



**Republic v Lewis (Criminal Case E077 of 2021)
[2024] KEHC 738 (KLR) (Crim) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E077 OF 2021
K KIMONDO, J
FEBRUARY 2, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MSUYA NGOLO LEWIS ACCUSED

RULING

1. The Republic prays for an order “allowing the reliance upon and production of secondary evidence scheduled for further hearing on 27th July 2023”. The Notice of Motion is dated 31st May 2023 and predicated upon the affidavit of James Njuru, an investigator working for the Independent Policing Oversight Authority (hereafter IPOA).
2. The application is opposed by the accused through his replying affidavit sworn on 16th October 2023.
3. The principal grounds urged are that IPOA’s original investigation file and its duplicate as well as all original witness statements and exhibits were stolen from their records office. The documents were in the custody of Norbert Opeyo. He and two alleged accomplices have since been charged for theft by servant in Milimani Chief Magistrates Court Criminal Case No. E620 of 2021. The matter is still pending.
4. It is contended that unless secondary evidence is allowed, the Republic will be hamstrung at the trial. It was also argued that the accused will not suffer any undue prejudice.
5. The retort by the accused is that he should not suffer prejudice through admission of questionable documents due to the acts of a third party. He avers that is no explanation for the delay in certifying the documents from Kariobangi Police Station alluded to in paragraph 15 of the supporting affidavit. Further that the accused was not served in advance with the arms movement register, the list of officers



- involved in the shooting incident, duty roster for the week ending 18th November 2017 or that for officers assigned SPIV duties as at 13th November 2017.
6. The accused further avers that at the hearing that took place on 27th July 2023, some of the documents referred to had not been properly certified, dated and sealed in contravention of section 80 of the *Evidence Act*. In his view, it violates his right to a fair trial guaranteed in Article 50 of the *Constitution*.
 7. On 25th January 2024, I heard further submissions from learned counsel for the Republic, Ms. Kigira, and learned counsel for the accused, Mr. Mabeya.
 8. I must say at the outset that the draftsmanship of the motion is inelegant. For instance, to grant the above prayer as pleaded in such general terms would be to give a blank cheque to the prosecution. The prejudice to the accused or a fair trial is self-evident. The better course would have been to seek leave of the court to rely on and adduce specified documents. To be fair to the prosecutor, the supporting affidavit lists those documents at paragraphs 14 and 15. A relief could thus have easily been couched with specific reference to those items.
 9. The other important matter is that the date of 27th July 2023 has passed. Yet the relief was meant to serve the hearing for that day. Again to be fair to the prosecutor, the Republic sought to produce a number of those documents on that date through oral applications that were often contested by the defence. For instance, PW9, Corporal Jacinta Wanjugu, was stood down over an objection to the production of a copy of the arms movement register. I ruled at that time that the matter would be resolved together with the present motion.
 10. So much so that parts of the motion remain live for determination. Furthermore, Article 159 of the *Constitution* implores the court to dispense justice fairly and without undue regard to technicalities.
 11. Secondary evidence is still good evidence. Section 64 of the *Evidence Act* expressly states that the contents of documents may be proved either by primary or by secondary evidence. It is also important to keep in mind the difference between admission of such secondary evidence and the weight that will finally be attached to it by the court. The veracity of such evidence will be determined by many other factors including any defence by an accused person.
 12. From the uncontroverted averments of James Njuru above, I find that the original file number IPOA/INV/xxxx/2017 is lost. I have used that last word carefully in view of the criminal case pending at the Chief Magistrates Court. It is also averred that the duplicate copy of the file was recovered from the said Norbert Opeyo. Again I say that very carefully. What it also means is that the original documents cannot be produced within a reasonable time.
 13. It follows that the witnesses leading evidence of the contents of the duplicate IPOA file or certified copies of it can do so under sections 68 (1) (c). Such secondary evidence is admissible under subsection 2 (a) thereof.
 14. That has now laid the general basis for admission of the secondary evidence and I so find. Furthermore, and by dint of section 81 of the *Evidence Act*, certified copies of public documents may be produced as proof of the contents of the documents they purport to be copies. However, it will be up to specific witnesses to seek to produce specific secondary evidence and to show their competence to do so.
 15. That is important because firstly, the Republic may not manage to call all the witnesses to produce the documents listed in paragraph 14 of the deposition. Secondly, the certified copies would still require to reasonably pass the tests in section 80 of the *Evidence Act*. Thirdly, the Republic would still be required to supply such evidence to the defence in advance as required by Article 50 (2) of the *Constitution*. In essence, the accused will be entitled to challenge admissibility and for the court to rule specifically on



such challenges. In that manner, the accused's right to a fair trial guaranteed by the Constitution would not be compromised.

16. I have also seen a formal notice by the DPP addressed to the defence counsel of the intention to tender 11 copies of pieces of secondary evidence under sections 68 and 69 of the Evidence Act. It seems to me to have been served out of an abundance of caution. I say so because it is superfluous as there is no evidence or allegation at the moment that the original document is in the hands of the accused.
17. Turning now to the evidence of PW9, Corporal Jacinta Wanjugu, who was stood down, it is clear from her evidence in chief that she is the one who made the entries in the primary arms register that is now lost. The certified copy she now seeks to produce is a copy of the document she made. It falls squarely under section 66 (e) of the Evidence Act as an oral account of the contents of a document that she has herself seen. For the additional reasons in the preceding paragraphs, the objection raised by learned counsel, Mr. Mabeya, is thus overruled.
18. The witness is hereby allowed to produce the certified copy of the arms movement book/register (MFI 10). She may also produce the duty roster for the week ending 18th November 2017 (MFI 8); and, the list of the officers assigned SPIV duties as at 13th November 2017 (MFI 9). All those documents were marked for identification during her evidence in chief. The witness will accordingly be recalled to the stand for that purpose and for further examination.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

The accused.

Ms. Kigira for the Republic instructed by the office of the Director of Public prosecutions.

Ms. Omwoyo holding brief for Mr. Omari for the accused instructed by Danstan Omari & Associates Advocates.

Mr. E. Ombuna, Court Assistant.

