



**Mbungu v Republic; Masika (Interested Party) (Miscellaneous Criminal Application E015 of 2023) [2023] KEHC 18741 (KLR) (Crim) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E015 OF 2023**

**DR KAVEDZA, J**

**JUNE 2, 2023**

**BETWEEN**

**JASPER IRERI MBUNGU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AND**

**ALEX SIMIYU MASIKA ..... INTERESTED PARTY**

*(Being an application for revision of the order issued by Hon. S. Mwaniki (SRM) on 30th November 2022 at Kibera Chief Magistrate's Court criminal case no. E123 of 2022 Republic vs Jasper Ireri Mbungu)*

**RULING**

1. The applicant has moved the court vide a Notice of Motion dated January 9, 2023, pursuant to the provisions of Article 50(2)(1) of the Constitution, sections 362 and 364 of the Criminal Procedure Code (cap 75), Laws of Kenya, seeking for revision of the orders made on November 30, 2022 by Hon S Mwaniki (SRM) in Criminal Case No E123 of 2022 at Kibera Law Courts.
2. The applicant particularly seeks orders that: the order for the introduction of new documentary evidence made by the trial court be stayed. The court be pleased to stay further proceedings in the trial court. The court to recall the record of criminal proceedings in the trial court for purposes of examining and satisfying itself on the correctness, legality, and propriety of the order for the introduction of new documentary evidence mid-trial made on November 30, 2022.
3. The application is supported by the affidavit of Jasper Ireri Mbungu and on the grounds on the face of the application. The applicant avers that the matter was slated for pre-trial on March 10, 2022 wherein



the prosecution confirmed furnishing the accused with all documents and consequently, the matter was fixed for hearing on May 31, 2022.

4. On May 31, 2022, the complainant testified at length and the suit was fixed for further hearing on September 1, 2022 on which date PW 2 testified and the matter was fixed for further hearing on November 30, 2022. The applicant however avers that on November 30, 2022, no prosecution witness was availed in court but instead, the prosecution with the aid of the complainant, sought to introduce new material/ documentary evidence. The said new material consisted of call log printouts of the accused's alleged phone number. The defence opposed the introduction of the said documentary evidence on grounds that the prosecution did not demonstrate difficulty in obtaining the same prior to the pretrial date when the prosecution confirmed having disclosed all evidence.
5. Eventually, the learned Magistrate made a decision allowing the prosecution's application for the introduction of new material despite opposition by the defence. The applicant argues that the decision was incorrect, irregular, improper and thus illegal. He therefore implores this court to invoke its powers under sections 362 and 364 of the Criminal Procedure Code and set aside the ruling of November 30, 2022 allowing the introduction of fresh material in evidence mid-trial.

#### **The submissions of the accused/ applicant**

6. Counsel for the applicant submitted that failure by the prosecution to produce all the intended evidence during the pre-trial stage amounted to a procedural technicality not curable by Article 159(2) (d) of the *Constitution*. It was their submission that the delayed production of the said evidence is tantamount to frustrating the fair hearing of the case as the defence has always been in possession of the evidence prior to the pre-trial.
7. It was further submitted that the evidence ought to be expunged from the court record for failure to comply with Article 50(2)(c) of the *Constitution* for justice to prevail.
8. The application was opposed by the respondent vide the grounds of opposition dated February 7, 2023. The respondent argues that discovery in criminal proceedings is a continuous process and thus the application is unsubstantiated. In addition to that, the respondent argues that the application lacks merit as the applicant will be given time to examine the document and prepare a defence before trial.
9. The application was further opposed by the interested party vide the notice of preliminary objection dated March 5, 2023 and the grounds of opposition dated March 3, 2023. The interested party argues that the application is supported by a false affidavit of the applicant, in particular ground (d) wherein the applicant averred that: -  

“..that on 30<sup>th</sup> November 2022, no prosecution witness was availed in court but the prosecution instead, with the aid of the complainant, sought to introduce new material/ documentary evidence”
10. The interested party further avers that by dint of the said statement, the applicant is otherwise guilty of misrepresentation and of material non-disclosure for failing to disclose that he had been afforded reasonable opportunity and time to prepare a defence after being supplied with the new documentary evidence. The interested party urged the court to dismiss the application on the grounds that the ruling was proper, correct and validly made in the interest of justice.



### Submissions of the interested party

11. In support of his arguments, the interested party's counsel, submitted that the duty of disclosure in a criminal trial is a continuous process and cannot be restricted to the pre-trial stage. He cited the case of *Dennis Edmond APAA & 2 others vs Ethics and Anti-Corruption Commission & Another* (2012) eKLR where it was reiterated that the duty of disclosure is a continuous one throughout the trial. It was further submitted that according to Article 50(2)(j) of the *Constitution*, the right to be informed in advance cannot be read restrictively to mean in advance of the trial.
12. The interested party contended that he is entitled under section 13 of the *Victim Protection Act*, 2014 to *inter alia* present and or adduce evidence which has been left out, including the call logs from Safaricom which are important for the just determination of the criminal case. The interested party further argued that the applicant will not be prejudiced by the production of further documentary evidence.

### Issues for determination

13. I have considered the supporting affidavit of the applicant, the applicant's and the interested party's submissions and note that the respondent has not filed any submissions despite directions of the court. Even so, I find that the main issues for determination are whether it was proper for the trial Court to allow the prosecution to introduce new documentary evidence mid-trial, after two witnesses had testified and whether the said decision violated the applicant's right to fair trial under Article 50 of the *Constitution*.

### Analysis and determination

14. The revisionary jurisdiction of the High Court is provided under sections 362 and 364 of the Criminal Procedure Code. The court would ordinarily exercise its revisionary powers to correct mistakes, illegalities and irregularities to prevent miscarriage of justice.
15. The first question that begs for an answer is whether reasonable access under Article 50(2)(j) is synonymous with supplying ALL the evidence at once to the defence prior to the commencement of the trial? It was submitted by the applicant that the decision of the trial court allowing the prosecution to introduce new documentary evidence mid-trial was improper. On the contrary, it was argued by the respondent and the interested party that the process of evidence discovery is continuous throughout the trial.
16. The right to fair trial is guaranteed under Article 50 of the *Constitution* which provides that:
  - 1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
  - (2) Every accused person has the right to a fair trial, which includes the right—
    - (a).... ..
    - (c) to have adequate time and facilities to prepare a defence;  
....
    - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;



- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
17. The issue disclosure of evidence by the prosecution has been severally addressed by the courts. For instance, in the cited case of *Thomas Patrick Gilbert Cholmondeley vs Republic* [2008] eKLR the court held that: -
- “We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”
18. Furthermore, in the case of *R vs Ward* (1993) 2ALL ER 557, the Court of Appeal in England held that: -
- “The prosecution’s duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.” (emphasis mine)
19. I take judicial notice of the fact that there are numerous applications by investigating officers seeking to introduce similar documentary evidence in other cases from across the country, in particular, call logs from Safaricom mobile service provider. However, it should be noted that this process cannot be likened to an automated machine in which one would insert a card and money instantly pops. Generating the aforementioned evidence requires a significant amount of time.
20. Nonetheless, Article 50 of the *Constitution* is an absolute right guaranteed under Article 25 and is therefore non-derogable. This means that a violation of this right would vitiate the right to a fair trial.
21. Does the right to be informed in advance of the evidence the prosecution intends to rely on mean that all evidence should be availed to the accused person at once before the commencement of the trial? I dare say no; it simply means that the accused person should be informed in advance of the evidence the prosecution intends to rely on, have reasonable access to that evidence, and be accorded adequate time to prepare a defence.
22. To my mind, counsel for the applicant has misread the provisions of Article 50(2)(j) of the *Constitution*. I believe that as long as the evidence has been provided or supplied in advance, the right to fair trial guaranteed to an accused person would not be violated. I would therefore refer back to the case of R



v Ward (*Supra*) where it was observed that the obligation to disclose witnesses and evidence by the prosecution was continuous and not limited to the pre-trial stage.

23. There may be situations where evidence needs to be supplied on the hearing date. For instance, when earlier disclosure may jeopardize the evidence of the prosecution due to various reasons, such as a threat to the life of a witness. In such cases, the evidence will be admitted on the hearing date, but the matter will be adjourned to enable the accused to prepare.
24. Secondly, is the accused likely to suffer any prejudice should the new documentary evidence be admitted mid-trial after two prosecution witnesses have testified? I see no prejudice being caused to the accused person as he will have sufficient time to go through the said documentary evidence and prepare a defence. In fact, the Honourable Magistrate properly directed himself when he dismissed the objection by the defence and subsequently adjourned the main hearing to enable the documents to be provided for perusal by the defence in readiness for cross-examination.
25. By so directing, the accused was granted the opportunity in accordance with section 150 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya to interrogate the evidence and if necessary, recall and cross-examine PW1 and PW2, who had already testified. The accused has therefore not demonstrated that he is likely to suffer prejudice if the said documentary evidence is admitted mid-trial and yet he has been granted reasonable access to the evidence to enable him to prepare for his defence.
26. In view of the foregoing, I am satisfied that there was no misdirection by the Trial Magistrate as alleged, and do not therefore, find any breach of the applicant's right to a fair trial under Article 50 of the [Constitution](#).
27. The application fails and the trial shall proceed in accordance with the directions issued by the Trial Magistrate on November 30, 2022. Having dismissed the application, the issue of costs is therefore moot.

**RULING DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF JUNE 2023.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Mr. Khanduli for the Applicant

Mr. Kiragu for the Respondent

Mr. Masika for the Interested Party

