REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 153 of 2004

REPUBLIC..... RESPONDENT

VERSUS

STOJANANOVIC MILAN alias ALLAN & ANOTHER.....ACCUSED

RULING

At the trial of the three accused, the prosecution sought on 3rd August and 4th August, 2006 to tender in evidence of electronic tape recording alleged to be a conversation between the accused No.1 (Stojananovic Milan) and a prosecution witness one Baktash Akasha (P.W.25)

The recording is said to have taken place on 12th August, 2003 at the offices of SSP Boniface Ngatia Eregi (P.W.26) at Mombasa Urban Police Station.

SSP Boniface Ngatia Eregi, (P.W.26), testimony so far as relevant is as follows:-

> *"Bakhash said that Milan had promised to call him at 1.00 p.m. on 12th August, 2002. At 1.00 p.m. I set my Sony Micro-wave cassette recorder in my office. Baktash Akasha and his wife were there and Inspector Kuria. The call came through. Baktash set his phone on a loud speaker mode so that we could hear the conversation. Inspector Kuria switched on the micro-cassette and recorded the conversation between Baktash and a person he identified as Stajananovic Milan. I had not heard that voice before. After recording I kept the voice cassette – Sony micro in my office safe which I locked…."*

It came to pass that SSPBoniface Ngatia Eregi (P.W.26) was transferred from Mombasa to Nairobi in November, 2003. It is his evidence that he handed over the tape to his successor, one SP Muiruri, who has so far not given evidence as to the circumstances of the tapes safe custody or handing over.

After the arrest of the 1st accused SSP Ngatia Eregi (P.W.26) sent PC Simiyu (P.W.24) to SP Muiruri the successor of SSP Ngatia to collect the tape and take it to his (Ngatia's) office in Nairobi Central Police Station on 24th November, 2004 - a period of about 1 year. Inspector Kuria prepared exhibit memo and forwarded the same together with tape and the recorder for the expert analysis of one Benjamin Mwaliko (P.W.18). That was 2 days before the accused persons were charged in Nairobi High Court Criminal Case No. 153/2004 - the current case.

On 3rd August, 2006 Mrs Ogoma applied for the recall of Benjamin Mwaliko (P.W.18) who had been stepped down to enable the prosecution to lay a basis for receiving Benjamin Mwaliko evidence. This, I later discovered on going through the evidence, to have been a repetition. Indeed I had granted the prosecution that order on 20.12.2005. The order was thus superfluous.

After that stage, the advocate for the 1st and 2nd accused, Prof. Muigai, re-newed his objection to the production of the tape. The earlier objection was on 2nd November, 2005 when Benjamin Mwaliko (P.W.18) was stepped down. The

defence through, Prof. Muigai adopted its earlier submissions in opposition to the reception of the tape and further submitted at length on other pertinent issues and reasons why the tape should not be admitted in evidence.

It was the contention of the defence that neither the testimony of Inspector Obadiah Kuria (P.W.21) nor the testimony of SSP Ngatia (P.W.26) is capable of establishing the link with regard to the chain of possession of the disputed tape.

That the evidence of Obadiah Kuria (P.W.21) and SSP Ngatia (P.W. 26) has shown that there is a missing link in the chain of possession of the disputed tape. One, the officer to whom SSP Ngatia (P.W.26) is alleged to have handed over the tape has not been called to testify to that effect. Two, there is a dispute as to the safe custody of the tape from November, 2003 when SSP Ngatia (P.W.26) was transferred from Mombasa to Nairobi in November, 2004 when the tape was taken by PC Simiyu (P.W.24) to SSP Ngatia in Nairobi before it was forwarded to Benjamin Mwaliko (P.W.18) for expert analysis. That officer who had the custody of the tape has not given evidence hence the evidence so far is hearsay. Reliance on the tape would therefore be unsafe and prejudicial. In this connection, I was referred to SHAKKAR ON EVIDENCE, Vol. 1 14th Edition at page 141 which states:

> *"A contemporaneous tape record if relevant is admissible provided the recorded conversation is relevant to the matter in issue and the identification of the voice and the accounting of the conversation is proved by eliminating the possibility of erasing the recorded tape."*

The defence conceded that when a statement is relevant, an accurate tape record of it is also relevant and admissible. The time and place and accuracy of the recording must be proved by competent witnesses. However, the defence contends that before receiving such evidence of a tape record the court must consider carefully the genuiness of the tape and should reflect upon it unless there is further independent reliable evidence.

Three, Benjamin Mwaliko made a transcript not from the original tape but the second tape which he himself manufactured. That the production of the transcript from the second tape destroys the originality of the original tape. Four, that while SSP Ngatia (P.W.26) evidence is that the recording was on 13th August, 2003, inspector Obadiah Kuria (P.W.21) evidence is that it was on 12th August, 2003.

In essence the transcript made from the second tape is inadmissible transcript in respect of the original tape. That to the extent that Benjamin Mwaliko (P.W.18) made a second tape from the original tape tampered with to that extend is the original tape in its present state and/or form is inadmissible, as it is tampered with even if the prosecution was able to explain the link in the chain in the handling of the original tape i.e. even if SP Muiruri is called to give evidence.

Mrs Ogoma, on behalf of the prosecution took the position that Benjamin Mwaliko (P.W.18) is an expert and his evidence would shed light as to the issue of whether the original cassette was tampered with during the recording of the second cassette. That in her view Mwaliko did not tamper with the original cassette. Mwaliko merely produced a second tape from the original with reduced ambient noise. That, that was for easy listening.

That in any event if the defence takes the view that the original was tempered with then the defence has a remedy under Section III of the Evidence Act to call an independent expert to rebut the evidence of the prosecution. That if all is said and done the process of production of a second tape and its effects on the original tape could only be explained by an expert such as Benjamin Mwaliko (PW 18) or a person who has similar experience or grounding.

That the original of the second tape cannot be suspect when PC Simiyu (P.W.24) testimony is that he was present when the original tape was removed from the safe of the successor of SSP Ngatia (P.W.26), one Muiruri who has not given evidence as yet.

That PC Simiyu's (P.W.21) evidence corroborates SSP Ngatia's (P.W.26) evidence that the tape, was produced from the safe where SSP Ngatia had placed it. Moreover PC Simiyu highlighted the markings on the envelope whose content he was told by Muiruri, as a tape.

That the prosecution has not closed its case. Hence the missing link in the chain of possession of the original cassette can still be addressed by the prosecution or the court on its own motion under Section 150 of the Evidence Act.

Last but not least that the prosecution contends that the original tape was in any event recorded after the death of Kamaldin Akasha (the deceased) and hence admissible under Section 10 of the Evidence Act.

Section 10 of the Evidence Act provides:-

> *"Where there is a reasonable ground to believe that two or more persons have conspired together to commit an*

offence or actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be conspiring, as well as for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

It is trite law that statements and actions referring to common intention is a relevant fact as against each of the persons believed to be conspiring. However the Evidence Act provides the manner in which such evidence may be received in court. That is my mission.

It appears to me that the defence contention is not that evidence relating to the conspiracy as may be contained in the disputed tape is not relevant but that the tape itself (and its contents) is inadmissible since doing so would be in violation of the Rules of Evidence.

The evidence of Benjamin Mwaliko (P.W.18) intended to be adduced consists of electronic tape recording of human voices alleged to be conversation between the accused and one of the witnesses to the prosecution one, Baktash Akasha (P.W.25).

It is contended by the defence among other things that the recording has been tempered with by Benjamin Mwaliko (P.W.18) and that the tape's custody is equally in doubt from November, 2003 – November, 2004, by reason of matters disclosed herein-above.

In considering this matter I have endeavoured to apply certain established principles. As a general rule any material which is relevant and of a probative value is admissible. See KURUMA SON OF KANIU –V- REPUBLIC [1955] 1 ALL E.R. 236. To the general rule that all relevant matters are admissible there are two exceptions:

i) One, stems from the former prohibition on an accused person from giving evidence on his own behalf. That is: oral or written statements that incriminate the accused and one made by him must be voluntary and are inadmissible if obtained by intimidation or inducement.

ii) Second, is founded on natural justice that is: a judge has a discretion to exclude a matter the prejudicial effect of which exceeds its prohibitive value.

In KURUMA's case (*supra*) GODDARD C.J. put it more widely when he said:

"in a criminal case the judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

REPUBLIC –V- MAQSUDALI, REPUBLIC –V- ASHIQ HUSSIEN [1965] 2 ALL E.R. is in point on the question of tape recorded evidence. The Judgment of the court clearly indicates that when dealing with tape recorded evidence particular care is required to contemplate that issues of truth or falsity may in some instances have to be considered as matters of admissibility.

In the most recent case of REPUBLIC –V- SENAT [1968] 52 Cr. Appl. Rep 282, while approving the admission of tape recorded evidence, *LORD PARKER* C.J. would appear to have kept open whether recording may have been tampered with or may have been wrongly transcribed.

In respect of this case, I have decided to limit my approach to one single issue which is within the province of admissibility. Just as in the case of photographs in a criminal trial *the original unretouched negatives have to be retained in strict custody of the photographer so in my view would the original tape recording.*

The burden of proving or establishing that a document is original document in a criminal burden of proof beyond reasonable doubt. In the circumstances of this case it appears to me that the prosecution has failed to establish that the tape is original. I say so for three reasons based on the evidence on record:

i) The date of recording in contradictory. While P.W.26 (SSP Ngatia) evidence that it was 13th August, 2003, Insp. Obadiah Kuria (P.W.21) says it was 12th August, 2003.

ii) SSP Ngatia kept the tape from 13th August, 2003 to November, 2003 when he was transferred from Mombasa to Nairobi, the person he handed over to the tape has not been called to shed light on the circumstances of the fact of safe custody thereof even when the prosecution was given time to do so. There is a missing link in the chain of possession of the tape to that extent. Nobody knows what happened to the tape between November 2003 and

November, 2004 – 1 year-when it was forwarded to SSP Ngatia (PW.26). Without evidence of safe custody reception of that tape in evidence would, in my view, be prejudicial to the accused persons.

iii) Benjamin Mwaliko (P.W.18) admitted in evidence that he reproduced a second tape from the original tape because the original was not clear. This makes the original tape inadmissible under Section 66 of the Evidence Act which provides:

66. Secondary evidence includes

(a) certified copies given under the provisions hereinafter contained.

(b) Copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(c) Copies made from on compared with the original:

(d) Counterparts of documents as against the parties who did not execute them;

(e) Oral accounts of the contents of a document given by some person who has himself seen it.

Moreover the transcript intended to be produced in evidence is the transcript of the second tape as opposed to the original tape. In the words of KILNER BROWN J. IN REPUBLIC –V- STEVENSON, REPUBLIC –V- HULSE AND REPUBLIC –V- WHITNEY [1971] ALL E.R. 678 at page 680 Letter E-G:

"Once the original has been impugned and sufficient details as to certain peculiarities in the preferred evidence have been examined in court, and once the situation is reached that it is likely that the preferred evidence is not the original is not the primary and best evidence - that seems to me to create a situation in which, whether a reasonable doubt or whether in a prima facie basic, the judge is left with no alternative but to reject the evidence".

I am aware that the prosecution has not closed its case at this moment in time. I am alive to the fact that the prosecution may wish to adduce further evidence. However this is not an adjournment application. If it were so, I would have considered it on its merits.

It was also urged that the Court on its own motion was obliged to invoke section 150 of the Evidence Act to call any relevant witnesses to buttress the evidence of admissibility of the tape. In my view it would be dangerous to do so since the prosecution has not closed its case. I would be misunderstood as being an extension of the prosecution. In a criminal trial the burden of proof is throughout on the prosecution. That burden never shifts except in few occasions when the relevant legislation says so.

In the premises I find and hold that in the disclosed circumstances, the tape in issue is not admissible in evidence. It is so ordered.

Dated and Delivered at Nairobi this 8th day of August, 2008.

N.R.O. OMBIJA

JUDGE