and, in the meantime, the accused is still out on bond. We are not ready to proceed today”.

The trial Court set down the matter for the hearing of the applicant’s preliminary objection on **4th November, 2010**; but in the meantime, the applicant came before this Court on **2nd November, 2010** and, upon hearing her application, I ordered the proceedings in the lower Court to be held in abeyance.

The specific question falling for decision is whether the trial in Criminal Case No. 2617 of 2010 is being conducted **in accordance with the law**, and, if it is not, whether this Court should terminate the trial proceedings.

Article 50 (2) (c) and (j), clearly, protect an accused person’s trial-rights, and seeks **fair trial** for an accused. The accused must have adequate time and facilities to prepare his or her defence; and in aid of that object, the accused is to be “*informed in advance of the evidence the prosecution intends to rely on*”. This amounts to a **constitutional obligation** resting on the prosecutor, to collate all the evidence intended to be relied on, and to serve the same upon the accused, in time for the conduct of trial.

From the record, the trial process was already running, plea having been taken, and dates being assigned for the conduct of hearing; but the statements of witnesses had **not** been provided to the accused. The record also shows that such statements were not even **available**, for the reason that evidentiary statements were still **in the process** of being recorded.

If there was as yet no recorded evidence, then how was the prosecutor going to prosecute his case? And how was he going to comply with the safeguards for fair trial as set out in Article 50 (2) (j) of the Constitution? This was not possible; and therefore the trial was being conducted in a manner that contravened specific terms of the Constitution. The trial in question, as of today, still amounts to a **process in contravention of the Constitution**. By virtue of Article 165 (7) of the Constitution, which entrusts the High Court with supervisory jurisdiction over Subordinate Court proceedings, this Court has a pre-existing obligation to nullify the said trial proceedings. But, with specific reference to the application before the Court,

I hereby allow the prayers, and terminate the trial proceedings in the Chief Magistrate’s Court Criminal Case No 2617 of 2010, **Republic v. Anna Wabilindila Kaseki**.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 15th day of February, 2011.

J. B. OJWANG

JUDGE

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Accused/Applicant: **Mr. Were**

For the Prosecutor/Respondent: **Mr. Onserio**