REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. E069 OF 2020

LENNOX CHENGEK CHESTIT.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The subject of this ruling is the applicant's Notice of Motion dated 3rd November 2020. Most of the prayers in the application are now spent. The only prayer pending this court's determination is prayer 4 in which the applicant seeks revision of the orders issued by the trial court *(Hon. L. Onyina, CM)* dated 7th October 2020 in which the trial court overruled the applicant's objection to disclosure of evidence in the course of the trial.

2. The background to the application is that the applicant and his co-accused were charged before the Chief Magistrate's Court JKIA in Criminal Case No. 192 of 2017 in two counts with the offence of trafficking in narcotic drugs contrary to *Section 4 (A)* of the *Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994*.

3. In the first count, it was alleged that on 2nd November 2017 at Jomo Kenyatta International Airport within Nairobi County, the applicant, jointly with others not before the court trafficked 10045.70 grams of heroin which had a market value of KShs.30,137,100.

4. In count 2, it was alleged that on the same date and place, the applicant's co-accused who were charged as accused 2 and accused 3 trafficked 9845.70 grams of heroin which had a market value of KShs.29,537,100.

5. The record of the trial court shows that in the course of the trial, the prosecution sought to introduce as evidence a CD-ROM containing CCTV footage which had allegedly been served directly on the accused persons earlier but had not been served on their advocates on record. The prosecution sought court's leave to allow re-issuance of the CCTV footage [hereinafter the footage] on the applicant's advocates since they were denying having received it from their clients and they had refused to accept service of the same.

6. Learned counsel on record for the applicant as well as counsel appearing for the other accused persons objected to the application mainly on grounds that their clients had denied having been served with the footage as alleged and that they had instructed them not to receive such evidence from the respondent; that disclosure at that late stage in the proceedings would be prejudicial to their clients as it might impact on their line of defence.

7. In his ruling, the learned trial magistrate dismissed the defence's objection noting that the issue of supply of the CD-ROM to the accused persons was not new as it had been raised on a mention date six months prior to the date the application was made and that the prosecution cannot be prevented from supplying to the advocates on record what had already been supplied to their clients. The court directed the prosecution to serve the footage on the advocates representing the accused persons who included the applicant and in case personal service was declined, the same to be effected electronically through email. This is the ruling that triggered the revision application under consideration.

8. In the grounds premising the motion and in the depositions made by the applicant in support of the application, the applicant faulted the trial court's ruling on grounds that it amounted to an ambush and was an affront to his right to a fair trial considering that it was delivered late in the proceedings when the prosecution was almost closing its case; that under *Article 50* of the *Constitution*, an accused person had a right to be informed in advance of the evidence the prosecution intended to rely on; that the trial court's reliance on the ***Cholmondeley case*** was wrong since the case was decided prior to the promulgation of the Constitution of Kenya, 2010 and findings therein were now obsolete.

9. In contesting the application, learned prosecuting counsel *Ms Akunja* filed grounds of opposition on 21st June 2021 in which she asserted that the application amounted to an abuse of the court process as it was meant to delay or defeat the ends of justice; that it contravened

Article 50 (2) of the *Constitution* which requires trials to be concluded without unreasonable delay; that disclosure of evidence is a continuous process throughout the prosecution case provided that the accused is given adequate time to prepare his defence; that the ruling did not prejudice the applicant as he would have had an opportunity to study the evidence, prepare his defence and cross-examine the witnesses during the trial; that the applicant has not demonstrated that the trial court acted in excess of its powers.

10. At the hearing, the application was prosecuted by way of both written and oral submissions. *Ms Akunja* filed skeleton written submissions which she highlighted orally on the date the application was scheduled for hearing. *Mr. Swaka* for the applicant chose to rely on oral submissions.

11. In his submissions, *Mr. Swaka* reiterated and expounded on the grounds anchoring the motion and the depositions made by the applicant in the supporting affidavit. In addition, counsel argued that allowing disclosure in the course of a trial would amount to an abuse of the discovery process which would violate an accused person's right to a fair trial guaranteed under *Article 50 (2)* of the *Constitution*. He urged the court to set aside the trial court's ruling and expunge the documents which were introduced.

12. On her part, learned prosecuting counsel *Ms Kimaru* relied on the skeleton written submissions filed by her colleague *Ms Akunja*. She emphasized that though the CCTV footage was not supplied to the applicant during pretrial, it was served on him during the trial; that the duty imposed on the prosecution to disclose evidence is continuous and subsists throughout the prosecution case and that since the prosecution case was still ongoing, no prejudice would be caused by the late disclosure of the CCTV footage since the prosecution was ready to give the applicant time to interrogate the evidence to prepare for cross examination of the prosecution witnesses. She invited the court to dismiss the application for lack of merit.

13. I have carefully considered the substantive prayer sought in the application alongside the rival submissions made on behalf of the applicant and the respondent. I have also read the impugned ruling. This being an application invoking the court's revisional jurisdiction, I find that the key issue for my determination is whether the application meets the threshold for revision as encapsulated in *Section 362* of the *Criminal Procedure Code*.

14. The above provision which donates to this court its revisional jurisdiction states as follows:

> **"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."**

15. A reading of the provision clearly shows that the High Court can only intervene and revise orders or decisions made by the trial court if it was satisfied that there was an error, illegality or impropriety in the impugned order or decision or that there was some irregularity in the proceedings leading to the challenged decision.

16. In this case, it is evident from the trial court's ruling that the learned trial magistrate carefully considered the contentions made by both parties and the law applicable to the prosecution's duty to disclose to an accused person the evidence it intends to rely on during the trial as enshrined in *Article 50 (2)* of the *Constitution.*

17. With due respect, I do not find substance in the applicant's argument that disclosure of the CCTV footage during the trial would have occasioned him prejudice. A look at *Article 50 (2) (j)* shows that an accused person is only guaranteed a right to be informed of evidence in advance and to be given an opportunity to access that evidence. The term "in advance" is not defined and it is left to the interpretation of the court.

18. In my view, a proper interpretation of the term should involve a consideration of other rights enshrined in *Article 50 (2)* of the *Constitution* which deals with the rights of an accused person to a fair trial. The fact that these rights are meant to ensure a fair trial means that they can be exercised either before or after commencement of the trial.

19. My take is that the right of an accused person to be informed of the prosecution's evidence in advance cannot be narrowly interpreted to mean that disclosure can only be made before commencement of the trial. In my opinion, disclosure can be made in the course of the trial but before the evidence in question is produced in court.

20. It is further my position that *Article 50 (2) (j)* should be read together with *Article 50 (2) (c)* which provides that an accused person should be given adequate time and facilities to prepare for his defence. This in effect means that even if disclosure is made in the course of the proceedings, it would only affect an accused person's right to a fair trial if he was denied an opportunity to interrogate it and prepare for cross examination of the witnesses expected to tender the evidence in court. I therefore agree with the respondent's submissions that the prosecution's duty of disclosure is continuous and can be discharged even after commencement of a trial but before the prosecution closed its case.

21. If the disclosure is made in the course of the trial, the duty shifts to the trial court to ensure that the accused is given sufficient time to consider the evidence and if represented to consult with its advocates in order to prepare his response to the evidence before it is formally produced in court.

22. In this case, it is not disputed that at the time the application was made, the prosecution had not closed its case. The trial court's decision to allow the application cannot thus be faulted as it was made in compliance with the law. The complaint that the trial court erred by following the findings in ***Thomas Patrick Cholmondeley V Republic, [2008] eKLR*** which were allegedly obsolete cannot be sustained because though the decision was made prior to promulgation of the Constitution of Kenya 2010, the findings therein were relevant to the prosecution's duty of disclosure and were in alignment with the provisions of the current constitution.

23. In view of the foregoing, it is my finding that the instant application has failed to meet the threshold of *Section 362* of the *Criminal Procedure Code* as there is no error, mistake or impropriety in the trial court's ruling that would warrant interference by this court by way of revision.

24. Accordingly, I do not find merit in the application and it is hereby dismissed. I direct that the original file be returned to the trial court to continue with the trial. Given the age of the case, the trial should be fast tracked and may be heard on a priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2021

C. W. GITHUA

JUDGE

In the presence of:

Mr. Swaka for the applicant

Ms Chege for the respondent

Ms Karwitha: Court Assistant