REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

REVISION APPLICATION NO. 42 OF 2019

(Being a Revision from the Ruling of Hon. D. Ogoti, CM delivered on 9th September 2019 in ACCR No. 26 of 2019 at Milimani CM's Court)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

PETER AGUKO ABOK .....1ST RESPONDENT

GEORGE ANYANGO OLOO.....2ND RESPONDENT

GEORGE OMOLLO ODAWA..... 3RD RESPONDENT

ANTHONY KIPRONO KOGO.....4TH RESPONDENT

DAVID NYAPIDA OYOSI..... 5TH RESPONDENT

JOHN NYEERA MANGO..... 6TH RESPONDENT

JOHN COLLINS ONYANGO.....7TH RESPONDENT

BONIFACE ORORI SIMBA.....8TH RESPONDENT

WILLIAM BILL OMODING.....9TH RESPONDENT

JIMMY WAPNGANA NABWERA.....10TH RESPONDENT

ALEX JIMMY MKABWA.....11TH RESPONDENT

MARY DORIS GOIMA MICHIEKA.....12TH RESPONDENT

KENNEDY OTAWA MUSEBE.....13TH RESPONDENT

MICHAEL OBORA.....14TH RESPONDENT

JOASH ODHIAMBO DACHE.....15TH RESPONDENT

DENIS SEBASTIAN MULAA.....16TH RESPONDENT

JOSIAH OKUMU .....17TH RESPONDENT

OKUMU OGWANG ODINDO.....18TH RESPONDENT

INNOCENT OBIRI MOMANYI.....19TH RESPONDENT

OSCAR ODHIAMBO OGUNDE.....20TH RESPONDENT

VINCENT MAKONJIO OGENGE..... 21ST RESPONDENT

LYDIA OWINO.....22ND RESPONDENT

ZHANG JING.....23RD RESPONDENT

JOHN ZEYUN YANG.....24TH RESPONDENT

ANTHONY CHEBULOBI KISAKA.....25TH RESPONDENT

NELSON OUMA ONYANGO.....26TH RESPONDENT

HENRY OGWANG ODINDO.....27TH RESPONDENT

EMMANUEL SONGORO.....28TH RESPONDENT

MOSES WEKESA..... 29TH RESPONDENT

GODFREY MAINA MWANGI.....30TH RESPONDENT

FREDRICK CHERE ONYANGO.....31ST RESPONDENT

ALBERT OJANGO OMONDO.....32ND RESPONDENT

AMELIA JACKELINE OTIENO.....33RD RESPONDENT

TERESIA ACHIENG' OCHAKA.....34TH RESPONDENT

ERDERMANN PROPERTY LIMIED .....35TH RESPONDENT

SYMBION KENYA LIMITED..... 36TH RESPONDENT

RULING

Factual background of the case

1. On 9th September, 2019, Peter Aguk Abok and 35 others were arraigned before the Anti-Corruption Court Milimani vide ACC Nos. 25/2019 and 26/2019 facing corruption related charges. Having returned a plea of not guilty, the accused persons were released on various bail terms and conditions.

2. For purposes of its ruling on the application for bail, the court consolidated the two files and delivered its ruling on 9/09/2019 under file No. 26/2019. It was during the hearing of the bail application that the court invited the prosecution also to address the issue of disclosure to which Mr. Kihara intimated that they had about 250 documents to disclose some of which had more than1,000 pages. Mr. Kihara also disclosed that they had 65 witnesses whom they intended to call.

3. In its ruling delivered on 9/09/2019, the court *suo motto* made remarks stating that;

> **"anti corruption matters are complex matters hence requiring a different approach in handling them from the inception the absence of the law governing their uniqueness notwithstanding".**

The court further observed that anti corruption matters were complex because they involve many accused persons, many charges, a lot of documentation and many witnesses cutting across cases thus posing a challenge on the hearing and disposal of cases. The honorable magistrate also noted that there was no law nor precedents clearly governing disclosure of evidence in conformity with Article 50(2)(j) and (4) and Article 24 and 25 of the Constitution.

4. In the learned Magistrate's view, lack of express provisions regarding disclosure, maximum number of charges to be preferred and the

extent of disclosure has posed a challenge in terms of delayed prosecution and determination of the matters, apathy in hearing anti-corruption cases, presentation of evidence by the prosecution and analysis of evidence by the trial court.

5. Consequently, the Learned Magistrate made the following directions;

> **1. The prosecution to make disclosure in every prosecution file.**
>
> **2. From today henceforth, the investigative agencies and the DPP to ensure that disclosure in each prosecution file must be done count by count.**
>
> **3. All disclosures should be captured in an inventory to be signed by both parties i.e prosecution and defence and filed in court.**
>
> **4. Each item to be presented in the inventory singularly.**
>
> **5. The documents be disclosed in such manners to have indexes paginated.**
>
> **6. On the issue of bail/bond, I have considered the nature of offences brought against the accused persons, the amount of money alleged to have been lost, the presumption of innocence and the court's duty to ensure that in admitting the accused to bond the main purpose is to ensure that they attend court.**

6. Aggrieved by the said ruling and in particular the direction for disclosure count by count, the DPP moved to this court pursuant to Article 165(6) and (7) of the Constitution of Kenya 2010 and Sections 362 and 364 of the Criminal Procedure Code, citing all accused persons as respondents seeking orders as follows;

> **1. That the Honourable Court be pleased to certify this application as urgent and heard exparte in the first instance and on priority basis.**
>
> **2. That the Honourable Court be pleased to stay the order dated 9th September, 2019 specifically directing all investigative agencies and the Director of Public Prosecutions in Anti-Corruption and Economic cases to ensure disclosure in each charge sheet to be done count by count until the hearing and final determination of this application inter partes.**
>
> **3. That this Honourable Court be pleased to call for and examine the record of the proceedings in the Anti-Corruption Chief Magistrate's court Nairobi at Milimani in Milimani Anti-corruption case Number, 25 and 26 of 2019 Republic vs. Peter Aguko Abok & 35 others for the purposes of satisfying itself and pronouncing the correctness, legality or propriety of the order issued on 9th September, 2019 by Hon. D. Ogoti.**
>
> **4. That the Court be pleased to review, vary, reverse and/or alter the orders relating to specific disclosure on each count in Anti-Corruption Chief Magistrate's Court Nairobi at Milimani AntiCorruption Case Number, 25 & 26 of 2019 Republic vs. Peter Aguko Abok & 35 others.**
>
> **5. That the Honourable Court be pleased to make any other order that it deems fit in the interests of justice.**

7. The application is anchored on grounds that disclosure of evidence count by count was contrary to the constitutional duty requiring reasonable access to all the evidence by the accused persons; that there was no legal basis upon which the order was anchored nor was there any indication that the prosecution had failed to discharge its disclosure mandate under Article 50(2) (c) (j); that disclosure of evidence is obligatory, continuous and expensive.

8. The application is further supported by an affidavit sworn on 25/09/2019 by Mary Gateru Senior Assistant Director of Public Prosecutions. It was averred that the court made the order *suo motto* without the prosecution being given an opportunity to place its material evidence; that the prosecution intends to produce 1,500pages of evidence which cuts across all counts hence the direction to present this case count per count was tantamount to directing the applicant on how to present its case contrary to Article 157 of the Constitution.

9. The application having been certified urgent on 25/09/2019, the same was served upon the accused persons as respondents some of who filed their affidavits in response.

10. During the pendency of the Revision application, the 29th accused person (29th respondent) through the law firm of Nyamodi & Co. Advocates filed a notice of motion dated 7th November, 2019 pursuant to *Articles 23 and 165 (4) , 159, 258 and 259 of the Constitution and Rules 3 and 19 of the Constitution (Protection of rights and fundamental freedoms/ practice and procedure rules, 2013)* seeking orders as follows;

> **a. That this application be certified urgent and be heard exparte in the first instance.**
>
> **b. That this application be heard in priority to any other matterin this revision**
>
> **c. That this court be pleased to certify this matter as one raising a substantial question of law under Article 165(4) of the**

Constitution which should be heard by an uneven number of Judges, being not less than three (3) assigned by the Honourable Chief Justice.

d. That this Honourable Court be pleased to refer this matter to the Chief Justice for empanelment of a bench as provided for by Article 165 (4) of the constitution.

e. That the costs of this application be in the cause.

11. After hearing the application seeking to refer the file to the Chief Justice for empanelment of a three Judge bench, the same was dismissed on 22nd January 2020 on grounds that the application did not raise any substantial question of law that could not be addressed by a single Judge. Having dismissed Mr. Nyamodi's application, the court directed for the hearing of the substantive revision application to proceed with the respondents as interested parties.

12. In response to the revision application, some of the accused persons who were named as respondents filed their responses. On 16th October 2019, the 20th and 36th respondents (interested parties) filed Grounds of Opposition dated 15th October 2019 opposing the revision application. They stated that the existence of 24 counts against 36 accused persons is too wide thus requiring the accused persons to know in detail the specific evidence in the prosecution's possession against each of them to be able to prepare their respective defences. That no prejudice will be suffered by the prosecution in complying with the order.

13. In support of this proposition, the court was referred to the decision in the case of **Juma and Others vs. The Attorney General (2003)**2 EA 461 where the court recognized the importance of a fair trial as follows;

"The accused person must be given and afforded those opportunities and means, so that the prosecution does not gain an underserved or unfair advantage over the accused; and; so that the accused is not impeded in any manner and suffer unfair disadvantage and prejudice in preparing his defence, confronting his accusers, and arming himself in his defence; and so that no miscarriage of justice is occasioned."

14. The court was further referred to the decision in the case of **Republic vs. Raphael Muoki Kalungu (2015)eKLR** where the court ordered prosecution to supply the defence with Safaricom call logs before commencement of the prosecution case to aid the defence adequately prepare its case.

15. On 17th October 2019, the 10th respondent (interested party) filed a replying affidavit sworn on 16th October 2019 opposing the application for revision arguing that; it lacked merit; that the right to a fair trial is inalienable which cannot be limited. On the same day, the 13th respondent (interested party) filed a replying affidavit sworn on 16th January 2019 opposing the application terming it as unmeritorious and whose intention is to curtail the accused person's rights to full disclosure of all material evidence available in respect of each count.

16. On his part, the 3rd respondent (interested party) challenged the application through grounds of opposition dated 17th October 2019 and filed on 18th October 2019 stating that the application was misconceived and misplaced as Section 362 of the CPC was not applicable in the circumstances. That each accused is charged as an individual hence entitled to specific disclosure on the evidence concerning the relevant count.

17. On 22nd October 2019, the 26th and 32nd respondents (interested parties) filed a joint replying affidavit sworn on 21st October 2019 stating that; the application is tainted with falsehood and ill motive intended to belittle the Constitution on the right to a fair hearing under Article 50 (2)(j) on the right to be informed in advance the evidence in possession of the prosecution against an accused person. That the orders of the court were intended to achieve greater justice and that, the court properly exercised its discretion hence the High Court should not interfere with that discretion which is not prejudicial. To support that position, the court was referred to the decision in the case of **Mbogo vs. Shah (1968)EA 93**.

18. The 30th Respondent (30th interested party) filed grounds of opposition dated 22nd October 2019 stating that, the trial court's discretion was in accordance with the Constitution and the applicant should not find any difficult in supplying the evidence to avoid non-disclosure of some material evidence which will render some accused persons unprepared.

19. The 6th Respondent (interested party) also filed his grounds of opposition on 22nd October 2019 citing Article 35(1) of the Constitution which guarantees the right to access information and fair hearing under Article 50(2) (j) which recognizes advance supply of detailed evidence by the prosecution before trial commences hence the necessity to disclose count by count.

20. On 30th October 2019, the 20th and 36th Respondents (interested parties) filed a preliminary objection challenging the legality of the application arguing that it was brought against wrong parties.

21. On the other hand, the 16th Respondent (16th interested party) filed his grounds of Opposition on 11th November 2019 stating that: the application is filed in bad faith; each accused individually deserves to know the evidence against him and, that the court has the right to control proceedings before it.

22. The 28th Respondent (28 interested party) responded through a replying affidavit sworn on 11th November 2019 stating that, he was wrongly enjoined in the suit as the application should have been directed against the court which issued the same *suo motto*. He however supported the orders of the court as being in tandem with the Constitution.

23. Associating himself with the impugned orders of the court, the 14th Respondent filed Grounds of Opposition on 11th November 2019 contending that the orders of the court were purely administrative in nature thus promoting fair administration of justice under Article 50(2)(1) of the Constitution.

24. The 15th Respondent (15th interested party) filed Grounds of Opposition on 4th November 2019 arguing that the impugned orders were in tandem with common parlance as held in the case of **R vs. Sussex Justices exparte Mc Carthy [1924] 1 KB ALL ER** that;

> **"Justice should not only be done but should be seen to be done."**

25. When the court delivered it's ruling on 22nd January 2020 dismissing the prayer by the 29th Respondent seeking to have the file referred to the Chief Justice for empanelling a three Judge bench, parties agreed to file submissions to dispose the revision application.

Applicant's Submissions

26. The applicant (DPP) filed his submissions on 29th January 2020. Mr. Kinjanyui basically adopted averments contained in the affidavit in support of the application for revision and submissions filed on 29th January 2019. Learned counsel submitted on three broad issues stating that the impugned order was not known in law, was illegal, irregular, lopsided and foreign to any known law; the court erred in issuing an order *suo motto* without giving the prosecution or even the defence a chance to the heard; the order flies against the Constitutional duty of the prosecution to disclose to the defence all the evidence it intends to rely on; learned Magistrate misconstrued the applicant's duty of disclosure under Article 50(2)(j) of the Constitution as provided in the active case management guidelines; the order is an affront to Article 157 of the Constitution as it usurped the role and duty of the applicant and that; the order was a blank directive applicable in all Anti-Corruption Cases yet no law permits the learned Chief Magistrate to so order or micro manage the prosecution.

27. Mr. Kinyanjui further submitted that the court made the orders without first giving the prosecution an opportunity to present the evidence they were intending to rely on in full without segregating on who was entitled to what. He further submitted that, the evidence held in 15000 pages cuts across all counts and specific disclosure count by count is tantamount to directing the applicant on how to conduct its trial. That disclosure basically refers to access to all material evidence and not to prove the case at the pre-trial stage.

28. Learned counsel opined that the court lacked jurisdiction in making the orders it did contrary to the holding in **John Kipng'eno Koech & 2 others vs. Nakuru County Assembly & 5 others [2013] eKLR and Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** where both courts held that jurisdiction is everything and where there is none a court should down its tools and move no further step.

29. Regarding whether the court illegally, irregularly and improperly acted in issuing *suo motto* orders, Mr. Kinyanjui urged that the court had no right to give exparte orders without being moved by anybody thus restricting the scope of disclosure. In support of complete disclosure, counsel referred to the decision in the case of **George Ngodhe Juma, Peter Okoth Alingo, Susan Muthoni Nyoike vs. Attorney General (2003)eKLR** where the court underscored the necessity for complete disclosure of the prosecution case.

30. Further, Mr. Kinyanjui contended that disclosure is a continuous process hence cannot be restricted to pre-trial stage. To buttress this fact, counsel relied on the holding in the case of **Dennis Edmond** APAA & **2 Others vs. Ethics** and **Anticorruption Commission** & **Another**[2012]**eKLR where the court held that:-**

> **"The case of *R v Ward* (Supra) cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right *"to be informed in advance"* cannot be read restrictively to mean in advance of the trial."**

31. Counsel further referred to the decision in **Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission and 3 Others (2013)eKLR** where the court stated that:-

> **"The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right."**

32. Mr. Kinyanjui further submitted that the court misinterpreted Article 50(2)(j) by directing disclosure count by count. That Article 50(2)(j) does not restrict disclosure but rather it directs full disclosure of all the evidence relevant to the trial. To support this proposition, counsel referred to the decision in the case of **Joseph Ndungu Kagiri vs. Republic (2016)eKLR** where the Court of Appeal held that Article 50(2)(j) means supply of all evidence at the disposal of the prosecution to the defence.

Submissions by the 3rd and 9th Respondents (interested parties)

33. Through the firm of Rachier and Amollo Advocates, the 3rd and 9th interested parties supported the impugned orders thus opposing the application. They broke the issues for determination into three:-

> **a. Whether the DPP has satisfied the legal threshold of invoking Section 362 and 364 of the Criminal Procedure Code.**
>
> **b. The constitutionality of the order issued by the trial court.**

c. Whether the DPP has demonstrated sufficient grounds for disturbing the discretion of the trial court.

34. According to the learned counsel, the DPP has not proved any illegality or impropriety in the impugned orders and that they will not suffer any prejudice in complying with the order. That it was difficult for an Advocate to go through 15000 pages of evidence to be able to understand what was relevant to each individual accused person in respect of each count.

35. Turning on the Constitutionality of the order, counsel submitted that an accused should be informed in sufficient detail evidence against him specifically and not generally. To support this position, reliance was placed on **Thomas Patrick Gilbert Cholmondeley vs Republic (2009]eKLR** where the court stated 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."**

Submissions by the 20th, 28th and 36th Respondents (interested parties)

36. The firm of Coulson Harrey, LLP appearing for the interested parties (20th, 28th and 36th) filed their skeleton submissions on 11th November 2019 restating their Grounds of Opposition dated 15th October 2019. Mr. Deya submitted that the impugned orders are legal and in conformity with Article 50(2)(j) of the Constitution. He basically repeated what the rest of the interested parties (respondents) had submitted regarding the legality of the orders. That it would be unfair for the prosecution to throw to the defence volumes of evidence to sieve through on what is relevant and what is not relevant.

37. That parties will be put on equal footing if evidence is disclosed count by count. To fortify this position, the court was referred to the decision in the case of **Soon Yeon Kong Kim Kwang Moa vs. The Attorney General of Uganda** Constitutional Reference No. 6/2007 where the court held that:-

> **"the right to fair hearing envisages equality between contestants in litigation."**

Submissions by the 10th and 13th Respondents (Interested Parties)

38. Through the firm of Musyoka Murambi and Associates, the 10th and 13th Interested Parties filed their submissions on 29th January 2019 also emphasizing on the need for the prosecution to supply evidence count by count. He also quoted the holding in **Thomas Patrick Gilbert Cholmondeley vs. Republic** and **Joseph Ndungu Kagiri vs. Republic** above quoted. The court was further referred to the case in the Central Republic in the case of **The Prosecutor vs. Jean-Pierre Bemba Gombo ICC – 01/05-01/08 – 682 29-01-2010 1/14 RHT** where the court allowed presentation of evidence in table format providing a clear and comprehensive overview of all incriminating evidence and how each item of evidence related to the charges against them.

The 23rd, 24th and 35th Respondents' (interested parties) Submissions

39. Through the firm of Zed Achoki Hussein Advocates LLP, they filed their submissions dated 28th January 2020 and filed on 29th January 2020. Mr. Ogada appearing for the interested parties relied on their grounds of opposition dated 22nd October 2019 stating that, the prosecution is supposed to disclose all relevant information to the defence. Reliance was placed on a Canadian case of **R vs. Stinchcombe (1991)3 S.C.R. 326** where the court stated that the crown had a legal duty to disclose all relevant information to the defence. Equally, the court was referred to **Thomas Patrick Gilbert Cholmondeley vs. Republic** (supra) where the court underscored the importance of disclosing all material evidence to the defence.

40. Concerning whether the court was seized of the authority to make the orders it did, counsel submitted that the court properly exercised its discretionary powers in making the orders it did. To illuminate this position, the court was referred to the decision in the case of **Connelly vs. Director of Public Prosecutions (1964)A.C. 1254** where the court held that a court must enjoy some powers to enforce its rules of practice to suppress any abuses.

41. The rest of the respondents either opted not to respond nor file submissions. Others appeared and merely associated themselves with their colleagues' submissions.

Analysis and Determination

42. I have considered the application herein, responses thereof and submissions by counsel. Issues that crystallize for determination are:-

a. **whether this court has jurisdiction to entertain the application.**

b. whether the respondents (interested parties) were properly joined in this application.

c. Whether the applicant has met the threshold for revision of the impugned orders.

a) Whether this court has jurisdiction to entertain the application

43. Jurisdiction is the cornerstone of any judicial proceedings. It flows from either the Constitution or Statute or both. Without it, a court must down its tools and move no further step. See **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Supreme Court Civil Application No. 2 of 2011** and **Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd (1989)KLR 1.**

44. In **John Kipng'eno Koech and 2 Others vs. Nakuru County Assembly and Others (2013)eKLR** jurisdiction was defined as:-

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

45. In this case, the court has been called upon to exercise its supervisory jurisdiction pursuant to Article 165(6) and (7) of the Constitution and Section 362 of the CPC. Article 165(6) confers supervisory jurisdiction of the High Court over Subordinate Courts, and over any person, body or authority exercising judicial or quasi-judicial function but not over a Superior Court. Article 165(7) goes further to state that:-

> **"For the purposes of Clause (6), the High Court may 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 direction it considers appropriate to ensure the fair administration of justice."**

46. Underlying the operationalization of the above constitutional provision is Section 362 of the CPC which underscores the supervisory role of the High Court over Subordinate Courts thus providing that;

> **"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."**

47. However, despite the authority to exercise these wide discretionary powers, the same must be discharged reasonably and judiciously. Those powers must only be directed towards addressing or correcting decisions arrived at based on misapprehension of the law or application of wrong principles of the law. See **Ferdinand Ndungu Waititu Babayao & 22 Others vs. Republic (2019)eKLR**.

48. Considering that parties are in agreement that this court has jurisdiction over the matter, and further considering that the law does provide expressly of these powers, it is my holding that the court has jurisdiction to determine the application.

b) Whether the Respondents (interested parties) were properly joined in this application as respondents

49. The impugned orders herein were made on the court's own motion (*suo motto*). However, the applicant (DPP) decided to name the accused persons as respondents. Some of them argued that they were being dragged to court for orders made by the court and without their participation.

50. Ideally, the applicant should have named the CM's court as the respondent either in a Judicial Review application seeking for certiorari orders or for revision as in this case. The accused persons never played any role whatsoever nor did they contribute towards the issuance of those orders. Their joinder in these proceedings in my humble view was unnecessary. However, in my ruling delivered on 22nd January 2020 where I dismissed one of the respondent's application seeking empanelment of a three Judge bench, I stated that, at best, the respondents should have been enjoined as interested parties and not as respondents. Consequently, I allowed them to participate as interested parties on grounds that the outcome of the orders to be made by this court whether upholding the lower court decision or not will affect their interest in one way or the other.

51. Pursuant to Section 364(2) and 365 of the CPC, this court has powers to hear any party either personally or by an advocate if it finds it necessary. For avoidance of doubt, I will reproduce Section 365 which provides as follows:-

> **"No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:**
>
> **Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2)."**

52. For those reasons, there is no prejudice in granting the accused persons an opportunity to give their side of the story as interested parties which is not prejudicial to any party.

c) Whether the applicant has met the threshold for revision of the impugned orders

(i) Legality of *suo motto* orders

53. The impugned orders herein elicited quite exciting and insightful legal discourse and or arguments both from the applicant and the interested parties. The applicant has described the directive on disclosure of evidence by the prosecution count by count as illegal, irregular and improper. It is incumbent upon the applicant to prove the elements of illegality, impropriety, irregularity or error.

54. There are several questions that have arisen out of this dispute. One is whether, the court had jurisdiction to issue the orders *suo motto*.

55. It is admitted by both parties and indeed by the court itself that there is no express legal provision governing the process of disclosure of evidence during the pre-trial stage count by count. The only relevant document currently addressing the issue of disclosure is the Judiciary Guidelines for active case management of criminal cases in Magistrates and High Courts of Kenya.

56. Paragraph 5.1 of the said guidelines provides for pre-trial case management by the court as follows:-

> **"In furthering the overriding objectives, the court shall set a pre-trial conference as soon as possible, preferably not later than fourteen (14) days after a plea of 'not guilty' is entered."**

57. Paragraph 6.1 goes further to provide:-

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

58. Paragraph 6.2 further states:-

> **"Such direction or step shall not be inconsistent with any legislation or these guidelines."**

59. Paragraph 6.3 also provides-

> **"A court may give a direction on its own motion or on application by a party."**

60. From the above quoted paragraphs of the said guidelines, it is clear that a trial court can *suo motto* give directions to ensure efficient and smooth running of court business. A court of law is not a mechanical machine to strictly operate within strict and fixed parameters. Each court has a case management strategy 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 whilst exercising any power given under the law.

61. 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. In the English case of **Connelly vs. Director of Public Prosecutions, (supra)** the court observed as follows;

> **"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and suppress any abuses of its process and to defeat any attempted thwarting of its process."**

62. In view of the above stated guidelines, I do not find anything wrong in the trial court making *suo motto* directions in the circumstances of this case which in any event are inherent by virtue of holding that jurisdiction.

Disclosure of evidence count per count

63. Despite lack of express legislative legal frame work governing the process of disclosure of material evidence in criminal proceedings, the requirement is underscored constitutionally under Article 50(2) which provides that;

> **"Every accused person has the right to a fair trial, which includes the right-**
>
> **a. to be presumed innocent until the contrary is proved;**
>
> **b. to be informed of the charge, with sufficient detail to answer it;**
>
> **c. to have adequate time and facilities to prepare a defence;**
>
> **d. to a public trial before a court established under this Constitution;**
>
> **e. to have the trial begin and conclude without unreasonable delay;**
>
> **f. …**
>
> **g. …**
>
> **h. …**
>
> **i. …**

j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

64. It is clear from the above provision that the right to a fair trial (hearing) which under Article 25(e) is absolute as an inalienable right cannot be compromised at the altar of any convenience.

65. The central and most contentious aspect emanating from the impugned directive is the interpretation of Article 50(2) (b) and (j) as to whether disclosure in advance of the evidence the prosecution intends to rely on in sufficient detail means general or restricted disclosure detailing what evidence is available against which accused and in which count in case they are more than one.

66. The whole issue revolves around the interpretation of Article 50(2) and in particular paragraph (b) and (j).

67. Under Article 259 of the Constitution, courts are duty bound to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, and, the human rights and fundamental freedoms in the bill of rights, permits the development of the law; and contributes to good governance.

68. Various courts both from within and outside jurisdiction have given guidelines on the approach to constitutional interpretation. In the case of **Timothy Njoya and Others vs. Attorney General and Others (2004)IEA 194** Ringera J. as he then was held that:-

> **"I shall accordingly approach constitutional interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution."**

69. The principle in constitutional interpretation is that, it should be given a purposive inherent interpretation and where the words used are clear leaving no ambiguity, the court should not strive to give any other meaning other than to pronounce what the objective of that provision entails without leaving room for discretion. In the matter of the Re matter of the **Interim Independent Electoral Commission Application No. 2 of 2011**, the court held:-

> **"The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."**

70. What does the provision 'supply in advance' and in 'sufficient detail' entail? From the plain reading of Article 50(2)(b) and (j), prosecution has a legal and binding obligation to supply to the defence all material evidence in its possession which it intends to rely on to enable the defence prepare its defence adequately. The rationale behind this provision is to avoid practice by ambush. It is meant to put both the prosecution and the defence on equal footing so that none is caught by surprise. Secondly, it is in fulfillment of Article 35 of the Constitution which underpins the right to access information. See **Republic vs. Raphael Muoki Kalungu (2015)eKLR** where the court stated that all evidence in possession of prosecution be supplied to the defence to avoid trial by ambush.

71. The essence of disclosure of evidence in advance was aptly captured in the case of **George Ngodhe Juma, Peter Okoth Alingo and Susan Muthoni Nyoike v Attorney-General [2003] eKLR** where the court stated that:-

> **"In general, it means that, an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case."**

72. Mr. Kinyanjui for the State submitted that they have not refused to supply in sufficient detail the available evidence against the accused persons. His concern was that it will be costly and time wasting to start separating evidence which in any event is a continuous process.

73. Indeed the prosecution had not failed to supply all material evidence in their possession. The direction by the court only came a bit too early even before a pre-trial conference could be held. It was perhaps a cautionary alert that when time eventually came that was what was expected of them.

74. It is trite that before a pre-trial conference is held and necessary directions for disclosure made, a charge sheet properly framed must be presented before court and all necessary ingredients satisfied as provided for under Section 134 of the CPC which provides;

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

75. The starting point of Article 50(2) (b) is to be informed of the charge, with sufficient detail. In this case, nobody has challenged the manner in which the charge sheet has been drafted or framed. All accused persons took plea and denied the charges which were sufficiently explained and understood by the accused. None of them claimed that the charges as framed in the charge sheet were defective nor did the court note that. The accused are therefore deemed to know the specific offence or wrong doing leveled against them and therefore from the particulars of the charge sheet they are aware of what is it that they are supposed to defend themselves against. There is no allegation of any

ambiguity on the manner in which the charge sheet has been drawn. To that extent the interested parties cannot claim not to have understood sufficiently what charges they are facing.

76. Having answered paragraph (b), the court is then left to unlock the elephant in the room that is, 'to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access.' It is trite that, supply of evidence the prosecution intends to rely on is not a one stop- shop kind of adventure. The exercise is an ongoing process. It is obvious that, disclosure can be before the hearing or trial commences or during the trial depending on the circumstances of each case or discovery of new evidence which could reasonably not be expected or be available at the start or commencement of the trial. In such a situation (s), the prosecution could be expected to notify the court and the accused of the intention to adduce additional evidence or even the court on its own motion under Section 150 of the CPC demand where necessary for certain witnesses although not listed to be called and testify for the ends of justice to be met.

77. In the case of **Thuita Mwangi and 2 Others vs. Ethics and Anti-Corruption Commission and 3 Others (2013)eKLR** at paragraph 102 the court held that:-

> **"The right to be provided with … material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence."**

78. Similar position was held in **Thomas Patrick Gilbert Cholmondeley vs. Republic C.A. Cr. No. 116/2007 (supra) and Dennis Edmond Apaa and 2 Others vs. Ethics and Anti-Corruption Commissioin and Another Petition No. 317/2012 (supra) where the court held;**

> **"The *Cholmondeley Case* does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of *R v Ward* (Supra) cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right *"to be informed in advance"* cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, *"to have adequate facilities to prepare a defence."***
>
> **(Paragraph 27)- This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial."**

79. In **Bukenya & Others vs. Uganga (1972)EA 549**, the court held that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent and the court has a right and duty to call all witnesses whose evidence appears essential to the just decision of the case.

80. See also **George Ngodhe Juma vs. Attorney General** (supra) where it was stated that the state must disclose all material which is known or possessed and which ought to be disclosed. From the case law quoted above and my plain reading of Article 50(2) (j), the duty imposed upon the prosecution is to make available all the evidence in their possession to the defence without restricting the same to individual accused persons or counts.

81. Full disclosure is neither restrictive nor conditional. Prosecution should not be made to withhold some evidence which it intends to use in the trial from other accused persons. Prosecution of a criminal case is like a web. What may not directly touch on one accused can indirectly or circumstantially connect or touch on another accused person. To restrict production or supply of information or evidence according to each count against individual accused persons in respect of each count will go against the spirit of full disclosure of evidence to the defence contrary to what is envisaged under Article 50(2) of the Constitution.

82. The accused persons should not complain that they are going to be overburdened in reading the entire prosecution evidence or material including that which is not relevant to their respective clients. How will they know what is relevant if they do not have the advantage of reading the entire evidence relied on by the prosecution?

83. If it is left to the discretion of the prosecution to isolate evidence and restrict supply to individual counts, what will happen if later it is discovered by the defence that some evidence in the possession of some accused persons ought to have been supplied to accused so and so as well? It will cause more confusion in the course of the trial when such discovery is made and some accused persons demands to be supplied what they were never supplied but others were supplied with.

84. An advocate should not fear going through the entire evidence as that is what entails adequate preparation of the defence case.

85. Unlike those old days when murder trials used to be conducted through committal proceedings before a Magistrate using committal bundles before the trial would commence in the High Court, there is no law governing committal process for now. If we had such provision which was scrapped from our Statute books, the request for committal proceedings and proof of evidence count by count would have applied. Without a clear legal frame work governing committal proceedings or pre-trial conference as is the case in the International Court of Justice, we cannot craft one from nowhere.

86. Although I commend the trial Magistrate for being creative and innovative in trying to advance jurisprudence, there must be a legal frame

work stipulating on how the process is to be undertaken and the consequences for non-adherence with such directions. Unlike civil cases where a case can be dismissed at a preliminary stage for failure to disclose reasonable cause of action, in criminal cases, the case has to go through a full trial before a court can acquit.

87. What will happen if the prosecution does not have all the evidence at once before the trial commences yet disclosure is a continuous process? Can the court find that there is no full disclosure for such and such an accused person or counts and therefore set free the accused person? Courts do not issue orders or make decisions in vain. Once a charge has properly been framed, registered and admitted in court, the prosecution is duty bound to disclose all the evidence it intends to rely on without segregating on which evidence is applicable to which accused or to which count.

88. There are sufficient constitutional and statutory safety measures governing the rights of an accused person including cross examining witnesses if necessary and submitting in their case and even call witnesses.

89. I do not see how their rights to a fair hearing or trial will be prejudiced or what injury will be suffered by having all the prosecution evidence disclosed in advance which the prosecution is more than willing to supply as per the law. The interested parties have not proved with precision how their rights will be violated or have been violated by not being supplied with all the material evidence count by count (see **Anarita Karimi Njeru vs. Republic (1979)I KLR**. Infact, prosecution should be commended for being more than ready to supply in advance all material evidence without restriction or segregation which might attract complaints of discrimination on account of selective supply hence contravening the Constitution and the Fair Administrative Action Act.

90. In my view and understanding, the framers of Article 50(2)(b) and (j) and generally the Kenyan people did not intend to restrict or limit disclosure of information in supply of evidence to accused persons. By giving it a broader interpretation, it serves its objective that disclosure of evidence means the entire evidence relating to the subject case regardless whether one is charged alone or with other persons in respect of one count or more. From the entire evidence supplied, each accused is able to have a broader understanding of the case so as to prepare the defence sufficiently.

91. I do not see any mischief to be cured by restricted disclosure of evidence. In my humble opinion, there are more benefits when having full disclosure of evidence than restricting it to individual counts or individual accused persons.

92. Since there is no law in place specifically governing disclosure on count per count, it suffices to say that, Article 50(2)(b) and (j) when read together with other provisions governing the trial of criminal proceedings is sufficient engine to drive the entire process without jeopardizing anybody's rights.

93. Accordingly, it is my finding that the order of the trial court directing that prosecution discloses evidence count by count will amount to demanding to much from the applicant and by extension controlling its prosecutorial role even before the hearing process commences.

94. I am therefore satisfied with the prosecution's prayers that the trial court improperly and without any underpinning legal frame work arrived at the direction of disclosure of evidence count by count. To that extent, that order and direction is hereby set aside and the prosecution shall be at liberty to supply all material evidence relating to the case to all accused persons whether facing one count or more.

95. Regarding the other directions or orders, the same shall remain in force as they were not challenged in this revision application.

96. Perhaps, it is high time the Attorney General prepared amendments to the Evidence Act and Criminal Procedure Code to provide a clear legal frame work on committal proceedings or pre-trial conference proceedings where the evidence disclosed in advance would be challenged at a preliminary stage to determine whether an accused person should be committed to stand trial on the basis of the evidence available.

97. With a proper legal framework, it will save more precious judicial time, cost and avoid charges prepared for the sake of settling personal scores or speculative charges which are eventually withdrawn for lack of evidence, witnesses, or simply collapse from the word go. This will also mean that Judiciary will concentrate on more serious and deserving cases and that the prosecution will be more than vigilant to present only serious cases in court.

98. As it is now, the DPP cannot be questioned or challenged on the merits or sufficiency of the evidence at the pre-trial stage until full hearing is conducted and cross examination duly carried out and then determined by the court on whether there is a case to answer or not. Aware that Anti-Corruption matters are unique in nature, there is need for legislation to provide for special process of prosecution including preliminary committal proceedings at the pre-trial conference stage to determine on cases worthy proceeding to full trial.

99. From the above reasons stated, the application herein succeeds and the orders regarding disclosure of evidence count per count is hereby set aside.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2020.

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J. N. ONYIEGO

JUDGE