REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MILIMANI LAW COURTS

CRIMINAL DIVISION

MISCELLANEOUS CR. APP. CASE NO 148 OF 2019

GIDEON KIPTOO KIMAIYO.....APPLICANT

VERSUS

CHIEF MAGISTRATE COURT KIBERA.....1ST RESPONDENT

OFFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION...2ND RESPONDENT

AND

AIRTEL NETWORKS KENYA LIMINTED.....INTERESTED PARTY

RULING

This matter is before the court now for the applicant's application dated 18.3.2019 and filed on 19.3.2019. The same is brought under several articles of the constitution i.e Article 2(4), 19, 20(1)(2) and (3), 22(1), 23(1), 25(c), 35(1)(b), 50(1)d(2) and 159(2) and sections 362 and 364 of the Criminal Procedure Code. The application on the face of it seeks 4 prayers. However, only prayer 3 of the same is of relevance at this stage, and all the submissions were made only on the same. Prayer number 3 of this application has 2 limbs as follow:-

> 3(a) That the 2nd Respondent to supply the applicant with copies of the underlisted documents prior to the commencement of the trial/hearing of the case.
>
> (i) The employment records of the applicant.
>
> (ii) The information about lines 0734-xxxx, 0753-xxxx, 0780-xxxx, 0787-xxxx and 0788-xxxx, including but not limited to when they were created, the details of the officers who created them, compliance (KYC) documents and history of float allocations therein.
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> (iii) Audited accounts of Airtel Kenya Limited between 2015 and 2018
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> (iv) Breakdown of the alleged loss of Kshs. 613,269.550/= specifying dates of loses.
>
> (v) Monthly Trust Reconciliations between 2015 and 2018.
>
> (vi) Extract of the statement of user account of the applicant
>
> (vii) Extract of OB No. 15.19.2018
>
> (viii) Investigations diary.

3(b) That the Advocate watching brief for the complainant be barred from directly participating in the matter.

The applicant is supported by the affidavit of the Applicant. It is opposed by the 2nd Respondent, as well as the Interested Party who have both filed their respective replying affidavits.

It was submitted by Mr. Abidha the advocate for the Applicant, that upon being supplied with documents by the 2nd Respondent the Applicant realized that a number of documents mentioned had not been supplied. These are the documents listed under prayer 3(a). That despite requests the 2nd Respondent failed to do so. The applicant feels aggrieved with the order of the trial court that the 2nd Respondent could only supply the documents in their possession. Counsel maintained that this a Breach of Article 35(1). And as to Article 50(2), it was submitted that an accused is entitled to a right to file trial which would include perusing documents supplied by the prosecution. And that the 2nd Respondent has not supplied. Some of the documents mentioned in the affidavit of the investigating officer. He challenged the affidavit of the representative of the Interested Party on the claim that the Interested Party for reasons of confidentiality (amongst others) cannot supply the documents.

Counsel also submitted that the accused is entitled to that information, both under Article 35(1) and 5.3 of Access to Information Act. Also that section 26 of the ODPP Act demands that the police are to avail all documents that may be relevant to the prosecution and the defence.

To buttress the arguments, counsel relied on the cases of George Ngodhe Juma & others Versus Attorney General (2003)eKLR, and Thomas Patrick Gilbert Cholmondly Versus Republic (NAC)Criminal Application 116/2007(2008)eKLR. That Commercial interests are not a good ground for non-disclosure where such information is in the custody of the Respondent.

Further reliance was made on the case of George Bala Versus Attorney General (2017)eKLR, that the court ought to interpret articles of the constitution to give it light and not to limit the same.

Regarding the 2nd limb of the application, counsel submitted that the victims protection Act, allow only the advocate representing a victim to appear, cross-examine and submit, but not those of companies as in our case. That there is no law for a compliant to proceed parallel to the DPP in Criminal proceedings. He cited the case of Kimuri Housing company Versus DPP(2017)eKLR.

The advocate for the Interested Party also made submissions. The submissions were that the Interested Party duly submitted all documents to the DPP as sought for prosecution of the case, and the same have all been supplied to the defence. That under Article 50(2)(g), the access to the evidence must be reasonable and the evidence must be relevant. Counsel also maintained that they intend to participate in the proceedings only to raise concerns that they may have i.e Limited participation. Also that they may participate as intermediaries (Article 57).

And on the Kinjuri Housing case (page 7), the submissions adere that the court held that the statute should be read to include legal persons also.

Ms. Kimani for the 2nd Respondent, (the DPP) was the last to submit. Her submissions were that the DPP has fully complied with Article 50(2)(i) and provided the defence with all the evidence that the prosecution intends to rely on. And that the documents mentioned in prayer 3(a) are not in possession of the 2nd Respondent. If was therefore the fear of the prosecution that the applicant simply intends to direct the DPP on how to conduct the cases contrary to Article 157, which dictates the DPP is to carry out its duties without any control from anyone. Lastly, that the prosecution has supplied all the documents received from the complainant and so the prayer sought cannot be implemented by the 2nd Respondent. She urged that this application be dismissed.

I have considered the above submissions of the 3 learned counsel for the parties. I have also perused in detail the affidavits filed, the submissions and also the authorities relied on. As I understand it, this application seeks to have enforced the rights of an accused person as to information on the face of it, several provisions of the constitution have been cited. However, the submissions were limited to only 2 articles i.e Article 35 and Article 50 respectively. The parties in my view were agreed as to the right to information under Article 35 of the constitution. Indeed no detailed submissions were made on this. There is no doubt that the clear provisions on the right of access to information (Article 35) was well acknowledged and agreed by the parties.

The more relevant constitutional provisions on which this application is based is Article 50(1) and (2)(j). it would help to reproduce these provisions herein. Article 50 of the constitution relates to the right to fair hearing.

> Article 50(1) reads:
>
> "*Every person has a 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."*
>
> And Article 50(2)(j) states:
>
> "*Every accused person has a right to and fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."*

The point of disagreement between that parties herein is the extent to which the disclosure of information (evidence) may be undertaken by the prosecution side that, whereas the prosecution side maintains that they have supplied the defence with all the evidence they obtained from the complainant and which they intend to rely on in the prosecution of this case, it is the position of the defence that the prosecution has not supplied and or availed to the defence all the evidence that the defence would require to adequately prepared and conduct their defence. That the right of the accused (applicant) to a fair trial would be infringed on if these evidence (listed at paragraph 3a) are not provided to the defence.

This is not something new in our courts and the authorities relied on by the defence are testimony of this. The said authorities actually give a good guide on this issue. I shall consider them as follows:

(i) George Ngodhe Juma & 2 others Versus Attonery General (2003)eKLR

This was a similar situation like our own. The applicants therein sought to have the words to be afforded facilities under the old section 77(1)(2)(c) and (e) interpreted to include the provision by the prosecution to the defence, copies of witnesses statements and exhibits the presentation would rely on in the prosecution of the case well before the trial to enable the accused prepare adequently for his defence. The trial judges (The Hon. Mbogholi Msagha and Kuloba JJ) declared that indeed, to ensure fair trial, the prosecution were duty bound to supply the defence with all the copies of witness statements and exhibits prior to the hearing. At page 8 of the said judgment the court held that the state is obliged to provide an accused person with copies of witness statements and relevant documents. And just before this finding, at page 7, of the court also declared that the disclosure would be of the material which is known, possessed and proposed to be used at the trial.

The authority in this case cited by the defence is therefore that such duty to disclose evidence is to the extent to which the evidence is relevant, known, possessed and proposed to be used at the trial. The rider given by the court, is that such evidence relevant, known and possessed shall be supplied to the defence if it assists the accused even if the prosecution does not propose to us I do not therefore envisage a situation where the prosecution would be required to supply evidence which is neither relevant not in their possession.

(ii) Thomas Patrick Gilbert Cholmondeley Versus Republic (2008)eKLR:

This is where the applicant moved to the Court of Appeal to challenge an order of the High Court that the defence to supply the prosecution side with the statements and exhibits that the defence intended to rely on in their defence. At paragraph 3 of the said decision, the court stressed the duty to supply the defence with all the relevant material they had gathered and intended to use at the trial. Again the holding was that evidence to be supplied must have been gathered. In fact the court went to declare that even the evidence gathered during the trial would still be supplied.

(iii) George Bala Versus Attorney General (2017)eKLR:

This case and especially the portion of the ruling cited (page 11) dealt with the issue of interpretation of the constitution where there are ambiguity, unreasonableness, obvious imbalance, lack of proportionality or absurdity. None of these circumstances have been pointed at in our instance case.

The sum total of the jurisprudence from the courts as relied on by the applicant herein is that the prosecution is under a duty to supply the defence with copies of all witness statements, documents and exhibits. These would be statements, documents and exhibits obtained, gathered and possessed by the prosecution side whether they intend to use them or not. This, in my view, would accord the accused the opportunity to use all this material in his defence.

I therefore am not convinced that the prosecution has a duty to supply to the defence any evidence (document, statement or exhibit) that they have not gathered or those that are not in their possession. Were the court to order, obviously the court would be moving into the arena of controlling the course of the investigations. In courts constitutional responsibility remains that of considering all the evidence presented before if by both sides and reaching at a just determination based on facts and the law.

It goes without saying much that the applicant (accused) is entitled to a fair trial. In our case, this will entail the prosecution side supplying the defence side with all evidence, material, statements, documents and exhibits obtained from the investigations and in their possession prior to the hearing of this case. This, to me would satisfy the constitutional requirement of Article 50(2)(j).

To this extent therefore, this court declines to issue the orders prayed for in prayer 3(a) of this application which relates to evidence (material) which the 1st Respondent has denied neither gathering nor being in possession of. As rightly put by counsel for the 1st Respondent the prayers sought by the applicant do not. We with the 1st Respondent I therefore dismiss this prayer.

Regarding the 2nd issue raised by the applicant on the extent of participation of the Interested Party in these proceedings, this court notes that the applicant is not objecting to such participation per se. The only divergence between the applicant ant the interested party is the level of participation of the interested party in these proceedings whereas the Interested Party seeks to participate to the extent of raising issues of law and filing of submissions, it is the position of the defence that the participation of the Interested Party ought to be passive as the case is prosecuted by the 1st Respondent, the Director of Public Prosecutions.

Article 157(1) of the constitution establishes the office of Director of Public Prosecutions. At Article 157(6)(a) the Director of Public Prosecutions is the body or office mandated to institute and undertake criminal proceedings against any person before any court (other than a court Martial) in respect of any offence alleged to have been committed. That office, under sub-article 10, shall not be under the direction or control of any person or authority.

These provisions buttress the position that the office of the Director of Public Prosecution is an independent office. It is the sole constitutional body (office) with the powers to conduct Criminal prosecutions. It is also clear that the interested party appreciates this position and has accordingly chosen to come in this matter under the office of Public prosecutions. Were this not the case, the interested party would have chosen to pursue a private prosecution against the applicant and indeed the applicant's co-accuseds. The issue for consideration is therefore, whether the participation of the interested party in these proceedings to the extent of raising and or pointing out points of law and filing of submissions would be tantamount to usurping the constitutional powers of the Director of Public Prosecutions.

Article 50(a) of the constitutions declares that parliament shall enact legislation providing for the protection, rights and welfare of victims of offences. This provision expresses the true spirits and intent of the constitution is to safeguarding the interests of victims of offences. I have no doubt in my mind, that the interested party herein, being the complainant in the criminal trial, is a victim as envisaged in the constitution.

And there has been no dispute about this from the applicant.

One of the statutes that parliament has since enacted pursuant to Article 50(a) is the Victims Protection Act. At section 2(b) of the said Act:

> *"Every victim is as far as possible given an opportunity to be heard and to respond before any decision affecting him or her is taken."*

There is no distinction made in this provision on whether the victim ought only to be human or even corporate. It is the understanding of this court therefore that a victim in our case is the complainant which happens to be a corporate body. And being the victim, the interested party must essentially enjoy all the rights of a victim under the Victims Protection Act. It therefore follows that under the current constitutional dispensation, the complainant (victim) enjoys a wide latitude in criminal proceedings in ensuring and or protection of his rights.

This has been the position taken by the courts. And on this, I am guided by the decision of the Hon. Lady Justice Lesiit in Leonard Maina Mwangi versus DPP and 2 others (2017)eKLR in which the Honorable judge noted:

> *"I find that the victims right to participate in the trial process subsists, and is not passive, but active within the limits set. I find that the participation of the victim is non-derogable right under Article 25 of the constitution."*

I am not persuaded by the submissions of learned counsel for the applicant, that the role of counsel watching brief can only be passive, silent and only sit through the proceedings. See also, Gideon Mwiti Irea Versus DPP and 7 others others (2015)eKLR and Republic Versus Veronicah Gitahi and PC Issa Mzee (Mombasa Criminal 4/2014, Criminal Appeal 23(2016)

On the same issue, the Court of Appeal (Githinji, Okwengu and J. Mohammed JJA), in a decision that binds this court in Joseph Lendrix Waswa Versus Republic(2019) eKLR, noted authoritatively:-

> *"The concept of "watching brief" in Criminal trial where an advocate for the victim does not play any active role in the trial process is outdated. The constitution and the Victim Protection Act now gives the victim of an offence a right to a fair trial and the right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to the public interest. The right of the victim to be heard persists throughout the trial process and continues to the appellant process."*

The Court of Appeal went on to declare that the constitutional and statutory role of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process. And that the implementation of the right may be ensured by the trial court at the appropriate stages of the proceedings as justice would require.

In conclusion, I note that this is an interlocutory application against an order of the lower court. It has had the effect of prolonging the period of hearing and conclusion of the matter, whereas the issues raised could very well have been raised if all upon final determination of the case. This is a practice which must be discouraged and frowned upon. The authority of the Court of Appeal in Thomas Patrick Gilbert Cholmondeley Versus Republic (2008)eKLR, gives the apt directions, this,

> *"First, the fact that the trial Judge has made an adverse ruling against an accused person in a criminal trial does not end cannot mean that the Judge will inevitably convict. The judge might well acquit in the end and the adverse ruling. Even if it amounted to a breach of a fundamental right, falls by the way side and causes no harm to such an accused. The advantage of that cause is that the long delay in the hearing of the charge is avoided and in the event of a conviction, the matter can be raised on appeal once and for all…. We think it is against public policy that Criminal trials should be held up in this fashion, and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We should add that in future, if such appeals are brought the court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."*

I accordingly therefore do not find any merit in this application of the applicant dated 18.3.2019. I dismiss the same wholly and order that the Applicant do appear before the trial court for the hearing of his case. Orders accordingly.

D. O. OGEMBO

JUDGE

15.5.2020

Court:

Ruling read out in the presence of Mr. Abidha for the Applicant, Ms. Kaburu holding brief for Mr. Ataka for the interested party and Ms. Kibathi for the state.

D. O. OGEMBO

JUDGE

15.5.2020

Court:

Case to be mentioned before the trial court (Kibera Court) for further directions. Mention 19.6.2020.

D. O. OGEMBO

JUDGE

15.5.2020

Court:

Original file and the ruling to be submitted to the trial court. Copies of the ruling to be supplied to the parties.

D. O. OGEMBO

JUDGE

15.5.2020