



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 92 OF 2018**

**EVANS ISABOKE NYACHOI.....APPLICANT**

**VERSUS**

**1. THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**2. DIVISIONAL CRIMINAL INVESTIGATIONS OFFICER**

**KILINDINI (AT PORT POLICE STATION) MOMBASA.....2<sup>ND</sup> RESPONDENT**

**3. P. C. RAPHAEL MWAKA.....3<sup>RD</sup> RESPONDENT**

**(Revision from the orders of Hon. Kagoni, Principal Magistrate, made on 27th June, 2018 in Mombasa Chief Magistrate's Court Criminal Application No. 121 of 2018).**

**RULING ON REVISION**

1. The application before me is dated 23<sup>rd</sup> July, 2018. It seeks the following orders and/or determination:-

(i) This matter be certified urgent and heard *ex parte* in the first instance; (2) (a) In its supervisory jurisdiction over subordinate courts exercising judicial authority, the High Court be pleased to call for the record and entire proceedings pending before the Chief Magistrate's Court at Mombasa and make such orders or give such directions appropriate to ensure the protection of the applicant's rights under Article 50(2) and (4) of the Constitution for fair hearing and for the ends of justice in the following 2 cases:-

**(a) Republic of Kenya**

**In the Chief Magistrates Court at Mombasa**

**CMCC No. 903 of 2018 (Mombasa)**

**Republic .....Complainant**

**Versus**

**Evans Isaboke Nyachoi.....Accused**

**(b) Republic of Kenya**

**Misc. Criminal Application No. 121 of 2018**

**Director of Criminal Investigations.....Applicant**

**versus**

**NIC Bank Limited.....Respondent**

(b) Pending the hearing and determination of this matter there be an order for stay of proceedings in the above cited cases in 2(a) above.

(3) A declaratory order be issued that all actions, proceedings and consequential orders made by the Hon. E. Kagoni (SRM) in *ex parte* proceedings in 2(b) during the pendency of the case in prayer (2)(a) above are unlawful, illegal and unconstitutional, null and void and the same be set aside and are hereby expunged from the record of case No. 903 of 2018 cited in prayer 2(a) above.

(4) The court be pleased to make such orders and directions to stop undue interference by the respondents and the Senior Resident Magistrate, Hon. E. Kagoni and all orders of the said Magistrate issued contrary to the provisions of Article 50(2)(4) of the Constitution be set aside by the Court.

(5) Any other orders appropriate in the circumstances to meet the ends of justice.

### **The applicant's case**

2. The applicant's case is that this court has jurisdiction to supervise the subordinate courts to achieve fair administration of justice and that the matters in **Mombasa Chief Magistrate's Court Criminal Case No. 903 of 2018, Republic vs Evans Isaboke Nyachoi** and **Mombasa Chief Magistrate's Court Miscellaneous Criminal Application No. 121 of 2018, Director of Criminal Investigations vs NIC Bank Limited** are being conducted contrary to Article 50(2)(4) of the Constitution of Kenya and Sections 118, 121, 207, 208 of the Criminal Procedure Code and Section 180 of the Evidence Act. The applicant further states that his case concerns the conduct of Criminal Case No. 903 of 2018 pending in the Chief Magistrate's Court Mombasa.

3. That the applicant was charged in Mombasa Chief Magistrate's Court on 28<sup>th</sup> May, 2018 and kept in custody for 5 days at the Kilindini Port Police Station, Mombasa and thereafter the prosecution was ordered to supply the applicant with the requisite witness statements and all the evidence. That on 12<sup>th</sup> June, 2018 the prosecution sought for more time until 19<sup>th</sup> June, 2018 to comply, but yet again sought for more time to 3<sup>rd</sup> July, 2018 when it was allowed to amend the charge. The applicant contends that the prosecution introduced what was referred to as a strange court order from **Mombasa Chief Magistrate's Court Miscellaneous Criminal Application No. 121 of 2018 Director of Criminal Investigations vs NIC Bank Limited** issued by Hon. E. Kagoni, Senior Resident Magistrate (now Principal Magistrate) from another Court in Mombasa on 27<sup>th</sup> June, 2018. Counsel for the applicant explained that the plea had been taken by Hon. Ogweno, Resident Magistrate.

4. The applicant states that the 3<sup>rd</sup> respondent hid the pendency of **Mombasa Chief Magistrate's Court Criminal Case No. 903 of 2018, Republic vs Evans Isaboke Nyachoi** from the above mentioned Magistrate and that the non-disclosure is aimed at sanitizing the illegality of obtaining orders directing the Investigating Officer to access, investigate and obtain information and carry away documents relating to Bank Account No. 1001771287 NIC Bank Ltd held by the applicant.

5. The applicant further states that the said actions are an affront to his right to privacy and right to protection of his inherent dignity as well as the right to fair administrative action. That the applicant ought to be allowed to participate in any proceedings that may impact his rights, freedoms and liberties and that the same amounts to illegal search and seizure of him and his property contrary to Article 31 of the Constitution.

6. The applicant prayed for the orders granted by Hon. E. Kagoni, Principal Magistrate to be set aside as having been obtained through practice of fraud on the court and any evidence as such be excluded from trial as the actions are against the rights of the applicant contained in Article 50(2) and (4) of the Constitution of Kenya, regarding fair hearing. Further that the impugned actions go to negate the applicant's rights in that at the time of taking plea, the prosecution did not have enough evidence to arrest and charge him.

### **The respondent's case**

7. In response to the application, the respondents filed a replying affidavit on 20<sup>th</sup> November, 2018 sworn by the 3<sup>rd</sup> respondent Police Constable Raphael Mwaka. It is the respondent's case that the applicant was arrested on 26<sup>th</sup> May, 2018 for questioning by the 3<sup>rd</sup> respondent and subsequently booked at Port Police Station so that investigations could commence. That the applicant was arraigned in court on Monday 28<sup>th</sup> May, 2018. The 3<sup>rd</sup> respondent sought to detain the applicant for 5 days but the Court that took the plea refused to grant the orders that were being sought.

8. The 3<sup>rd</sup> respondent averred that by the time the matter was set down for pre-trial he had recorded the complainant's statement together with one of his witnesses but he did not have bank statements which the complainant in the lower court case had alluded to. He also deposed to the fact that he was advised by the Office of the Director of Public Prosecutions to swear an affidavit to be served upon the Bank in order to obtain the statements and as a result filed Miscellaneous Criminal Application. No. 121 of 2018. He further stated that the application was argued before the duty court Hon. Kagoni, Principal Magistrate, in the presence of the Prosecuting Counsel and prayers were granted to the effect that the 3<sup>rd</sup> Respondent could serve NIC Bank with the application and court order.

9. The 3<sup>rd</sup> respondent stated that there was full disclosure before the court and that there is only one criminal case that the applicant is charged with and that there was no abuse of the court process since the bank records could only be accessed through a court order. The 3<sup>rd</sup> respondent further indicated that the applicant's right to privacy, right to protection, dignity and fair administrative action had not been violated.

10. The respondents averred that the applicant's right to fair hearing hadn't been curtailed and he had been duly informed of the evidence the prosecution intends to rely on. The respondents were of the view that the applicant should challenge the evidence in the lower court case and

that should this application be allowed, they were likely to suffer great prejudice.

## ANALYSIS AND DETERMINATION

**The issue that this court is called upon to decide is whether the orders granted by the lower court amounted to an infringement of the applicant's rights to fair trial.**

11. Article 50 of the current Constitution of Kenya provides for the right to a fair trial. Article 50(2) thereof provides and explains what constitutes the right to a fair trial. Article 50(2)(j) of the Constitution provides for the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. In **Dennis Edmond Apaa & others vs EACC & Another** [2012] eKLR, Judge Majanja was of the view that the words "**to be informed in advance**" as per the provisions of Article 50(2)(j) of the Constitution cannot be read restrictively to mean in advance of the trial. He further stated that 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 and under Article 50(2)(c) of the Constitution, by being accorded adequate facilities to prepare for his or her defence.

12. In **Republic vs Stinchcombe** [1991] 3S.C.R 326, the Supreme Court of Canada held as follows:-

*".....failure by the prosecution to disclose would impede the ability of the defence to make full answer and defence, a common law right which was subsequently included in the Canadian Charter of Rights and Freedoms and was one of the pillars of criminal justice system which ensured that the innocent were not convicted. The obligation to disclose was a continuing one and was to be updated when additional information was received....."*

13. The Black's Law Dictionary 9<sup>th</sup> Edition defines Discovery as a compulsory disclosure, at a party's request of information that relates to the litigation. In the present context, it means a request for a pre-trial full disclosure of information in the possession of the agents of the state, namely, the DPP, is relevant to the defence.

14. The applicant alleges that the evidence from the bank was irregularly obtained and that the said evidence should be shut out of the prosecution's case. Article 50(4) of the said Constitution provides as follows:-

*"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."*

15. On the other hand, Section 118 of the Criminal Procedure Code provides as follows with regard to the powers of the courts in issuance of search warrants:-

*"Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."*

16. Section 118A of the Criminal Procedure Code provides that an application for a search warrant under section 118 shall be made *ex parte* to a Magistrate. Going by the provisions of the said Section that requires an application for a search warrant to be made *ex parte* before a Magistrate, the applicant herein cannot argue that he should have been involved in the application seeking orders for discovery of evidence through a search warrant. In any event, it would have been self defeating if the Investigating Officer had disclosed to the applicant that an application for a search warrant was in the offing.

17. Ideally, the Investigating Officer should have sought a search warrant before a decision was made to charge the applicant. He however charged the applicant on 28th May, 2018 and then filed a Miscellaneous Criminal Application dated 27th June, 2018 before the Magistrate's Court. PC Raphael Mwaka deposed in his affidavit that he followed the instructions of the duty Counsel, in the office of Director of Public Prosecutions, Ms Ngina Mutua, to prepare the charge sheet for the applicant with the offence of stealing by agent. He added that by then, he had not recorded all the statements and he did not have all the documentary exhibits.

18. I have perused the proceedings of the lower court file and do note that the court order to obtain the applicant's bank statements was made during the pre-trial stage. I read no mischief whatsoever from the fact that the orders in issue were made by Hon. Kagoni, Principal Magistrate, instead of Hon. Ogweni, Resident Magistrate, who took the plea. In paragraph 11 of his affidavit, PC Raphael Mwaka averred that the duty court on the day he made his application was the one presided over by Hon. Kagoni, Principal Magistrate.

19. I note from the depositions made by PC Raphael Mwaka, that he did not disclose that as at the time he made his application before Hon. Kagoni, Principal Magistrate, the applicant herein had already been charged. I however note from PC Raphael Mwaka's affidavit in support of the application dated 27th June, 2018, in paragraph 6 he stated that he had on 5th June, 2018 sought a search warrant, which orders he was granted but realized that he had cited the wrong dates with regard to the period under investigation. That is how he ended up making the subsequent application dated 27th June, 2018. It is therefore my finding that the evidence in issue was obtained in a procedural manner pursuant to a court order.

20. In the petition of **Philemona Mbete Mwilu vs Director of Public Prosecutions and 3 Others, Stanley Muluvi Kiima (Interested party); International Commission of Jurists Kenya Chapter (Amicus curie)** [2019] eKLR a 5 Judge bench of the High Court found that some evidence had not been procedurally obtained by investigators. The court had the following to say:-

***“There was no order authorising the DCI to investigate the petitioner’s accounts at IBL. The investigation into the petitioner’s accounts was not sanctioned by any court and such evidence as was obtained would appear to be illegally obtained evidence. There was an apparent false start on the part of the DCI .....*”**

21. In the present case, the investigating officer obtained orders from court to get information about the applicant’s bank account. That is unlike in the case I have cited above where the Director of Criminal Investigations was found to have encroached into investigating the petitioner’s bank account when the order obtained was to investigate a different account. The applicant herein was duty bound to demonstrate to this court and satisfactorily so, the extent to which the orders granted by Hon. Kagoni, Principal Magistrate, were not properly obtained and how they will prejudice his trial. The applicant has failed to demonstrate how the provisions of Articles 50(2) and 50(4) of the Constitution of Kenya were violated in the lower court case and more specifically, at the pre-trial stage. The upshot therefore is that the application dated 23<sup>rd</sup> July, 2018 is without merit and the same is hereby dismissed.

22. The Deputy Registrar is directed to remit the lower court file to the Trial Court. The lower court case will be mentioned on 27th June, 2019 before Hon. Ogwen, Resident Magistrate, for directions as to the hearing of the case.

**DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of June, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Paul Magolo holding brief for Mr. Opolu for the applicant

Ms Ogwen, Principal Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant.