REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CRIMINAL APPL.ICATION NO 345 OF 2001

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA
A N D
IN THE MATTER OF THE CHIEF MAGISTRATES COURT – CRIMINAL CASE NUMBERS 849 OF 2001, 850 OF 2001, 851 OF 2001 AND 852 OF 2001

BETWEEN

GEORGE NGODHE JUMA ……..1ST APPLICANT

PETER OKOTH ALINGO …….2ND APPLICANT

SUSAN MUTHONI NYOIKE …….3RD APPLICANT

VERSUS

THE ATTORNEY-GENERAL ……..……RESPONDENT

J U D G M E N T

It does not really matter how one puts it, but what is raised on this reference, is the very important question as to the right of access to information where a person facing criminal charges before a court of competent jurisdiction requests pre-trial disclosure of the prosecution witnesses' statements – the accused requesting copies of statements from potential witnesses for the prosecution on the ground, basically, that he requires disclosure of such information for the protection of his rights.It is a question which is at the centre of the constitutional doctrine of the fundamental right to the protection of the law secured by, among other things, being afforded a fair hearing within a reasonable time by an independent and impartial court established by law, being given adequate time and facilities for the preparation of one's defence, and being afforded facilities to examine witnesses against one, in a criminal case. It is a doctrine entrenched in sections 70 and 77(1), (2) (c) and (e).

The genesis of this constitutional reference is the charging of the applicants with certain criminal offences, whereupn the applicants applied to the trial court, before the commencement of the trial, for orders that the prosecution do supply to the applicants copies of the statements made by the would-be prosecution witnesses, and copies of exhibits on which the prosecution will rely at the trial – in particular, they want to be furnished with copies of exhibits taken from them by the police during criminal investigations.The trial court turned down this application, and eventually the applicants have come to this court in this reference, complaining that their rights under sections 70, 77(1) and 77(2) of the

Constitution of Kenya are in danger of being violated by the applicants not being allowed to have access to the prosecution witnesses' statements and exhibits. Those provisions say that for purposes of a fair hearing and within a reasonable time, a person who is charged with a criminal offence is to be given adequate time and facilities for the preparation of his defence, and he is to be afforded facilities to examine witnesses called by the prosecution. The issue for our determination centred on section 77(2) paragraphs (c) and (e), and we were to state the constitutional meaning and extent of a fair hearing within a reasonable time, and giving an accused person adequate time and facilities to prepare his defence, and whether such facilities include allowing an accused person to obtain copies of statements of witnesses to be called by the prosecution, and copies of exhibits.

The applicants' case is that an accused person is entitled to the prosecution witnesses' statements and exhibits in copy form, which the prosecution intends to rely on at the trial. They say that this right is subject only to rules governing privileged communication. They say that as accused persons, they will not be able to prepare for their defence if they are not availed these facilities.It is not, they say, unusual to furnish the accused with copies of statements of prosecution witnesses before trial. For instance, they say, this is done in proceedings under the Armed Forces Act (cap 199); and, they add, in the civil process discovery and inspection devices are employed to aid the other side to know the case of his opponent in advance of the hearing, without any harm. Keeping one's case secret until at the trial is a thing of the past and serves little or no useful purpose to-day. On these arguments we were asked to state what it is that amounts to affording an accused person adequate facilities to prepare his defence.

The issue had arisen before the trial court which denied the applicants these very requests, on two grounds, that the practice in subordinate courts does not allow such access, and that police have standing orders (Standing Order No 32) according to which an accused person is not allowed to have access to police files. The State, in opposing the applicants' quest for the desired information, says that any facility to which an accused person is entitled must be expressly provided for in the Constitution of Kenya or in a particular statute, and can be availed only when the trial is underway and going on, but not before the trial begins, except in cases tried in the High Court only.

In this connection, the State said that the only facilities to which an accused is entitled are the summoning of a witness, or being allowed to engage a lawyer of his own choice as provided for in section 77(2)(e) of the Constitution of Kenya, but at his own expense, and again only in the course of a trial but not before the trial begins. In the case of statements of the witnesses for the prosecution, the State argued that such statements are not to be availed to an accused person until after the witness concerned has testified on it. The only other facilities which the State says are envisaged by the Constitution are those which accord an accused the procedure where a case before a subordinate court proves unsuitable for summary trial; in which case under section 220 of the Criminal Procedure Code (cap 75), you apply to him the provisions relating to the committal of accused persons for trial before the High Court.The other are the facilities in relation to committal documents, under section 231 of the same Code, by which it is provided that not less than 14 days before the date fixed for committal proceedings, the prosecutor shall furnish the accused person or his advocate with one set of the committal documents. It was said that since there is no provision in the Criminal Procedure Code for the equivalent of discovery in the civil process, there is no power to order the prosecution to produce statements of prosecution witnesses and exhibit documents: there is no rule of disclosure expressly provided for in Kenya with regard to the criminal process in subordinate courts.

Those were the arguments on both sides, setting out and supporting the case of each party.

The relevant provisions of the Constitution of Kenya, which are under focus on this reference are in the following words

> : 77(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence –

(c) shall be given adequate time and facilities for the preparation of his defence … … …

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

What troubles the parties in this reference is the meaning to be given to these provisions. We do not find any sensible difficulty at all with regard to the meaning and intention of these provisions, and their effect on the instant reference. We begin with the expression in section 77(1), "a fair hearing" or trial.

It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with fundamental principles of justice and due process of law of which a party has had reasonable notice as to the time, place, and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford, and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis for the adverse view of him and for the judgment, a right to argue that a decision be made in accordance with the law and evidence.

The adjective "fair" describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done it is imperative to weigh the interests of the parties alike for both, and make an estimate of what is reciprocally just. The processing and hearing or trial of a case must be free from prejudice, favouritism, and self-interest; and the court must be detached, unbiased, even- handed, just, disinterested, balanced, upright and square. There must be shown all the qualities of impartiality and honesty. So, a fair hearing is one which has the following minimum elements present. It must be one:

1. where the accused's legal rights are safeguard and respected by law;

2. where a lawyer of the accused's choice looks after his defence unhindered;

3. where there is compulsory attendance of witnesses, if need be;

4. where allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one's defence;

5. wherein an accused person's witnesses, himself, or his lawyer, are not intimidated or obstructed in any improper manner;

6. wherein no undue advantage is taken by the prosecutor or anyone else, by reason of technicality or employment of a statute as an engine of injustice;

7. wherein witnesses are permitted to testify under rules of court within proper bounds of judicial discretion, and under the law governing testimony of witnesses;

8. where litigation is open, justice done, and justice seen done by those who have eyes to see, free from secrecy, mystery and the mystique.

And, as section 77(1) itself requires, a fair trial having the above minimum qualities, must be undertaken, prosecuted and concluded within a reasonable time, before and by an independent and impartial court established by law. These aspects do not arise for consideration on the present reference, and we are mentioning them only for completeness of the interpretation of subsection (1) of section 77.

Sub-section (2), paragraphs (c) and (e) of section 77 of the Constitution of Kenya is really an elaboration

on sub-section (1) and is an amplication of what a fair hearing or trial of a case ought to be. The subsection requires, in essence, that for a hearing to be fair, a person charged with a criminal offence must be afforded, among other things, “facilities for the preparation of his defence” and “facilities to examine … the witnesses called by the prosecution … and to obtain the attendance and carry out the examination of witnesses to testify on his behalf”. He must be given and afforded the facilities to do those things. In practical terms this constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witness called by prosecution, and securing witnesses to testify on his behalf.He must be given and afforded that which aids or makes easier for him to defend himself if he chooses to contest the charge. In general, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case.

We say so because we believe that the framers of our Constitution intended the expression “facilities” in this section to be understood in its ordinary everyday meaning, free from any technicality and artificial bendings of that word. In its ordinary connotation, that word means the resources, conveniences or means which make it easier to achieve a purpose; and unimpeded opportunity for doing something; favourable conditions for the easier performance of something; means or opportunities that render anything readily possible. Its verb is to “facilitate”, and means to render easy or easier the performance or doing of something to attain a result; to promote, help forward; to assist, aid or lessen the labour of one; to make less difficult; or to free from difficulty or impediment.

That is what the Constitution of Kenya requires, in mandatory terms, the court to do in every case. The accused must be given and afforded those opportunities and means, so that the prosecution does not gain an underserved or unfair advantage over the accused; and so that the accused is not impeded in any manner and suffer unfair disadvantage and prejudice in preparing his defence, confronting his accusers, and arming himself in his defence; and so that no miscarriage of justice is occasioned.

Therefore, in our considered judgment, the provisions of the Constitution of Kenya under consideration can have life and practical meaning only if accused persons are provided with copies of statements made to the police by persons who will or may be called to testify as witnesses for the prosecution, as well as copies of exhibits which are to be offered in evidence for the prosecution.This is not a novel idea. It was well-known and approved in this country under the Emergency Regulations, and it was never found to prejudice the prosecution at all. See Kariuki Kamau and others v Reginam (1954), 21 EACA 203, where this practice was approved of by the Court of Appeal for Eastern Africa. This is only a recognition of the accused’s elementary right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice. No authority is needed for such a proposition. On the broad basis of this right, an accused person is plainly entitled, (subject to statutory limitations on disclosure, and public interest immunity) to be supplied in advance with copies of statements to the police by persons to be called as witnesses for the prosecution, and those who prepare and conduct prosecutions owe a duty to the court to ensure that all relevant evidence of help is either led by them or made available to the accused reasonably early.

In an open and democratic society based on freedom and equality, with the Rule of Law as its ultimate defender, such as ours, the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type, courts cannot give approval to trials by ambush, and in criminal litigation the courts cannot adopt a practice under which an accused person will be ambushed. Subject to the rights of every person entrenched in the Constitution of Kenya, including the presumption of innocence until proved guilty beyond reasonable doubt, the fundamental right to a fair hearing by its nature requires that there be equality between the contestants in litigation.

There can be no true equality if the legal process allows one party to withhold material information from his adversary, without a just cause or peculiar circumstances of the case. There are very compelling

reasons to support our conclusion that an accused person should be informed well in advance of a hearing, with the evidence against him. The statements given to the prosecution by witnesses, and the exhibits, if made available to the accused will enable him well before his appearance in the court for trial, to have the fullest opportunity to prepare for trial. By making a complete disclosure of the prosecution case, the accused gets to know the whole of the material that will be put against him: this is one important function of the committal procedure for cases to be tried before the High Court, and it is useful.

Likewise, a preparatory discovery in anticipation of a trial, has much to be said in its favour. In the case unsophisticated or uneducated accused persons and witnesses who are often beyond reach by telephone or postal delivery and arrive at court only on the morning of the hearing or trial, they suffer a great handicap if they had not seen before hand the prosecution's case against them. Each witness for the prosecution has to be crossexamined virtually immediately and without any meaningful opportunity to prepare. Without knowing in advance what the next witness will say, the accused or his advocate is deprived of the opportunity to confront a witness with the evidence to be given by witnesses called later. In addition, the accused is generally unable to conduct any sort of investigation in order to determine, for example, whether an identification witness was actually at the scene, or has poor eyesight, or was sober at the time of the incident, because the accused is given no idea what any particular witness might be called to testify.These are some of the serious handicaps on the accused under a procedure, which denies pre-trial disclosure.

The fullest possible pre-trial access to information held by or in the control of the prosecution helps the accused or his advocate to determine precisely what case the accused has to meet, to prepare for crossexamination, to determine what witnesses are available to him, to make further inquiries if necessary and generally to explore such other avenues as may be available to him. Obviously, the constitutional right to be represented by a lawyer of one's choice would be meaningless if it did not mean informed representation. Moreover, an accused's right to adduce and challenge evidence cannot be exercised properly unless he can determine from the statements and exhibits of the prosecution's witnesses whether there are witnesses favourable to him, who can be either those who had already made statements to the police or others who were mentioned in such statements.On looking at a statement made to the police, if the prosecution have not called the maker of that statement as a prosecution witness, the accused may decide whether he should call him.

Section 77 of the Constitution of Kenya guarantees every accused person a fair hearing. A trial in a criminal case is in the nature of a contest. A fair hearing requires, by its nature, equality between the contestants, subject to the supreme principles of criminal jurisprudence, requiring the presumption of innocence and that the guilt of the accused be proved beyond any reasonable doubt. When one of the contestants has no pre-trial access to the statements taken by the police from potential witnesses the contest can be neither equal nor fair.

In addition, given the undoubted inequality as between the prosecution and the accused in many cases, like with regard to access to forensic scientists, it is of paramount importance that the duty of disclosure should be appreciated by those who prosecute and defend in criminal cases.

We are fully aware that in the adversary process of adjudication the element of surprise was formerly accepted and delighted in as a great weapon in the arsenal of the adversaries. But in the civil process this aspect has long since disappeared, and full discovery is a familiar feature of civil practice. This change resulted from acceptance of the principle that justice is better served when the element of surprise is eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.It is, therefore, surprising that in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system can be supported to linger on; and it is even more surprising that there should be resistance to any extent of discovery in criminal practice. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.

It is not easy to justify the position which clings to the notion that the prosecution does not have a legal

duty to disclose all relevant information. Opponents to such disclosure sometimes say that the duty should be reciprocal, so that the accused, too, should disclose his case before trial. This will be considered when an occasion presents itself for its consideration. It does not arise in the present reference before us. But while it deserves consideration in the future, it is not a valid reason for absolving the prosecution of its duty. In opposing disclosure, however, sight is always lost of the fundamental difference in the respective roles of the prosecution and the defence.Always remember, that the purpose of a criminal prosecution is not to obtain a conviction: it is to lay before the court what the State considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing: his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness, of judicial proceedings.

The fruits of the investigation which are in the possession of the prosecution counsel are not the property of the prosecution for use in securing a conviction: it is the property of the public to be used to ensure that justice is done. The public pays for the State to carry out the investigations. The accused, too, as a tax payer meets the expenses of the police investigations. In contrast, the accused has no obligation to assist the prosecution and is entitled to assume a purely adversarial role towards the prosecution. He is presumed to be innocent in the first place. Why should he help in being investigated? The absence of a duty to disclose on his part can, therefore, be justified as being consistent with this role and presumption of innocence.

It is sometimes feared that a general duty to disclose all relevant information would impose onerous new obligations on the prosecutors resulting in increased delays in bringing accused persons to trial. But this fear would be offset by the time saved which is now spent resolving disputes such as this one surrounding the present reference, and dealing with matters that take the accused by surprise. In the latter case adjournments are frequently the result of non-disclosure and more time is taken by a defence advocate who is not prepared. Indeed, much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening of preliminary hearings. Proper disclosure of evidence of great force may cause the accused to plead guilty, and this would be to the advantage both of the administration of justice and of the accused.

Other opponents of disclosure advance as a ground for their opposition, that the material disclosed will be used to enable the accused to tailor his evidence to conform with information in the possession of the prosecution; e.g a witness may change his testimony to conform with a previous statement given to the police. It is said that the accused with knowledge of the contents of the statements of the prosecution witnesses will falsely adjust his own evidence or his case in order to escape conviction. But this is not a valid fear. Disclosure is not to help liars to tell more convincing lies, but to help even one innocent person go free. There is nothing wrong in a witness refreshing his memory from a previous statement or document.The witness may even change his evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The search for truth is advanced rather than retarded by disclosure of all relevant material.

Moreover, the reasoning that the accused will falsely adjust his own evidence or his own case to escape conviction assumes in advance of the trial that the accused is guilty of the offence charged and is likely to act dishonestly. Such reasoning offends against the principle contained in section 77(2)(a) of the Constitution of Kenya which vests the accused with the right to be presumed innocent until he is proved or has pleaded guilty.

A matter which alarms opponents of a broad duty of disclosure, is the fear that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. But protection of the identity of informers is well covered by separate rules relating to informer privilege and exceptions thereto (see Marks v Beyfus (1890) 25 QBD 494), and any rules with respect to disclosure would be subject to this and other rules of immunity. There is the overriding concern that failure to disclose

impedes the ability of the accused to make full answer and defence. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted; and the erosion of this right due to non-disclosure may lead to the conviction and incarceration of an innocent person. Anything less than complete disclosure by the prosecution falls short of decency and fair play.

An accused person needs to know in advance the case which will be made against him if he is to have a proper opportunity of giving his answer to that case to the best of his ability. Failure to disclose statements and/or exhibits in advance, and their use at the trial may lead to material irregularity in the course of the trial. We find arguments against the existence of a duty to disclose before trial groundless while those in favour are overwhelming. We, therefore, hold that there is a general duty on the part of the State to disclose to the accused all material which is known or possessed and which ought to be disclosed, and it proposes to use at the trial and especially all evidence which may assist the accused even if the prosecution does not propose to adduce it.

At the same time, however, we hold that this obligation to disclose is not absolute. It is subject to the discretion of the trial court, both with regard to denying disclosure and to the timing of disclosure. The discretion must be exercised judicially: there must be respect for sound principles, the law and certain facts shown to be present. Thus, for example, there is a discretion not to allow disclosure:

> (1) where there are grounds for fearing that disclosing a statement might lead to an attempt being improperly made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him; or
>
> (2) where the statement is sensitive and for this reason it is not in the public interest to disclose it, e.g. (a) one dealing with matters of national security,
>
> (b) one disclosing the identity of an informant and there are good reasons for fearing that disclosure of his identity would put him or his family in danger,
>
> (c) one by, or disclosing the identity of a witness who might be in danger of assault or intimidation if his identity is known
>
> (d) one which contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect,
>
> (e) one disclosing some unus (f) ual form of surveillance or method of detecting crime,
>
> (g) one containing details of private delicacy to the maker and/or might create risk of domestic strife.

Moreover, disclosable matter is, and the obligation to disclose, only arises in relation to, evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise in the course of the trial.

In many cases there will be voluntary disclosure; but in the event of resistance, the trial court will have to resolve the issue. If difficulties arise in a particular case, the trial court must be the final judge, with a right of appeal unimpaired. Each case will depend on its own peculiarities, and what we have listed above are examples only, and do not form an exclusive and exhaustive list of what may be considered by the trial court. In broad terms, the trial court should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of state security and other good reasons like the security or safety of witnesses or persons who have supplied information to the investigation, irrelevance and interference with the investigation.

We hold that the State is obliged to provide an accused person with copies of witness statements and

relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence. In this connection, it is for the prosecution to establish special circumstances upon which any limitation of the right of access may be based. The State must adduce evidence in individual cases to establish precisely what documents or statements or persons are to be protected and the basis for such limitation. In other words, the onus of establishing the justification for a limitation of any of the fundamental rights guaranteed by the protection of the law provisions of the Constitution must be on the party alleging such justification to derogate from the Constitutional guarantees.

In this case we were not told precisely what statements and exhibits were in question. We order that the prosecution shall disclose to the accused all the statements made by the prosecution witnesses, and the exhibits; but if it has any objection to disclosing any of them, it shall indicate to the accused what is objected to and the reason for such objection. If upon receiving such objection the accused shall still want disclosure of what is objected to, the accused will be at liberty to ask the trial court to determine the objection and direct and order accordingly, giving reasons for deciding the matter one way or the other. In reaching a decision, the trial court shall be guided by the principles which we have set out in this judgment, and any relevant law.

Accordingly, we allow the reference, and direct a trial at which the statements and exhibits shall be disclosed to the accused before the commencement of the trial, unless there shall be a valid ground for nondisclosure. Any statutory provision in any legislation, or any police standing orders or other instrument which tend to limit this fundamental right guaranteed by the constitutional edicts which ensure the protection of the law, would be contrary to, and contravene, the Constitution of Kenya, and shall, to the extent of the inconsistency with the Constitution, be void.

Having said the foregoing based on broad constitutional principles, we believe that in allowing extensive but controlled rights of access to information in the police files and exhibits, no prejudice will be occasioned to any party. If anything, the ends of justice shall surely be done and justice will be reasonably expedited.

We so order

Signed and dated by us at Nairobi this 13th day of February, 2003.

A MBOGHOLI MSAGHA

JUDGE

R KULOBA

JUDGE

13.2.2003