



**Republic v Ali & 2 others (Criminal Revision E055 of 2023)
[2024] KEHC 10969 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E055 OF 2023
DO CHEPKWONY, J
SEPTEMBER 20, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

UNKNOWN ALIAS MIRE ABDULAHI ALI 1ST ACCUSED

HUSSEIN MOHAMED ABDILLE ALI 2ND ACCUSED

MOHAMED ABDI ALI 3RD ACCUSED

RULING

1. By way of background, the Respondent/Accused persons are facing various charges under the *Prevention of Terrorism Act*, related to the terrorist attack that occurred at the Dusit D2 Hotel Complex on 15th January, 2019. The Respondents were arrested on 27th January, 2019, 26th January, 2019 and 19th April, 2019 respectively and initially charged at the Chief Magistrate Court at Milimani Law Courts vide NCCR. NO.474 OF 2019. Thereafter, vide a Miscellaneous *Criminal Application No.E225 of 2021*, the case was transferred to the Chief Magistrate’s Court at Kahawa Law Courts.
2. The prosecution proceeded with the hearing of their case and closed their case after calling forty-five (45) witnesses on 22nd February, 2023. Pursuant to trial court’s directions, parties filed written submission on whether or not the prosecution has established a prima-facie case to warrant the Respondent/Accuseds to be placed on defence.
3. However, on 28th November, 2022, PW38, Chief Inspector Joseph Kolum sought to introduce several pieces of electronic evidence which had been obtained from the forensic examination of mobile phones which had been seized from the Respondents/Accused persons and marked for identification as exhibits;
 - a. MFI 166A – Nokia Mobile T1030



- b. MFI 166B – Report extracted from MFI 166A.
 - c. MFI 166C – Exhibit Memo for the MFI 166A.
 - d. MFI 166D – Certificate under Section 106 of the *Evidence Act*.
 - e. MFI 167A – Nokia TA1010
 - f. MFI 167B – Exhibit Memo for MFI 167A
 - g. MFI 167C – Certificate under Section 106 of the *Evidence Act*.
 - h. MFI 168 – Facebook Account for Mohamed Yare.
 - i. MFI 169A – Extract of Report of IP Address 4120710986 alleged to have been extended by the 1st accused to Jillib in Somalia.
 - j. MFI 169B – Memo for MFI 169A
 - k. MFI 169C – Certificate under Section 106 of the *Evidence Act*.
 - l. MFI 170A – Facebook Account for Smple Wes which p38 Linked to Mobile No.0708154070 allegedly used by the 2nd accused.
 - m. MFI 170B – Certificate under Section 106 of the *Evidence Act*.
 - n. MFI 172A – Mobile phone make Infinix X554.
 - o. MFI 172B – Report extracted from MFI 171A.
 - p. MFI 172C – Certificate under Section 106 of the *Evidence Act*.
4. Mr. Chacha, counsel for the defence objected to the production and use of the said evidence on the ground that the forensic examination had been conducted without obtaining a search warrant and without basis contrary to the provisions of Article 50(4) of *the Constitution* and Sections 118 and 121 of the Criminal Procedure Code. According to Mr. Chacha, the evidence had been obtained illegally thus was inadmissible under Article 50(4) of *the Constitution*.
 5. In response to the argument by Mr. Chacha, counsel for the Respondent/accused, Mr. Kiarie, counsel for the prosecution conceded that indeed the prosecution had not obtained a court order to warrant the exploitation of the electronic gadgets. However, he went on to submit that the Respondents/accused had voluntarily submitted the mobile phones to the investigators and gave out their passwords without any form of coercion and this is what led to their arrest so that the issue of illegally obtained evidence could not arise.
 6. He also pointed out that under Sections 25 of the Criminal Procedure Code and Section 31 of the *Prevention of Terrorism Act* (POTA), the police officers have the power to search an arrested person as well as the items found on them as long as evidence of imminent danger or harm is demonstrated. In rejoinder, counsel for the defence (Respondents) submitted that their objection was based on the admissibility and not credibility of the evidence.
 7. Upon considering the application, objection and rival submissions by counsel for the parties, in determining the issue of what the place of illegally obtained evidence in criminal cases in Kenya, the trial court in its ruling delivered on 21st February, 2023, considered the statute and case law on the issue and declined the application by the Investigating Officer, PW38 to introduce items and or documents marked as MFI-166 A, B, C, and D, MFI-167 A, B, and C, MFI-168, MFI-169 A, B and C and MFI-172



- A and B as evidence since it had been obtained illegally and thus infringed on the Respondents' right to privacy.
8. Dissatisfied with the said ruling, the Office of the Director of Public Prosecutions (ODPP) moved the High Court by way of a Notice of Motion application dated 4th April, 2023 and filed under Certificate of Urgency.
 9. Vide a Notice of Motion application dated 4th April, 2023, the prosecution/ Applicant seeks the following orders:-
 - a. Spent.
 - b. That the decision by the Chief Magistrate's Court, Kahawa in Criminal Case No.3 of 2021 delivered on the 21st day of February, 2023 where the trial court ruled that PW38 will not adduce evidence pursuant to forensic examination of the accused's/Respondent mobile phones be set aside and or revised.
 - c. Spent.
 - d. Any further orders this Honourable Court may deem fit.
 10. The application is premised on the grounds set out on its face and affidavit in support sworn by Michael Sang, Senior Assistant Director of Public Prosecutor on 4th April, 2023. According to the prosecution's/Applicant's counsel, the decision by the Trial Court vide its ruling delivered on 21st February, 2023 was incorrect, and or improper hence legally erroneous. It is the Applicant's argument that the decision has the effect of putting the National Security at risk and or adversely affect ongoing criminal trials in other court.
 11. It is the Applicant's/Prosecution's contention that the Respondent/Accused persons are facing serious charges that attract stiff sentences hence the need to ensure attendance is on record for justice to be seen as done, this being a matter of great public interest that touches on National Security.
 12. The Applicant/Prosecution seeks this Court to exercise its unlimited original and supervisory jurisdiction alongside its discretionary power as provided for under Section 362 of the Criminal Procedure Code and call for the lower court record for examination of the impugned order on its correctness, legality and propriety.
 13. The application for revision of the order issued on 21st February, 2023 is opposed by the Respondent/accused persons vide a Notice of Preliminary Objection and Grounds of Opposition filed by the defence counsel, Mr. Chacha Mwita on 26th April, 2023. It is the counsel's contention that the decision that is being challenged was penned off by a Judge and not a Magistrate, hence this Court lacks jurisdiction to hear and determine the same.
 14. According to the Respondents/accused persons' counsel, the Applicants are limiting their remedy to an appeal since they have not demonstrated any incorrectness, illegality and or impropriety in the decision in question to call for a revision of the same. He further avers that apart from making reference to National Security, the Applicant has not shown any other basis or demonstrated any exigent and or special circumstances that would justify the violation of privacy of an individual so as to align the evidence to the dictates of Article 50(4) of *the Constitution* of Kenya 2010, in terms of fair trial and due administration of justice.
 15. When the matter was placed before this Court for directions, the first issue that arose for and which this Court found should be determined first was the objection on the jurisdiction of this Court to hear and determine the application for revision given that it is a pure point of law and its consideration would



determine whether this Court can exercise an oversight mandate over the subject ruling delivered on 21st February, 2023.

16. This Court took note of the ruling delivered on 21st February, 2023 having been penned of by Hon. Diana Kavedza as Judge. The court also appreciated that the Honourable Judge was appointed as Judge of the High Court while serving as a Chief Magistrate at Kahawa Law Courts and was presiding over the Kahawa Chief Magistrate's Criminal Case No.3 of 2021 among other cases. It further took note and appreciated that the Honourable Judge was granted leave by the Honourable Chief Justice to continue with her Magistrial duties so as to clear and finalize this case.
17. The dilemma that then arose was whether by Honourable Justice Kavedza penning off the ruling delivered on 21st February, 2023 as a Judge, this Court had been divested of its supervisory jurisdiction to hear and determine the application as bestowed upon it under Article 162(4) of *the Constitution*.
18. Out of abundance of caution, and having considered that the application before court is calling upon it to invoke its supervisory power under Articles 156(6) and (7) of *the Constitution* as read with Section 362 and 364 (1) of the Criminal Procedure Code, this Court noted that the court being a High Court, its supervisory authority is legally limited to courts subordinate to it and not courts of superior or of equal jurisdiction to it. Therefore, having noted that the ruling issued on 21st February, 2023 had been issued and penned of by a judge and when the matter is still properly pending before the Magistrates' court, this Court found it supervisory and or appellate jurisdiction compromised. The Court then directed that the matter be placed before the Honourable Justice D. Kavedza for directions on her jurisdiction in Kahawa Chief Magistrate's Criminal Case No.3 of 2021.
19. Subsequently, the matter was placed before Hon. D. Kavedza on 29th August, 2024 whereby she acknowledged the error and corrected the same by indicating that she was handling the said matter in exercise of her magisterial jurisdiction pursuant to the consent of the parties in the said matter and with authority conferred upon her by the Hon. Chief Justice and not in the capacity of a Judge of the High Court. With this acknowledgement, it is therefore apparent that the decision issued on 21st February, 2023 was delivered by a trial court which is subordinate and of first instant, and whose forum is well under the supervisory jurisdiction of this Honourable Court.
20. The High Court had occasion to consider the above-mentioned issue of coram non-judice in the case of Republic –vs- Fredrick Ole Leliman and 4 Others {2022}eKLR, where counsel submitted that the High Court lacked jurisdiction over the subject matter based on the Presiding Judge's appointment as a Judge of the Court of Appeal. The High Court then held as follows:-

“ 68. *The Constitution* 2010 did not provide transitional provisions dictating or providing for what should happen to partly heard matters before court where the presiding magistrate or judge is elevated to a higher bench. It did not prescribe either whether a judge elevated to a higher bench could finalize pending matters. *The Constitution* is dead silent on this issue. Does silence mean that *the Constitution* has ousted the jurisdiction of a judge elevated to a higher bench to conclude its cases upon elevation?

72. I agree with Mr. Mutuku that the directions given by the Hon. Chief Justice to the Judges appointed from the High Court to the Court of Appeal, to complete their respective advanced partly heard matters, was an administrative action that was anchored in the law. Section 16 (a), (c) and (e) of the *High Court (Organization and Administration) Act* No. 27 of 2015.



82. Not to mention that if there is an interruption in the conclusion of the matter and the case given to another judge to handle, there are several implications. First, the costs factor to the public coffers will be enormous, considering but not limited to State Officers who will be engaged in handling the matter. Second, the other important question to consider is what will be the effect or impact of handing over this file to another judge in the Criminal Division. If they will have to proceed to write judgment, how long will it take the judge to understand the numerous volumes of proceedings before penning down a judgment? Third, what guarantee will there be that witnesses will be found supposing the matter were ordered tried afresh, seven years down the line? Fourth, what trauma will the families and colleagues of the deceased continue to suffer due to prolonged waiting for the final determination of the case? Fifth, what of the accused persons having to have the case start all over again, even the most strong and patient of them all will have trauma by such a move.
83. I believe that it will be against public interest and public policy; and it will not serve efficacious disposal of this case to adjourn it and hand it over for continuation by another judge. Such an action does not settle well with the need to uphold the purpose, values and principles of *the Constitution*, especially those touching on the expeditious delivery of justice without unreasonable delay. Including advancing the rule of law, human rights and good governance, in exercise of its judicial authority, as obligated under Article 259(2)(e) of *the Constitution*. Constitutional values, principles, rule of law and public interest will best be served by declining the invitation by the counsel for the 5th accused to declare this court coram non iudice.”
21. It is therefore clear that the decision by Hon. Justice Diana Kavedza was a decision by the Chief Magistrate’s Court which is subject to challenge by way of appeal or revision to the High Court and one cannot invoke this Court to seek such redress before the Court of Appeal as contended by counsel for the Respondents/accused persons.
22. Consequently, the court is persuaded that it has the requisite jurisdiction to determine the instant application thus the Notice of Preliminary Objection on this issue fails. The court will then proceed to the merits of the application dated 4th April, 2023.
23. Having rested the issue of jurisdiction as raised in the Notice of Preliminary Objection, I have also read through the pleadings and submissions filed by either party for purposes of determining:-
- a. Whether the exclusion by the trial court of electronic evidence obtained without a warrant was proper in the circumstances of this case.
 - b. Whether, if the electronic evidence obtained without a warrant is admitted as evidence, the trial would be rendered as unfair and or otherwise detrimental or prejudicial to the administration of justice under Article 50(4) of the Constitution
 - c. What other remedies would be suitable for the parties in this case.
24. From the onset, this Court wishes to emphasize that the High Court is bestowed with supervisory jurisdiction over subordinate courts and or any person, body, or authority exercising a judicial or quasi-judicial function pursuant to the provision of Article 165(3) and (6) of *the Constitution* of Kenya. Article 165(3) provides that:-



2. “Subject to clause (5), the High Court shall have—
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation.

Article 165(6) goes on to state that:-

6. 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.
25. In exercise of its supervisory powers, the High Court is bestowed with revisionary powers of the records of the subordinate courts under Section 362 of the Criminal Procedure Code which provides that:-

“(362) Power of High Court to call for records

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.”

26. This Court agrees with the decision of the court in the case of Republic –vs- Mark Lloyd Stevenson[2010]eKLR, where Hon. Justice Joel Ngugi held as follows:-

“(10) ...The section does not, however, mean that a party which has a right of appeal cannot thereby invoke the Court’s power to review a Magistrate’s court’s order or decision.

(11) For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a Magistrate’s court only in exceptional circumstances. While difficult to determine with mathematical precision when



the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below.” Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals are not entertained piecemeal.” (Walhaus & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D; S. v Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D.

(12) With these principles in mind, I was persuaded that this was a proper case to exercise the Court’s inherent powers for revision given the impact that the Trial Court’s ruling, if incorrect, would potentially have on guilt or otherwise of the Accused Person.

27. Therefore, taking cue from the above cited decision, the revisionary of powers of the High Court empower it to effectively supervise subordinate courts with the objective of correcting their errors or wrongs and or ascertaining itself on the correctness, legality and propriety of the lower court record as emphasised under Section 362 of the Criminal Procedure Code.
28. Vide the instant application, this Court has been called upon to examine the ruling of the trial court delivered on 21st February, 2023 and determine whether it was legally correct to find that the forensic electronic evidence which exploited the accused persons’ mobile phones without a warrant. The trial court held that the said evidence was obtained in breach of the accused persons’ right to privacy, and without any justification or any special circumstances hence, was an affront to the administration of justice and fair trial.
29. According to the prosecution/Applicants’ counsel, it is their prayer that the said electronic evidence be admitted for consideration by the trial court notwithstanding the procedural technicalities in the manner in which it was obtained by taking into account the authenticity and accuracy thereof as presented before it. It is the Applicants’ argument that the special circumstances of the instant case, and more particularly the risk posed to the National Security interests of the Republic of Kenya are sufficient enough to warrant an exception to the exclusionary rule on such evidence obtained without a warrant.
30. Mr. Chacha Mwita, counsel for the accuseds/Respondents herein has advanced a contrary view point that the exclusionary rule should be strictly adhered to without any wiggle room, regardless of the circumstances. He has submitted that the exclusionary rule is a fundamental safeguard for the protection of individual rights such as the right to privacy so that admitting such evidence obtained without a warrant would set a dangerous precedent and undermine the rule of law. It is his view that the Applicant has not demonstrated that the evidence could not have been obtained through any other lawful means.
31. Whereas, the defence argues that the evidence obtained without a warrant infringes on the accused persons’ right to privacy, the prosecution on the other hand has emphasised on the seriousness of terrorism offences such as the ones the Respondents are facing by pointing out that the said offences have an international stature not to mention their effects on the lives, peace and security of not only the Nation but the entire World.



32. In order to objectively determine the question at hand, it is vital to consider the context and facts around a case. It is worth-noting that the accuseds/Respondents were charged with a number of terrorism offences, namely Committing a Terrorist Act contrary to Section 4 of the *Prevention of Terrorism Act* (POTA), Conspiracy to Commit a Terrorism Act contrary to Section 23(2) as read with Section 23(4) of the *Prevention of Terrorism Act*, 2012, Facilitation of a Terrorist Act contrary to Section 9A of the *Prevention of Terrorism Act* among other listed charges.
33. Having read through the original record of proceedings furnished to this Court from the trial court, it has been established that one of the accused persons namely Unknown alias Mire Abdulahi Ali entered into a Plea Bargain Agreement negotiated by Mr. Chacha Mwita, the defence counsel. The said accused voluntarily pleaded guilty to the offence of Cyber-Terrorism contrary to Section 33 of the *Computer Misuse and Cybercrimes Act*, 2018, the offence of Forgery and that of Illegally Obtaining Kenya Identity documents. The Plea Bargain Agreement was deposited and adopted by the trial court, whereof the said accused person was convicted on his own plea of guilt. He was then sentenced to serve four (4) years imprisonment.
34. From these facts, it is therefore an irrefutable fact that these offences were allegedly committed in collusion with the other accused/Respondent whose trial is still on-going and or other unknown associates, who may still be lingering about and posing as a threat to the National Security interests of the Nation including the lives and property of the Kenyan people.
35. In this court's view, the special circumstances and typology of the nature of case involved, a reasonably well-founded risk of significant threats to National Security and general public safety is imminent. Therefore, the nature and severity of the alleged offences, particularly those related to terrorism, necessitates a careful balance between the protection of individual rights and the imperative to safeguard the public from imminent existential threats and dangers. It is for these reasons that the courts must consider whether the exclusion of crucial electronic evidence, even if obtained without a warrant, would undermine the broader interests of justice and the general public security in this exceptional context.
36. It is worth of note that the *Prevention of Terrorism Act*, 2012 was enacted with the statutory objective to provide measures for the detection and prevention of terrorist activities. In recognising the difficulty of preventing, suppressing and effectively investigating and prosecuting terrorism related offences, the Act provides for the possibility of admission of evidence (including electronic evidence) without undue regard to procedural technicalities. This possibility is expressly availed by Section 39A of the *Prevention of Terrorism Act*, 2012, which stipulates that:-
- (39A) Evidence
- The Court shall have due regard to the authenticity and accuracy of the evidence presented before it without undue regard to technicalities of procedure.
37. In this court's view, the above provision calls upon any court adjudicating over cases of terrorism to prioritize the consideration of the totality of evidence placed before it so as to ascertain if the same is in fact genuine and correct.
38. It will be appreciated that investigations and prosecution of terrorism cases and related types of transnational organised crimes are fraught with difficulty and a multiplicity of challenges due to their very nature, coupled with the rapid advancement of technology. And this is because the prohibited conduct is transacted in secrecy.



39. Therefore, in this Court’s opinion, any attempt to comply with procedural safeguards may alert suspects or their intricate network, who then are likely to tamper with the evidence beyond recovery by the investigative agencies. It is also worth-noting that the special character of terrorism, which frequently aims at causing mass casualty and serious destruction to both public and private property, often heightens the stakes when it comes to acquisition of evidence. This view received judicial recognition by the High Court in the case of *Ismael Mona Otieno –vs- Republic* [2022]eKLR, when it held:-
- (46) Learned counsel for the Appellant contends that the evidence generated from the gadgets found with the Appellant was obtained illegally and was inadmissible. Article 50(4) of *the Constitution* provides that:
- “Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice”.
- (47) However, this Article must be read in conjunction with Articles 24 and 25 of *the Constitution* as well as Section 35 of the *Prevention of Terrorism Act*. Considering the nature of the offences in question, the admission by the Appellant that the nine mobile phones were his, and the reports generated therefrom, I find that the trial court was entitled to admit the impugned reports”.
40. To make a case for the necessity of securing evidence without a warrant and the minimum adverse impact that such process would have on the fair trial and administration of justice, the Director of Public Prosecution has placed reliance on the concept or legal doctrine of inevitable discovery. This doctrine allows for the admission of illegally obtained evidence or evidence obtained without a warrant, as long as it can be demonstrated that the said evidence would have been discovered lawfully irregardless of the circumstances. The simple meaning of this legal doctrine can answered by this question:-
- “Whether the DPP sought or not, the fact is, it is highly likely that the same evidence would still have been inevitably discovered anyway”.
41. This doctrine is an exception to the exclusionary rule, as was demonstrated in the case of *Nix – vs- Williams* 467 U.S 131(1984), where the Supreme Court held that “the evidence obtained in violation of the Sixth Amendment was admissible because the victims’ bonding would have been found anyway”.
42. Although the notion and concept attributed to the legal doctrine of inevitable discovery may seem novel to the Kenyan Criminal Law, it had long been recognized in our jurisprudence albeit by different names.
43. In a strong attempt to expand on this concept of the necessity of justifiable exception to the exclusionary rule in the context of terrorism offences, the Supreme Court, and more particularly in the case of *Mohamed Abolfathi & Another –vs- Republic* [2021]eKLR, had this to say:-
- (64) “This calls for vigilance of all Kenyans including Judges and Judicial Officers. For Judges and Judicial Officers, their vigilance has to be within the confines of the rule of law. They cannot, for instance, act on public outrage of the offences of terrorism and ignore the law. While they must jealously guard an accused person’s right to a fair trial, the courts should equally guard public interest by ensuring that those who commit or plan to commit terrorist offences do not escape punishment” (emphasis added)



44. On the basis of the forgoing argument, this Court finds that the circumstances of the present case, which is typical of terrorism and related to other forms of serious transnational organized crimes, support the justifiable nature of admitting electronic evidence obtained without a warrant. Therefore, the exclusion of electronic evidence obtained without a warrant by the trial court, was (at the time of the impugned ruling) and still is, consequently improper in the extenuating circumstances of this instant case, as it falls short of meeting the spirit of the drafters of the Security Laws (Amendment) Act, 2014, which successfully amended and introduced Section 39A of the [Prevention of Terrorism Act](#), 2012 which states as follows:-

(39A) Evidence

“The court shall have due regard to the authenticity and accuracy of the evidence presented before court without undue regard to technicalities of procedure”.

45. In the context of the Dusit - D2 terrorist attack (subject matter of the trial) the police acted in utmost good faith, and the electronic evidence obtained would still have been inevitably discovered anyway through on-going investigations, which through customary practise by Law Enforcement Agencies in Kenya, is a continuous and unending process or search for the truth by deploying both conventional and unconventional normative standards due to the known and unknown emerging typologies relative to terrorism and other forms of serious transnational organised crimes that meta-morphose, posing dynamic challenges which are ever changing with the rapid and constant advancement of technology. Therefore, this warrants Kenyan Courts to utilize an adaptive, innovative and progressive approach in order to balance privacy rights on the one side and state rights/obligation on the other hand, in order to safeguard the lives and property of the innocent masses while at the same time protecting the National Security interests of Kenya.

46. The next issue for determination is whether in admitting electronic evidence obtained without a warrant would render the trial unfair or otherwise detrimental to the administration of justice under Article 50(4) of [the Constitution](#). Although related to the first issue, this issue is distinct.

47. Article 50(4) of [the Constitution](#) provides that:-

“ Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

48. In submitting in support of their Notice to Preliminary Objection, Mr. Chacha Mwita, counsel for the Respondents/accused relied on the said Article 50(4) of [the Constitution](#) as well as Section 118 and 121 of the Criminal Procedure Code and stated that the prosecution and indeed the investigations had not laid any basis for exploitation of the Respondents/ Accused persons’ mobile phones. It is his submission that the exploitation of these phones was conducted without a warrant order contrary to Sections 118 and 121, both of the Criminal Procedure Code which provide for search warrants. It is his contention that the said evidence was illegally obtained hence inadmissible under Article 50(4) of [the Constitution](#).

49. On the other hand, Mr. Duncan Ondumi, Senior Principle Prosecution’s counsel argued that admitting the electronic evidence obtained without a warrant would not breach the fair trial rights of the Respondents/accused persons and neither will it adversely impact justice. While acknowledging lack of a court order before examining the said electronic devices, the prosecution’s counsel explained that after the Dusit-D2 terrorist attack, about One Hundred and Seventy Seven (177) mobile phones were exploited in general and other recoveries were made from Mucatha Village within Kiambu



County together with a motor vehicle at the crime scene. It was his submission that the exploitation of these phones led to the arrest of the Respondents/accused persons and the evidence retrieved in totality. He contended that the respondents/accused persons voluntarily provided their phones and passwords negating any claims of inducement, trickery, promise foul play or coercion. He has relied on the provision of Sections 25 of the Criminal Procedure Code and Section 31 of the Prevention of Terrorism Act, 2012 which authorise searches on arrested persons and items without a warrant in cases of imminent danger. According to counsel for the Applicant, the right to privacy as provided for under Article 31 of the Constitution is not absolute as the same can be limited under Section 35 of the Prevention of Terrorism Act, 2012 as read with Article 24 of the Constitution of Kenya.

50. By dint of Article 24 and 25 of the Constitution, the electronic evidence in question is admissible and is given life by Section 35 of the Prevention of Terrorism Act, No.30 of 2012. These are the provision upon which certain rights may be limited.
51. Article 24 of the Constitution provides:-

“(24)

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
 - a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and



- c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
 3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
 4. The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.
 5. Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—
 - (a) Article 31—Privacy;
 - (b) Article 36—Freedom of association;
 - (c) Article 37—Assembly, demonstration, picketing and petition;
 - (d) Article 41—Labour relations;
 - (e) Article 43—Economic and social rights; and (f) Article 49—Rights of arrested persons.
52. Section 35 of the *Prevention of Terrorism Act*, No.30 of 2012 elaborates on the limitation of certain rights in the following manner:-
- “(1) Subject to Article 24 of *the Constitution*, the rights and fundamental freedoms of a person or entity to whom this Act applies may be limited for the purposes, in the manner and to the extent set out in this section.
 - (2) A limitation of a right or fundamental freedom under subsection (1) shall apply only for the purposes of ensuring—
 - (a) the investigations of a terrorist act;
 - (b) the detection and prevention of a terrorist act; or (c) that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.
 - (3) The limitation of a fundamental right and freedom under this section shall relate to—
 - (a) the right to privacy to the extent of allowing—
 - (i) a person, home or property to be searched;



- (ii) possessions to be seized; (iii) the privacy of a person’s communication to be investigated, intercepted or otherwise interfered with.
- (b) the rights of an arrested person specified under Article 49(1)(f) of *the Constitution* may be limited only for purposes of ensuring—
 - (i) the protection of the suspect or any witness;
 - (ii) the suspect avails himself for examination or trial or does not interfere with the investigations; or
 - (iii) the prevention of the commission of an offence under this Act and the preservation of national security.
- (c) the freedom of expression, the media and of conscience, religion, belief and opinion to the extent of preventing the commission of an offence under this Act.
- (d) the freedom of security of a person to the extent of allowing investigations under this Act.
- (e) the right to property to the extent of detaining or confiscating any property used in the commission of an offence under this Act”.

53. Section 39A of the *Prevention of Terrorism Act*, 2012 further provides as follows:-

“(39A) Evidence

“The court shall have due regard to the authenticity and accuracy of the evidence presented before court without undue regard to technicalities of procedure”.

54. In the case of Nairobi HCCRA E008 of 2022, Ismael Mona Otieno –vs- Republic, Justice Kimondo had this to say in regard to electronic evidence:-

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. However, this Article must be read in conjunction with Articles 24 and 25 of *the Constitution* as well as Section 35 of the *Prevention of Terrorism Act*. Considering the nature of the offences in question, the admission by the Appellant that the nine mobile phones were his, and the reports generated therefrom, I find that the trial court was entitled to admit the impugned reports”.

55. The Respondents heavily relied on the cases of *Philomena Mbete Mwilu –vs- Director of Public Prosecutions & 3 Others, Petition No.295 of 2018* – Stanley Muluvi Kiima (Interested Party) International Commission of Jurists, Kenya Chapter (Amicus Curiae)[2019]eKLR and the South African Case of *Gumede –vs- S. (800/2015)[2016] ZASCAA 148* in arguing their case that since the electronic evidence had been obtained without a warrant, the trial court was right to have declined its admission as evidence to be relied on in the trial against them for the reason that it would render the trial unfair and or detrimental to the administration of justice. The Applicant on the other hand contends that the evidence in question cannot be said to be the typically illegally obtained evidence but



rather, it is evidence obtained without a search warrant or court order, and with the explicit consent of one of the Respondents.

56. The key question for determination is whether the admission of electronic evidence obtained without a warrant would constitute a violation of the Appellants' right to fair trial or would be detrimental to the administration of justice. The High Court addressed itself on the two issues in the case of Honourable *Philomena Mbeti Mwilu –vs- Director of Public Prosecutions & Others, Petition No.295 of 2018* as follows:-

(308) Our courts have not defined what amounts to 'otherwise detrimental to the administration of justice' within this exclusion rule, but a similar provision in the South African Constitution was discussed in the South African case of *Gumede v S (800/2015) [2016] ZASCA 148*. The appeal concerned evidence obtained as a result of an unlawful search in violation of the right to privacy. In its decision, the court stated: "[23] This court in *S v Tandwa*[7] made it clear that s 35(5) does not provide for automatic exclusion of unconstitutionality obtained evidence. In this regard it had this to say (paras 116 to 117): Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused. [117] In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised "by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons". Relevant factors include the severity of the rights violation and the degree of prejudice, weighted against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused....(emphasis added).

57. Taking into consideration the jurisprudence set by the courts in Kenya, and across other jurisdictions, it is this court's view that an unfair trial is that which is characterised by the exclusion of critical evidence that is vital to the administration of justice, the absence of due process, the disregard for the rights of the accused, or any conduct that compromises the integrity and fairness of the judicial proceedings. It is a trial where the balance between individual rights and public interest is not maintained, leading to a potential mis-carriage of justice and undermining public confidence in the legal system.

58. Regarding the nature of conduct that would be detrimental to the administration of justice, such acts would include gross misconduct of Judicial Officers, unlawful interferences with judicial proceedings, tampering with evidence and breaches of due process. The point here is that the impugned conduct should be of the kind that undermines fairness, integrity and credibility of the judicial system, leading to a mis-carriage of justice or erosion of public trust in the legal process.

59. Having gone through the proceedings before the trial court, it is this Court's opinion that the circumstances of the case, which involved an urgent and significant threat to National Security and public safety due to the terrorist attack, made it most difficult, if not impossible for the investigating authorities to obtain the requisite evidence at the material time, by any other means possible, but only without a warrant. It was therefore strictly necessary to extract the evidence to prevent its potential loss



or destruction. This opinion is supported by the evidence of PW38 who testified that the immediate analysis of the seized mobile phones was crucial in tracking and apprehending the suspects involved in the said terrorist attack, so that any delay in obtaining a warrant could have compromised the entire investigations. Furthermore, the record also indicates that one of the Respondents/accused persons willingly handed over his mobile telephone device and confirmed that he knew the contents found therein.

60. Upon considering the arguments by counsel for the parties, alongside the applicable laws and jurisprudence, the court finds that the admission of electronic evidence obtained without a warrant is justified under the circumstances of this case. Thus, in declining to admit electronic evidence obtained without a warrant or court order, the trial court failed to take into consideration that Kenya as a country, has faced, not once, but on a number of occasions severe impacts of terror attacks and threats, including death, loss of property and economic harm. It goes without saying that threat to National Security and public safety during and after the Dusit-2 attack must have necessitated urgent action, and the evidence obtained was crucial for the prosecution of the serious offences faced by the Respondents/accused persons so that, the trial court ought to have exercised judicial discretion and allowed the admission of the said evidence. This is because, while the right of privacy is fundamental, the same is not absolute and can be limited under the circumstances as those presented in this case, and in regard to the provisions in the relevant statutes.
61. Consequently, the court finds the trial courts decision delivered on 21st February, 2023 was incorrect and erroneous as the admission of electronic evidence obtained without a warrant or court order would not render a trial unfair nor would it be detrimental to the administration of justice under Article 50(4) of *the Constitution*. Therefore, the admission of the electronic evidence obtained without a warrant is indeed proper in the circumstances of this case.
62. Additionally, this Court is of the considered view that the following statutes and offences under them, may be included with the necessary safety valves in the list of justifiable exceptions to the exclusionary rule on illegally obtained evidence due to their significant impact on the general public safety and the national security interests of Kenya. They are as follows:-
 - a. Terrorism offences under the *Prevention of Terrorism Act*, 2021;
 - b. Sexual offences under the *Sexual Offences Act*, 2006;
 - c. Offences of Genocide, war crimes and crimes against humanity as captured under Section 137N of the Criminal Procedure Code, Cap 75 Laws of Kenya;
 - d. Offences under the *International Crimes Act*, 2008;
 - e. Offences under the compute Misuse of Cybercrime Act, 2018, as specified in Gazette Notice No.1043;
 - f. Special Issue, published on 31st January, 2022 relating to the Designation of Critical Infrastructure;
 - g. Offences under the *Proceeds of Crime and Anti-Money laundering Act*, 2009; and
 - h. Offences under the *Prevention of Organised Crimes Act*, 2010 with the necessary safety valves set out in this decision.
63. These statutes encompass serious offences that pose exceptions to the exclusionary rule and illegally obtained evidence in order to ensure justice is effectively served and at all times being cognizant of the general public interest of millions of innocent Kenyans, who have a right to know the truth



through public judicial proceedings of this nature and by accessing information in the hand of Law Enforcement Agencies pursuant to the letter and spirit of the [Access to Information Act](#), No.31 of 2016 which in its short title states that it is, ‘An Act of Parliament to give effect to Article 35 of [the Constitution](#); to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes’. In summary, it is therefore vital for the law enforcement agencies to get all accurate revelations relevant to the general public and for courts to strike a delicate balance when permitting such evidence in the interests of the administration of justice.

64. The unique circumstances brought by this application has exposed the glaring gaps within the Criminal justice system in Kenya, especially on procedural requirements, that in general sense, limiting the admission of evidence obtained without a warrant or court order without taking into account a number of fundamental factors and indicators that would otherwise permit the admissibility of such evidence, where there is need to protect national security and general public interest and safety, while preventing catastrophic events. This is waylaid against the importance of upholding individual privacy, rights on one hand and the need to protect national security interests in Kenya , while striking a delicate balance of maintaining judicial and integrity. Having examined the practise of other comparative jurisdictions on this issue, this court is of the view that it is the opportune time for courts in Kenya to provide jurisprudential guidance by emailing certain exceptions to the exclusionary rules on illegally obtained evidence or rather evidence obtained without a warrant, particularly and strictly applicable and permissible to criminal matters only but with watertight safety values limited in application to terrorism and other forms of serious transnational organised crimes.
65. Having considered the arguments and the applicable laws, this court finds that the admission of the electronic evidence obtained without a warrant is justified under the circumstances. The threat to national security and public safely necessitated urgent action, and the evidence obtained was crucial for the prosecution of the serious offences faced by the Respondents/accused persons. The rights to privacy, while fundamental, are not absolute and can be limited under the circumstances provided for in the relevant statutes.
66. Ultimately, the court proceeds:-
- a. To order that the decision by the Chief Magistrate’s Court – Kahawa In Criminal Case No.3 of 2021 delivered on the 21st day of February, 2023, where the trial Court upheld the Respondents objection and declined to allow PW38 produce evidence pursuant to the forensic examination of the Respondents/accused persons’ mobile phones, is hereby set aside and vacated.
 - b. Directs that the electronic evidence obtained from the forensic examination of the Respondents/accused persons’ mobile phones shall be admissible in the ongoing trial in Kahawa Chief Magistrate’s Court, Criminal Case No.3 of 2021 – Republic –vs- Unknown alias Abu Mire Abdullahi Elmi & 2 Others.
 - c. The prosecution/Applicant is at liberty to recall Prosecution Witness No.38 to tender his testimony and produce the relevant exhibits on electronic evidence,pursuant to the orders of this court.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF SEPTEMBER, 2024.

D.O CHEPKWONY

JUDGE

