



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
REVISION APPLICATION NO. E005 OF 2021

The DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT MILIMANI ANTI-CORRUPTION DIVISION.....REPPONENT

-AND-

HENRY ROTICH.....1ST INTERESTED PARTY
DAVID KIPCHUMBA KIMOSOP.....2ND INTERESTED PARTY
KENNEDY NYAKUNDI NYACHIRO.....3RD INTERESTED PARTY
JACKSON NJAU KINYANJUI.....4TH INTERESTED PARTY
TITUS MURIITHI.....5TH INTERESTED PARTY
DAVID KIPCHUMBA KIMOSOP.....6TH INTERESTED PARTY
WILLIAM KIPKEMBOI MAINA.....7TH INTERESTED PARTY
PAUL KIPKOECH SERE.....8TH INTERESTED PARTY
FRANCIS CHEPKONGA KIPKECH.....9TH INTERESTED PARTY
ELIZABETH KEBENEL.....10TH INTERESTED PARTY
ESTHER JEPCHIRCHIR KIROR.....11TH INTERESTED PARTY
ISAAC KIIRU.....12TH INTERESTED PARTY
PATRICK KIPSANG.....13TH INTERESTED PARTY
FREDRICK TOWETT.....14TH INTERESTED PARTY
CHARITY MUUI.....15TH INTERESTED PARTY
GEOFREY MWANGI WAHUNGU.....16TH INTERESTED PARTY
DAVID WALUNYA ONGARE.....17TH INTERESTED PARTY

JUDGMENT ON REVISION

1. The interested Parties herein are facing various charges in the Chief Magistrates Anti-corruption Court to wit Milimani Anti-corruption case No. 18 of 2019 and Anti-corruption case No. 20 of 2020

2. On 26th May 2021 following a pre-trial hearing of the cases the trial magistrate – Chief Magistrate Hon. D. Ogoti gave directions inter alia that the applicant herein:

“Supply a chronology of calling the witnesses accompanied by a list of documents that each witness will rely on to the defence seven (7) days in advance to the hearing(s) and any change thereof be communicated to the parties 3 days before the hearing(s).”

3. Being aggrieved by this direction the Applicant filed the Notice of Motion dated 11th June 2021 seeking a revision of the direction and to overturn the same. The Notice of Motion application which is expressed to be brought under **Article 165 (6) & (7) of the Constitution of Kenya and Sections 362 and 364 of the Criminal Procedure Code** is premised on grounds that there was no factual or legal basis to warrant the order; that, the trial magistrate erred by ordering and directing the prosecution on the manner it shall conduct its case by limiting it to a specific order of calling the witnesses and disclosure of documents to be relied on by each witness whilst the same has no basis in fact or in law; that the prosecution had discharged its duty of disclosure as required under **Article 50 (2) (c) & (j) of the Constitution**; that the trial magistrate misconstrued the applicant’s duty to extend beyond disclosure and as such the impugned direction is inimical to the Applicant’s duty and should thus be set aside, varied and or revised. Further that the trial magistrate’s order will interfere with the applicant’s mandate under **Article 157 of the Constitution**, to prosecute; that the trial magistrate erred in failing to consider that its duty not only lies in guaranteeing the rights of accused persons to a fair hearing under **Article 50 (2)** but also safeguarding the rights of witnesses and victims under **Article 50 (9) of the Constitution** and lastly that the trial magistrate did not appreciate the danger of disclosing the witness that would testify on a particular date for such disclosure would expose the witness to the risk of harm.

4. The application is supported by the affidavit of **Ms. Judy Thuguri** sworn on 11th June 2021 which reiterates the grounds for the application and which I need not repeat.

5. The Respondents did not enter appearance or file a response to the application but the same is vehemently opposed by the **1st to 9th Interested Parties**.

6. **The 1st, 2nd and 6th** Interested Parties filed **Grounds of Objection** to the Notice of Motion which as summarized in their advocate’s submissions are to the effect that:

“a) The instant application does not meet the threshold for grant of revisionary orders.

b. The guidelines relating to active case management of Criminal Cases in the Magistrate Courts and High Courts of Kenya allow Judicial Officers to take any step to actively manage a case so long as such direction or step shall not be inconsistent with any legislation or the said guidelines.

c. The Interested Parties have a right to fair trial which include being given adequate time and facilities to prepare for their defence and to be informed in advance of the evidence that the prosecution is intending to reply on.

d. Supplying a chronology of calling the witness accompanied by a list of documents that each witness will rely on to the defense will reduce delay, case backlog, and ensure that justice is done to all the Accused Persons.

e. No prejudice will be suffered by the prosecution in complying with the orders of the trial court.”

7. **The 3rd & 4th Interested Parties** opposed the application vide a replying affidavit sworn on 1st October 2021 by their Counsel, Philip Nyachoti Advocate, in which he deposes that:

“1. That indeed, Milimani Anti-Corruption Criminal Case No. 20 of 2019 Republic V Henry Rotich & 4 others and Milimani Anti-Corruption Criminal Case No. 18 of 2019; Republic V David Kimosop & 12 Others are complex matters because they involve many accused persons, many charges, voluminous documentation containing forty seven (47) box files all full of documents and further additional documents thereto and many witnesses cutting across cases thus posing a challenge on the hearing and disposal of cases hence requiring a different approach in handling them more so since there is no express legal provision governing anti-corruption proceedings. (Annexed hereto and marked “PN-1” are true copies of the list of witnesses statement dated 7th August 2019, List of documents containing particulars of each of the forty seven (47) box files, Supplementary Disclosure Schedule dated 11th March 2021 as well as further Supplementary Disclosure schedule dated 18th March 2021 in respect thereof)

2. That in the circumstances, each court has an obligation to adopt a case management strategy which is executed within the confines of the law to ensure optimal results and attainment of the overriding objective that criminal cases be dealt with justly and expeditiously as provided for under Article 50(2) (e) of the Constitution of Kenya, 2010 whilst exercising any power given under the law.

3. That as regards the disclosure of a chronology of calling of witnesses accompanied by a list of documents that each witness will be relying to the Interested Parties seven (7) days in advance to the hearing(s) and any change thereof be communicated to the parties three (3) days before the hearing of the aforesaid matters, I aver that the only relevant legal provision currently addressing the issue of disclosure in anti-corruption proceedings is the Judiciary Guidelines for Active Case Management of criminal cases in Magistrates and High Courts of Kenya.

4. That under Paragraph 6.1 of the said Judiciary Guidelines for active case management of criminal cases in Magistrates and High Courts of Kenya provides for pre-trial case management by the court as follows:-

“In fulfilling its duty under paragraph 5.1, the court may give directions and take any step to actively manage a case.”

Paragraph 6.2 further states:-

“Such direction or step shall not be inconsistent with any legislation or these guidelines.”

Paragraph 6.3 also provides:-

“A court may give a direction on its own motion or on application by a party.”

5. That from the above quoted paragraphs of the said guidelines, it is clear that a trial court can suo motto give directions to ensure efficient, expeditious and smooth running of court business. In any event, a court with jurisdiction to hear a matter has certain inherent powers to exercise in civil or criminal proceedings which are not necessarily written.

6. That in view of the above, there was nothing improper, unlawful and/or unprocedural in the trial court making suo motto directions in the aforesaid matters which in any event are inherent by virtue of holding that jurisdiction .

7. That as regards the issue of danger of disclosing to the Interested Parties the witnesses that would testify seven (7) days in advance, no tangible proof supporting the allegation that such a disclosure would expose witnesses to risk had been placed before this Honorable Court. As such, I urge this Honourable Court to dismiss such allegation as just fertile imagination of the prosecution without any justification whatsoever.

8. That in light of the foregoing, it is evidently clear that the orders of the court were intended to achieve greater justice and that, the court properly exercised its discretion hence this Honourable Court should not interfere with that discretion which is not prejudicial.

9. That it is only fair, just and in the interest of justice that the Applicant’s Application dated 11th June 2021 be dismissed

.....”

8. Miss Muthiani for the 7th, 8th and 9th Interested Parties filed a replying affidavit sworn by the 7th respondent on 8th July 2021. In summary the 7th Interested Party deposes that the cases against them are complex and that the trial court gave the impugned direction so as to expedite the hearing and in line with the **Guidelines for Active Case Management of Criminal Cases** and also to afford the accused, now Interested Parties, a fair hearing. That therefore this court ought to uphold the direction rather than set it aside.

9. Counsel for the parties complied and duly filed their written submissions which they subsequently highlighted before me on 4th October 2021.

10. In summary Mr. Taib, learned Counsel for the applicant, submitted that the impugned order of the trial court was made without jurisdiction as there was no legal basis upon which the trial court could make such an order; that having made a full disclosure of its case to the accused persons and their counsel as provided under **Article 50 (2) (j)** of the Constitution the applicant owes no further duty to them; that the order therefore is an affront to the powers singularly reserved to the applicant to conduct criminal proceedings and that by granting the order the trial magistrate was so to speak directing the applicant in the manner it should conduct and manage its case yet **Article 157 of the Constitution** provides that the applicant cannot be directed or controlled by any person or authority in the exercise of its mandate.

11. Counsel further submitted that the direction also flies in the face of **Article 5(5) of The African Union Convention on Preventing and Combating Corruption 2003** which was ratified by Kenya in 2003 and **Article 32 of the United Nations Convention Against Corruption** ratified by Kenya on 9th December 2003 both of which provide for the protection of witnesses, experts and victims. In this regard Mr. Taib submitted that requiring the applicant to supply a chronology of witnesses seven days prior to the date they are required to testify exposes them to the risk of harm. Relying on an article on **The Problem of Witness Interference Before International Criminal Tribunals** published in the **International Criminal Law Review 15 (2015) 700-732** Counsel submitted that in issuing the order the trial magistrate failed to consider the impact that disclosure of the chronology beforehand would have on the safety and security of the witnesses, the trial process and also the prejudice that would be occasioned to the prosecution. Counsel contended that the trial court’s duty is to accord a fair hearing to all who appear before it and that includes the applicant and that therefore the impugned orders go against the spirit of **Article 50 (1) of the Constitution** and are therefore unconstitutional.

12. Counsel further stated that the Applicant should not be directed and or controlled to provide a list of documents that each witness would be relying upon as what may directly touch on one witness can indirectly or substantially connect or touch on another witness and therefore to restrict witnesses to specific documents would limit the evidence and ultimately prejudice the prosecution's case. Counsel also contended that the argument that the impugned orders are intended to expedite the hearing and were granted in line with Criminal Active Case Management Guidelines does not hold firstly because fairness should never be sacrificed at the altar of expediency and secondly because the Active Case Management Guidelines rank at the bottom of the hierarchy of what ought to be given consideration in a criminal trial. Counsel pointed out that in any event the argument that the order will aid the defence in identifying what box file of the 47 boxes of documents supplied to them by the applicant to carry to the trial does not hold water given that the accused persons and their advocates were also supplied with soft copies of the witness statements and documents and all they will require is to open the same in their computers. Counsel contended therefore that the issue of space and convenience does not also arise.

13. Counsel urged this court to find merit in the application and hold that the orders are illegal, irregular and do not conform to any law and set them aside and hence allow the prosecution to conduct its case unhindered and in accordance with the Constitution and written law.

14. In support of his submission Mr. Taib relied on the following cases:-

1. **Director of Public Prosecution V Perry Mansukh Kansagara & 8 others[2020] eKLR**
2. **George Ngodhe Juma, Peter Okoth Alingo, Susan Muthoni Nyoike V Attorney General [2003] eKLR**
3. **Thomas Patrick Gilbert Cholmondeley V Republic [2008] eKLR**
4. **Joseph Lendrix Waswa V Republic [2020] eKLR**
5. **Nairobi High Court Misc. Civil Application No. 249 of 2012, Republic V The Director of Public Prosecution Ex-parte Victory Welding works Limited And Another**
6. **Director of Public Prosecutions V Peter Aguko Abok & 35 others [2020] eKLR**

15. On their part Counsel for the Interested Parties urged this court not to vacate the impugned orders. It was their submission that the cases against the Interested Parties are complex with 47 box files full of documents that run over 6000 pages and the impugned orders are necessary and shall accord the Interested Parties a fair hearing as they shall know which witness shall be called when and what documents those witnesses will testify on and hence there shall be no trial by ambush. Counsel submitted that the nature of the cases against the Interested Parties require a different approach in handling them and were in any event informed by the **Judiciary Guidelines for Active Case Management in Criminal Cases in the Magistrate Courts and High Courts of Kenya**; that moreover **Article 50 (2) (e) of the Constitution** requires that Criminal cases be dealt with justly and expeditiously and for that reason each court has an obligation to adopt a case management strategy which is executed within the confines of the law to ensure optimal results. Counsel dismissed the submission by Counsel for the applicant that the orders are likely to expose the witnesses to danger and stated that they as well as the Interested Parties have had the statements of the witnesses from as far back as 2019 and the same disclose the names and even the physical addresses of the witnesses yet there has been no attempt by anyone to interfere or intimidate those witnesses. They contended therefore that the submission that the orders shall expose the witnesses to danger is apart from being based on speculation, baseless. They contended that the orders shall accord the defence and the prosecution a level playing field and this court ought to uphold the same as the Interested Parties are entitled to a fair trial. Mr. Katwa Kigen learned Counsel for the 1st, 2nd & 6th Interested Parties submitted that the order is adequately fair as it gives the applicant latitude to change the chronology of the witnesses provided they give the Interested Parties notice. He submitted that extinguishing those orders will occasion unreasonable delay in the cases and that the orders were made after consulting the parties in the course of about three pre-trial conferences. Counsel contended that the trial magistrate properly exercised his discretion in good faith and acted within the law in view of **Article 50 of the Constitution**. He described as untenable the submission that the orders have the effect of micromanaging the case for the prosecution and contended that the prosecution shall still be at liberty to call as many witnesses as it pleases and nobody has told them that they shall not call any of the witnesses. Counsel urged that if there is any attempt at threatening or intimidating the witnesses then it is the responsibility of the prosecution to protect them rather than to limit the rights of the accused to a fair trial. The foregoing submissions were echoed by Mr. Nyachoti learned Counsel for the 3rd and 4th Interested Parties and by Miss Muthiani learned Counsel for the 7th, 8th and 9th Interested Parties. They all urged this court to uphold the orders of the trial magistrate.

16. This application is brought under **Article 165 (6) & (7) of the Constitution** and Sections 362 and 364 of the Criminal Procedure Code which cloth this court with Supervisory jurisdiction over the magistrates courts that fall under its jurisdiction, in this case the Nairobi Chief Magistrates Anti-Corruption Courts. The provisions also give this court power to call for the records of such courts and examine them for the purpose of satisfying itself as to the correctness, legality or propriety of any order finding or sentence and as to the regularity of any proceedings of any such court. This court in exercising such power may make any order or give any direction it considers appropriate to ensure the fair administration of justice. It may also alter or reverse the order of the lower court. The court may exercise its power either suo moto or upon an application.

17. It is evident that the impugned orders were made upon a pre-trial hearing held pursuant to the **Guidelines for Active Case Management of Criminal Cases in the Magistrate Courts and High Courts of Kenya** as there exist no such provisions in the Criminal Procedure Code. The overriding objective of the Guidelines which were promulgated by the Chief Justice of the Republic of Kenya is expressed as follows:-

“The overriding objective of these Guidelines is that criminal cases be dealt with justly and expeditiously whilst exercising any power given under the Laws of Kenya.”

18. The guidelines state that dealing with a criminal case justly and expeditiously includes:

“(a) Acquitting the innocent and convicting the guilty;

b. Dealing with the prosecution and defence fairly;

c. Recognizing the rights of an accused, particularly, those rights granted under the Constitution;

d. Respecting the interests of witnesses and victims by keeping them informed of the progress of the case and protecting the rights of the victim under the law;

e. Determining the case efficiently and expeditiously;

f. Ensuring that appropriate information is available to the court when applications for bails and sentences are considered ; and

g. Dealing with the case in a way that takes into account:-

(i) The gravity of the offence alleged;

(ii) The complexity of the issues involved;

(iii) The severity of the consequences faced by the accused, the Victims, witnesses and all others affected;

(iv) The needs of accused persons who are unrepresented; and

(v) The needs of other cases”

19. Paragraph 6 of the Guidelines gives a trial court discretion to give directions and to take any step to actively manage a case provided that such direction is not inconsistent with any legislation or the guidelines and further states that such discretion may be exercised by the court either on its own motion or on application by a party. The directions are therefore in the discretion of the trial court.

20. In the case of **Joseph Lendrix Waswa V Republic [2020] eKLR** the Supreme Court observed that:-

“72. Discretionary pronouncements of a court, as we have stated in several decisions, form an integral part of a court’s jurisdiction and should not be interfered with unless an Appellate court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.....”

21. The point for determination by this court therefore is whether in giving the impugned directions and or orders the trial magistrate properly exercised his discretion. In determining this issue the court will examine inter alia whether the impugned direction is contrary to the Constitution or any legislation, whether it restricts the applicant’s mandate to conduct its case and whether it is likely to undermine the safety of the witnesses and expose them to danger, and further whether the applicant is likely to suffer any injustice or prejudice.

22. My understanding of the trial magistrate’s direction is that the applicant shall during the trial be required to inform the Interested Parties and their Counsel the order by which it shall call its witnesses and point out to them the documents in respect to which the witnesses shall testify, refer or produce. While the defence opines that this direction shall expedite the trial the prosecution strongly feels that the direction is being used by the court as a means to micro-manage its case which they opine is totally unacceptable. It is the prosecution’s contention that they owe no other duty to the defence other than to make a full disclosure of their case as they have already done. Mr. Taib, learned Counsel for the prosecution/Applicant also contends that the orders are not supported by any known law and are in any event contrary to Article 50 (1) of the Constitution. Counsel cited the case of **George Ngodhe Juma & others V AG [2003] eKLR** where it was held that:-

“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 ... 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 cross-examination, 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...”

23. Counsel also relied on the case of **Thomas Patrick Gilbert Cholmondely V Republic [2008] eKLR** to support his argument that the applicant’s duty does not go beyond making a full disclosure of its case to the defence. Counsel reiterated therefore that the direction has no basis in law as in any case the Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts of Kenya provides that the directions given should not be inconsistent with any legislation or the guidelines.

24. I have carefully considered the rival submissions and cases cited and I beg to most respectfully differ with the submissions of Counsel for the Applicant. The rights of the accused are guaranteed under Article 50 of the Constitution. Article 50(1) states that “ **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**”

25. Article 50(2) which introduces the rights of every accused person states:- **“Every Accused person has the right to a fair trial, which includes the right”** In my considered view the phrase **“which includes”** connotes that the rights referred to in **Article 50(2) (a) to (q)** is not exhaustive. My so saying finds support in **Article 19 (3) (b)** of the Constitution which states:-

“3. The rights and fundamental freedoms in the Bill of Rights –

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.”

It is to be noted that Article 25 of the Constitution is emphatic that the right to a fair trial is one of the fundamental rights and freedoms that cannot be limited. Consequently the directions given by the trial magistrate must of necessity be examined in light of the Interested Parties' right to a fair trial vis a vis the applicant's power to conduct criminal proceedings without interference from any authority and also the need to safeguard the safety of the witnesses.

26. Having carefully considered the rival submissions and cases cited and taking the aforesaid into consideration my findings are; Firstly, that the direction given by the trial magistrate indeed has a legal basis. As noted earlier the overriding objective of the Active Case Management guidelines and the reason they were introduced to the criminal cases is so as to expedite cases and to afford accused persons a fair trial. Those rules are a kin to **Order 11 of the Civil Procedure Rules** and a simple reading of the same reveals that the same are anchored mainly on the Constitution and also on various statutes which donate power to the Chief Justice to make rules of court. Indeed the Chief Justice has in the preamble of those Guidelines cited the Constitution and the said statutes and also observed that **“the main objective of the Guidelines is to Article 159 of the Constitution particularly in reducing delay, case backlog and ensuring that justice is done irrespective of status. Accordingly, these Guidelines encompass ‘best practice’ in the governance of criminal trials and appeals.”**

27. Secondly I do not, with respect agree with the applicant's Counsel's submission that the rules are an affront of the power vested upon the applicant by the Constitution to conduct criminal proceedings. While the Applicant has the sole mandate to undertake and conduct Criminal proceedings **Article 157 of the Constitution** also requires the applicant to have regard to inter alia the interests of justice and the need to prevent and avoid abuse of the legal process. In my view the direction given by the trial magistrate does not in any way and will not in any manner affect the applicant's power to manage its case. It is after all the prosecution that shall decide which witness to call and when to call the witness and which document to refer to when, or produce when. That power lies **solely** with the prosecution. All that is required of it by the trial court is to inform or disclose to the defence the order by which it will be calling the witnesses so that the defence can prepare itself in regard to the specific witness(s). I consider this reasonable in light of the number of witnesses lined up in the cases. In my view complying with the direction will aid the interests of the administration of justice in the cases as it will expedite the trial.

28. I am not also persuaded that by complying with this direction the applicant is doing far beyond what is expected of it by the Constitution. The trial court is an impartial arbiter and it has a duty to provide a level playing field to the parties. I do agree with the submission that it owes that duty to the victims and witnesses as well as indeed our law has now been developed to accord the victims a place during the trial itself. While previously the victim could only sit in court and listen to the prosecutor argue the case they now have a right to participate in the trial. That right has been given impetus by the Supreme Court in the case of **Joseph Lendrix Waswa V Republic (Supra)**. Even in the case of disclosure that right has not always been available to the accused until cases such as the case of **George Ngodhe Juma, Peter Okoth Alingo, Susan Muthoni Nyoike V Attorney General (Supra)** and the case of **Thomas Patrick Gilbert Cholmondeley V Republic (Supra)**. The right was thereafter entrenched in **Article 50 (2) (j) of the Constitution**.

29. The accused's right to a fair trial is as already stated one that cannot be limited (**See Article 25 (c) of the Constitution**) and as I have demonstrated the list of rights under **Article 50(2)** is not exhaustive and it would be folly for this court to hold that the right to a fair trial ends when the accused is inter alia allowed to instruct an advocate of his choice and he has been supplied with all the evidence that the prosecution intends to rely on. In the case of **Attorney General's Reference (No. 3 of 1999)** cited in **R v H [2004] 2 AC 134** and cited with approval by the Supreme Court of Kenya in the case of **Joseph Lendrix Waswa v Republic [supra]** the court stated:

“68..... Herein, the Lords made pertinent observations on a ‘fair trial’. They noted at paragraph 11 that ‘fairness is a constantly evolving concept’ and that ‘it is important to recognize that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another’.....” They observed that although the focus of the Article 6 of the European Convention is on the right of a criminal defendant to a fair trial, this has to be exercised within the framework of the administration of the criminal law and ‘requires that the trial process, viewed as a whole, must be fair.....’

30. I agree with this observation of the Lords that **“fairness is a constantly evolving concept”** and that it is important to recognize that standards and perceptions of **“fairness may change, not only from one century to another but also, sometimes from one decade to another.”** The above view is of course consistent with **Article 259 (1) (b) and (c) of the Constitution** which enjoins this court to interpret the Constitution in a manner that:-

“(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits the development of the law; and”

31. The trial magistrate made his directions in good faith after hearing the parties in a pre-trial conference and I do agree with Counsel for the Interested Parties that the direction to supply a **“Chronology of witnesses”** is necessary in the circumstances of this case.

32. In regard to the safety of the witnesses I am not persuaded that the direction shall expose them to danger. This is in view of the fact that learned Counsel for the applicant has himself admitted that they supplied the particulars of the witnesses including their home addresses to the defence way back in 2019. Clearly if anybody was intent on harming the witnesses they would have done so by now. Moreover the directions given by the trial magistrate are not **cast in stone**. They are amenable to review and or variation by the court suo moto or upon application by any of the parties whenever need arises (**see Guidelines 7.0 of the Guidelines for Active Case Management**). Should it arise that the witnesses are exposed to danger as a result of the direction/order the same can be reviewed. The safety of witnesses would in fact be a good ground for review. The application for variation of the direction must however be made before the trial magistrate as provided in guideline 7.0.

33. In the upshot I am not persuaded that the trial magistrate exercised his discretion in a manner that is unconstitutional, unreasonable or that in any manner violates the law. I therefore find no merit in this application and the same is dismissed.

DATED SIGNED AND DELIVERED ELECTRONICALLY ON THIS 14^H DAY OF OCTOBER, 2021

E.N. MAINA

JUDGE

14/10/2021