REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO.46 OF 2019

REPUBLIC .....APPELLANT

VERSUS

FRANCIS CHAHONYO.....1ST RESPONDENT

CHRIS OBURE.....2ND RESPONDENT

SAMMY KYUNGU.....3RD RESPONDENT

SAMUEL BUNDOTICH.....4TH RESPONDENT

(Being revision from a ruling delivered by the Hon. Ann Mwangi, Senior Principal magistrate on the 27th September, 2019)

RULING

1. The Respondents herein Francis Chahonyo (1st Respondent), Chris Obure (2nd respondent), Sammy Kyungu (3rd respondent) and Samuel Bundotich (4th respondent), were jointly arraigned before the Anti-Corruption court Milimani on 4th March, 2015 facing various charges relating to corruption *inter alia:* **Abuse of office contrary to Section 101(1) as read with Section 36 of the Penal Code and breach of trust against the public contrary to Section 127 as read with Section 36 of the Penal code.**

2. Having entered a plea of not guilty, the court fixed the case for full trial with the prosecution calling several witnesses. On 26th September 2019, prosecution put into the witness box their 27th (PW 27) witness one Mark Chemon Ndiema a forensic investigator working with the EACC. During his testimony, the witness made reference to various documents(exhibits) all of which were photocopies marked MF1-4,5,7,10 and 78.

3. When the said witness attempted to produce the said exhibits, the defence counsel for the 2nd accused (2nd Respondent) Mr. Kioko Kilukumi objected arguing that the documents were photocopies. According to counsel, no basis had been laid as to the whereabouts of the originals and that no leave had been sought by the prosecution before seeking to produce the photocopies as secondary evidence contrary to the Evidence Act.

4. Mr. Chacha appearing for the 3rd Accused person (3rd Respondent) also raised similar objection citing similar grounds. He submitted that the prosecution had not complied with Section 67 and 68 of the Evidence Act regarding production of secondary evidence.

5. In his response, Mr. Monda Prosecution counsel opposed the objection stating that they were prepared to avail proof that they had made every effort to look for the documents. Counsel further argued that PW26 had explained on how he had tried to access the original documents but in vain. According to Mr. Monda, that was sufficient effort made hence proof that a basis had been laid to justify admission of secondary evidence.

6. In his rejoinder, Mr. Kilukumi opined that PW 26 had told the court that he was not able to access the originals but fell short of explaining how much effort had been made to access the originals. Mr. Chacha on his rejoinder stated that, a mere statement of inability to access a document is not good enough. In his view, the witness must demonstrate the effort employed in retrieving or accessing the documents.

7. Having considered the objection and response thereto, the learned magistrate delivered her ruling on 27th September, 2019 upholding the objection. The honourable magistrate stated that prosecution had not met the threshold for admission of secondary evidence as underpinned under Section 67 and 68 of the Evidence Act. She further stated that prosecution did not demonstrate on the effort made to obtain the

original documents.

8. Aggrieved by the said ruling, the DPP moved this court through a letter dated 11th October, 2019 seeking revision orders.

9. The application is premised on the grounds that the honourable magistrate misdirected herself in declining to admit evidence marked MF1 4, 5, 7, 10 and 78 by finding that; the prosecution had not laid a basis for production of copies of the aforesaid documents; that a firm and proper legal basis was laid by Pw15 and Pw16 who stated the efforts made to retrieve the original documents; that the learned magistrate misapprehended the provisions of Section 68 of the Evidence Act; that the key witnesses had already testified and made reference to those documents hence no prejudice would be suffered by the accused persons in particular, Chris Obure and Bundotich.

10. It was further stated that the two accused persons had not even denied that they were signatories to those documents hence it is only fair and just in the circumstances that the prosecution be allowed to produce the copies of the documents already identified as they were prepared and signed by the accused persons as stated by PW 16. Further, it was contended that, pursuant to Article 159 of the Constitution, this court has the powers to direct the honourable court to admit the exhibits so declined by the trial court.

11. To urge his case, Mr. Monda relied on his submissions filed on 13th November, 2019 in which he stated that, the document marked MF1 7 and 10 had been referred to by the Auditor General who confirmed that payment had been made using the two documents. That PW2 in his evidence at page 80- 81 stated that he had visited various ministries and requested for documents in relation to the said contract but in vain.

12. Counsel contended that PW4 confirmed signing MF1 10 whereas PW5 gave his legal opinion to one Sammy Kyungu based on MF1 4, 5. and 7 being documents he found in his office.

13. Learned counsel further contended that PW9 had testified how he made payments after verifying MF1 5 (see pages 160-163 of the proceedings). Mr. Monda asserted that it was the 2nd, 3rd and 4th accused persons who signed the original documents marked MF1 4, 5, 7 and 10 among them the contract document which is the subject of the criminal proceedings herein hence no prejudice will be suffered by admitting the documents to which they were signatories. Learned counsel contended that PW16 and PW17 had informed the court of the efforts they made in trying to retrieve the impugned documents. I wish to note that both the 1st and 2nd respondent did not file any response to the application.

3RD Respondent's Response:

14. In response, the 3rd Respondent filed written submissions on 22nd November, 2019 through the firm of Oraro & Company Advocates. It was submitted that the prosecution had not met the threshold for admission of secondary evidence in accordance with section 68 of the Evidence Act. In support of this preposition, the court was referred to the decision in the case of **Republic vs David Tumbo M'munoru (2011) eKLR** where the court quoting from **Sarkar on evidence 11th Ed. Page 1623** stated:

> "**Where the original has been destroyed or lost, and a party has made a diligent search for it and exhausted all the resources and means available for its production, secondary evidence is admissible. The existence and execution of the document must of course be proved first. In cases under this clause any kind of evidence is admissible. A destruction signifies that the thing no longer exists, while a loss signifies merely that it cannot be discovered."**

15. In further buttressing the guidelines governing admission of secondary evidence, counsel made reference to the holding in the case of **Re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – deceased (2016) eKLR and Samuel Kibue Maina vs Republic (2018) eKLR** where the court held that;

> **"It is clear that the investigating officer made efforts to obtain the documents. It is also clear that the custodian of the said documents who was PW5 testified under oath that at the time he meant (sic) the copies which PW7 sought to produce, he did see the originals, but when the originals were sought at a later date they were found to be missing. This clearly brings this case under the ambit of section 68(1)(c) of the Evidence Act."**

16. Lastly, it was contended that Article 159 of the constitution is not applicable as the provision under section 68 of the Evidence Act is not a procedural technicality.

4TH Respondent's response:

17. Through the firm of Iseme, Kamau and Maema Advocates, the 4th Respondent filed his submissions on 23rd December, 2019. Just like the 3rd Respondent, it was submitted that the prosecution had not met the requisite conditions set out under Section 68 of the Evidence Act. It was further contended that none of the prosecution witnesses least of all, PW2, PW5, PW9, PW15, 16, 17 and 19 ever attempted to lay a basis for production and admission of the disputed documents in accordance with Section 68 of the Evidence Act.

18. In counsel's view, PW1 (Auditor General) and PW2 an officer from the Auditor General's office merely made reference to MF1 1-MF1 4, 5, 7 10, and 78 but did not give any evidence regarding their effort to get their originals. That PW5 Dan Ameyo also talked of receiving MF1 4 and 5 but never stated any efforts made to access originals. In the same vein, PW9, PW15, PW16, 17 and 19 made reference to those documents but failed to explain why the originals could not be availed.

19. To underscore the significance and enforcement of Section 68 of the Evidence Act, the court was referred to the decision in the case of

Re the Estate of Charles Ndegwa Kiragu (supra). Touching on the applicability of Article 159 of the constitution, it was contended that the same cannot oust a substantive provision of the Evidence Act which does not amount to a procedural technicality. To support this preposition, reliance was placed on the decision in the case of **Samuel Otieno Obudo and 6 others vs Republic (2019) KLR**. Lastly the court was urged that revisionary powers should only be exercised on exceptional circumstances and that the application herein is misconceived and it amounts to an abuse of the court process.

Analysis and determination:

20. I have considered the application herein, the original lower court record, the impugned ruling and submissions by both counsel. The only issue that emerge for determination is whether, the prosecution had met the threshold for admission of secondary evidence in accordance with the conditions set out under Section 68 of the Evidence Act.

21. Although the applicant did not specifically make reference to the provisions under which the application for revision is filed, I will never the less use this court's inherent powers to infer that the same is brought under Article 165, (6) and (7) of the Constitution and Section 362 of the CPC being the obvious provisions under which revision orders such as the ones sought can be invoked.

22. Article 165(6) of the Constitution confers the High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. As stated in the case of **John Kipng'eno Koech & 2 others vs Nakuru County Assembly & others (2013) eKLR** jurisdiction is;

> **"The practical authority granted to a formally constituted body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is a scope, validity, legitimacy or authority to preside or adjudicate upon a matter."**

23. Under Article 165(7), the High Court is empowered to call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause 6, and may make any order or give any directions it considers appropriate to ensure a fair administration of justice. To actualise this authority, Section 362 of the CPC goes to provide that;

> **'The High Court may call for and examine the record for 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."**

24. The exercise of revisionary powers is purely discretionary only to the extent of intervening in situations where the impugned decision, order or finding of the subordinate court may have been arrived at based on the application of a wrong legal principle or misapprehension of the law thus prejudicing due process. **(see Samuel Njuguna Githinji vs Republic (1992) eKLR and Joseph Waweru vs Republic (2014) eKLR.**

25. In the instant case, what is before me is the determination whether the prosecution had laid a foundation for production of secondary evidence.

26. Admissibility of secondary evidence is governed under section 67 and 68 of the Evidence Act. Section 67 provides – **documents must be proved by primary evidence except in the cases herein after mentioned.** Section 68 (1) further goes on to provide that:

> **"67. Secondary evidence may be given of the existence, condition or contents of a document in the following cases-**
>
> **(a) when the original is shown or appears to be in the possession or powers of-**
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> **(i) the person against whom the document is sought to be proved; or**
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> **(ii) a person out of reach of, or not subject to, the process of the court; or**
>
> **(iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;**
>
> **(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;**
>
> **(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;**
>
> **(d) when the original is of such a nature as not to be easily movable;**
>
> **(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;**
>
> **(g) when the original consists of numerous accounts or other documents which cannot conveniently**

be examined in court, and the fact to be proved is the general result of the whole collection."

27. It is incumbent upon the prosecution to properly lay a basis justifying and fulfilling the conditions set out under section 68. It is also within the discretion of the trial court to allow or not to allow the admission of exhibits after addressing and applying the relevant legal principles; the trial court should be satisfied that every effort must have been made to trace and or avail the original (primary document) and if not, apply for leave of the court to allow production and admission of secondary evidence (photocopies) under Section 68 of the Evidence Act. Further, it must also be shown that sufficient notice had been given to the person in whose custody the document is or to his lawyer subject to the exceptions provided under Section 69 of Evidence Act.

28. The above principles were enunciated in the case of **Republic vs David Tumbo M'munoru** (supra). Similar position was held in **petition No. 377/19 Nairobi High Court** between **Hassan Ahmed Ibrahim vs Kenya National Bureau of Statistics and 2 (2019) eKLR** where the court held that:

> **"The petitioner did not demonstrate the existence of any of the conditions or circumstances set out in Section 68, neither did he produce a certified copy of the letter. On the whole therefore, the said letter cannot be admitted to evidence."**

29. A cursory look at the court proceedings at page 534 overleaf, Mr. Monda for the state in response to the objection stated that:

> **"We are prepared to avail proof that we made every effort to look for the documents."**

From this opening remarks, Mr. Monda was admitting that the prosecution had not laid a proper foundation for admissibility of secondary evidence. Although in his submissions before this court Mr. Monda cited the evidence of various prosecution witnesses among them PW2, PW5, 16, 17, 19 and 26 as having made reference to the rejected documents, none of them stated where the originals were, efforts made to access them and whether, any notice was ever issued pursuant to Section 69 of the Evidence Act. There was no expression of any difficulties experienced in tracing them and therefore the need for leave to admit the photocopies as secondary evidence.

30. It is trite that, mere reference to a document which is not an original is not the same as demonstrating the efforts made to trace or get the originals. As correctly stated by the trial magistrate, no proper basis had been laid by the prosecution in explaining the whereabouts of the originals. It was not established as to who is in custody of the impugned documents and whether any notice to produce had been issued or certified copies obtained.

31. The best the prosecution should have done before close of prosecution case was to seek an opportunity to lay a basis and thereafter seek leave to produce secondary evidence. Seeking revision which is technically in the circumstances of this case akin to an interlocutory appeal will not have been the best option as the same will circumvent the outcome of the main appeal after the conclusion of the main trial. (See **Thomas Patrick Gilbert Cholmondeley vs Republic (2008) eKLR** where the court held that:

> **"In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379(1) of Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The appellant has not been convicted of any offence. As far as we understand, the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person…the fact that a trial judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the judge will inevitably convict. The judge might well acquit in the end and the adverse ruling, even if it amounts to a breach of fundamental rights, falls by the way side and cause no harm to such an accused person."**

32. Having taken into account all the facts and circumstances of this case, I am of the view that since the prosecution had admitted that they are ready to lay a basis, it is only fair, just and prudent that they be given an opportunity to do so in the interest of substantive justice. Although this should have been done immediately the defence raised the objection, it is not too late to do so given that the prosecution have not closed their case.

33. Pursuant to the inherent powers conferred to this court under Article 165(7) of the Constitution which provides that this court may make any order or give any direction it considers appropriate to ensure the fair administration of justice, I will direct that the prosecution seeks leave from the trial court to lay a basis for production and admission of the impugned documents as secondary evidence subject to fulfilling the requisite conditions set out under the relevant provision of the law (Evidence Act). This is informed from the fact that by the court declining to admit the exhibits, it did not shut the door for laying the basis before the close of the prosecution case. In any event, there will be no prejudice suffered in affording the prosecution an opportunity to comply with the relevant provisions.

34. Having made the above directions, the DR is directed to remit the original file to back to the trial court to continue with the trial as scheduled.

DATED, DELIVERED and SIGNED at Nairobi in open court this 14TH day of January, 2020.

J. N. ONYIEGO

JUDGE