REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CRIMINAL REVISION APPLICATION 37 OF 2019

NJUGUNA MWANGI.....1ST APPLICANT

SAMUEL IRUNGU MWANGI.....2ND APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. Pursuant to Article 159 (6) & (7) of the Constitution, Sections 362 and 364 (1) (b) of the Criminal Procedure Code, the applicants herein filed a notice of motion dated 13th September 2019 seeking orders that:

> **(1) This matter be certified urgent and heard exparte in the first instance.**
>
> **(2) The court file in the Chief Magistrate's Court Anti-Corruption Case No. 17 of 2014 Milimani be forthwith transmitted to the high court of Kenya at Nairobi.**
>
> **(3) The honourable court be pleased to issue revisionary orders to revise and set aside the orders of the learned honourable trial magistrate Hon. Thomas Nzyoka CM admitting into evidence the Audio Visual recording and dismissing the 1st accused's objection in the ruling of the 2nd September 2019 and substitute it with an order striking out the admissions and upholding the 1st accused's objection raised on the 28th June 2019 on admissibility of the same.**

2. The application is premised upon grounds set out on the face of it and an affidavit sworn on 13th September 2019 by Njuguna Mwangi the first applicant with authority from the 2nd applicant. Upon certifying the application urgent on the 16th September 2019, an order directing service of the application upon the respondents was made. In response, the respondent filed its submissions on 3rd October 2019. Equally, the applicants filed theirs on 3rd October 2019 through the firm of Okubasu and Munene Advocates. On 4th October 2019, both counsel highlighted on their respective submissions.

Brief facts of the case

3. The applicants herein were arraigned before the Anti-Corruption Chief Magistrate's Court Milimani jointly facing various charges relating to corruption interalia; corruptly soliciting for a benefit contrary to Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and, corruptly receiving a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No.3 of 2003.

4. Having entered a plea of not guilty, the matter proceeded to full hearing. On 28th August 2019, the prosecution called its 9th witness (PW9) the investigating officer in this case. In the course of giving her testimony, pw9 made reference to the visual and audio recording devices (MFI 30 & 31 respectively) which were alleged to have been used to record a conversation in which the solicitation and receipt of the alleged bribe was made by the applicants.

5. While testifying, the witness stated that, by use of her official laptop, she downloaded the recorded conversation and the images captured during the sting operation executed on 14th August 2014 into the Audio and Visual compact discs (MFI-8) and (MFI-27). The witness went further to state that, after saving the downloaded conversation into compact discs, she prepared a certificate (MFI-28 and 29 respectively). That before downloading the conversation, she tested the laptop (computer) and confirmed that it was in good working condition and that the recording devices were also in good working condition.

6. When the witness attempted to play the compact discs, the defence counsel comprising of Mr. Munene, Mr. Arusei and Okach advocates objected to the move alleging that the certificate prepared by PW9 did not meet the conditions set out under Section 106 B (2) of the Evidence Act governing admission of electronic evidence. Specifically, Mr. Munene counsel for the 1st applicant (1st accused) raised the issue of the witness having not indicated in the certificate that the computer she had used in downloading and developing the disc compacts was in good working condition.

7. Mr. Munene's objection was supported by Mr. Arusei for the 2nd applicant (2nd accused). Mr. Arusei submitted that PW9 was not an expert in computer and therefore not in a position to certify that the laptop she was using was serviceable or reliable. Mr. Okach also appearing for the second respondent associated himself with his colleagues' submissions.

8. In their response, Mutela for the sate opposed the objection stating that Section 106 B (2) does not require production of a computer used to download the compact disc. Learned counsel also submitted that the objection was not merited and urged the court to dismiss the same.

9. After considering the objection and the response thereto, the learned magistrate dismissed the objection stating that the objection lacked merit and therefore directed PW9 to continue with her testimony by playing the compact. It was the learned magistrate's finding that PW9 had custody of the recording devices and that a computer expert was not necessary. Further, the court found that the certificate had clearly captured at Paragraph 5 that the recording devices and laptop used to download the conversation were in good working condition.

Applicant's Submissions

10. Mr. Munene appearing for the applicants together with Mr. Arusei and Okach basically reiterated the averments contained in the affidavit in support of the application. It was counsel's submission that the trial court casually brushed aside several weighty legal grounds and objection raised on behalf of the applicant challenging the admissibility of electronic evidence in complete disregard of the pre-conditions set out under Section 106 B (2) of the Evidence Act.

11. That the court acted in error by incorrectly and illegally admitting the electronic evidence without certifying in the certificate that the computer used in generating the electronic device was in good working condition.

12. It was further submitted that the admissibility of the said evidence was oppressive, embarrassing and prejudicial to the applicant's case. Learned counsel urged this court to exercise its supervisory jurisdiction under Article 165 (6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code to set aside the orders. To support this proposition counsel referred the court to the case of **R v Jared Walukhe Tusei and another (2003) eKLR** where the court found that the High Court has wide supervisory jurisdiction under Article 165 of the Constitution and Section 362 of the Criminal Procedure Code and that it is not limited to situations where there is an error on the face of the record, or new issues having emerged.

13. It was Mr. Munene's further submission that paragraph 5 of the certificate did not indicate that pw9 had certified that the HP laptop was in good working condition as held by the honourable magistrate. That the investigating officer did not indicate in the certificate that the computer was certified to have been operating properly at the time of use; or that the accuracy of the computer is not otherwise affected.

14. To buttress their case, counsel referred the court to the decision in the case of **County Assembly of Kisumu and 2 others v Kisumu County Assembly Services Board and 6 others Civil Appeal Nos. 17 and 18 of 2015 (2015 eKLR** where the court of appeal held interalia:

> **[65] – Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer".**
>
> **[66] in our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106 B (2) of the Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced".**

Respondent's Submissions

15. M/s Sigei appearing for the respondent opposed the application stating that the applicants have not proved any illegality, impropriety or incorrectness committed by the trial court by dismissing the objection. Counsel submitted that the applicants had not met the threshold for revision as envisioned under Section 362 of the Civil Procedure Code.

16. Counsel urged that paragraph 5 of the impugned certificate (MFI.29) explained the condition of MF1-30 and MF1-31 and the laptop S/No. CEO 510Q GW that was used to download the information on the recording devices. In a nut shell, counsel submitted that there was no proof that Section 106 B of the Evidence Act was not complied with. Learned counsel referred the court to the decision in the case of **R v Mark Lloyd Steveson (2016) eKLR** where the court summarised the conditions to be met for admissibility of electronic documents under Section 106 B (2) as follows;

> **(a) The output must have been produced during regular use.**
>
> **(b) It must be of a type expected in ordinary use.**

(c) The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and

(d) Where multiple computers are involved, those operating in succession and considered as one.

17. Regarding violation of the applicants' rights, counsel submitted that there was no proof any specific rights that were violated and that the prosecution is at liberty to call any number of witnesses it wishes to call.

Analysis and Determination

18. I have considered the application herein, original record from the trial court, and submissions by both counsel. The only issues that crystallize for determination are; whether this application meets the threshold for grant of revisionary orders and if so, whether the trial court properly exercised its authority in holding that the electronic evidence(documents) intended to be relied on by the prosecution was properly retrieved and prepared in compliance with Section 106 B (1) and (2) of the Evidence Act.

19. This court has been called upon to exercise its revisionary powers pursuant to Article 165 (6) and (7) of the Constitution which gives the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function. In exercising that mandate, the High Court may call for the review of any proceedings before any subordinate court or person, body or authority and make any direction it considers appropriate to ensure fair administration of justice.

20. To operationalize Article 165 (6) and (7) above quoted, Parliament made specific provision under Section 362 of the Criminal Procedure Code thus providing that:

"the high court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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".

21. Jurisdiction conferred to the High Court vide the above quoted provision is wide and discretionary. A court exercising such immense discretionary powers must carefully balance the delicate act of distinguishing issues that will amount to an interlocutory appeal from those seeking implementation of Article 165 (6) and (7) and Section 362 of the Criminal Procedure Code on account of revision. The issue of exercising proper revisionary powers is a matter of jurisdiction determinable by the individual court seized of the matter in controversy. In the case of **John Kipngeno Koech and 2 others v Nakuru County Assembly & others (2013) eKLR** the court had this to say in regard to assumption of jurisdiction by a court:

"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".

22. The essence of revision is to ensure that the courts below complies with legal standards and the set principles in the Constitution and other legislative provisions in the administration of justice **(See R vs Wekesa and another (2010) eKLR**)

23. The crux of the matter before me is the finding by the trial court firstly, that the visual and audio recording devices used in capturing the alleged bribery conversation were not certified as having been in good working condition and serviceable. Secondly, that the investigation officer did not indicate in the certificate that she had certified the laptop (computer) used in downloading the conversation recorded in the audio and visual devices as serviceable and in good working condition.

24. From the proceedings, it is clear that PW9 the investigating officer had merely identified the recording devices and the laptop she used to download the conversation and the certificate prepared pursuant to Section 106 B (2) of the Evidence Act. The objection was raised at the point when the witness attempted to have the compact disc played. No application for admission of the contested exhibits had been made.

25. It is clear from the proceedings that the defence counsel were in a hurry to object to the tapes being played. In my view, the objection at this stage was premature. There is no dispute that a certificate prepared by PW9 is what is contentious with the allegation being, that it does not specifically state that the investigating officer had certified that the computer laptop she was using to download the conversation was serviceable and in good working condition.

26. Identification and production of exhibits during the trial is purely within the authority of the trial court. The court has immense powers to admit or reject exhibits depending on its credibility. The trial court cannot be directed on which exhibits to admit and which ones not to admit. In practice, a criminal trial may comprise tens, hundreds or thousands of exhibits. How practical is it for the High Court to intervene by way of revision in every case or situation where production of an exhibit by the prosecution or the defence is objected to and the losing party moves to the High Court to challenge the same?

27. The High Court will be flooded with all manner of revision applications some with ulterior motive meant to derail expeditious trial and delivery of justice. If every losing party in each application challenging production of an exhibit before the trial court moved to the High Court, the High Court will be doing nothing but handling voluminous work on revision alone.

28. Matters relating to production of exhibits should be left entirely to the discretion of the trial court unless extreme injustice is likely to occur without any other available remedy to address the same. In this case, the applicants have a remedy on appeal in the event of a conviction which will not entirely depend on the existence of electronic evidence alone.

29. Superior courts should act with restraint not to micro-manage trial courts even on issues which do not manifest any illegality, incorrectness or impropriety on the part of the trial court. A trial is never smooth and every obstacle encountered cannot be resolved by revision in the High Court or through an interlocutory appeal. To do so will translate the High Court prematurely into an avenue of arbitrating on mini appeals before conclusion of a trial. What is before me is nothing but an interlocutory appeal which superior courts have tried to discourage for the sake of smooth running of proceedings before trial courts. See the case of **Thomas Patrick Gilbert Cholmondeley vs R (2008)eKLR** where the court of appeal had this to say:

> **"In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379 (1) of the 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 atrial 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 amounted to a breach of fundamental rights, falls by the wayside and causes no harm to such an accused person".**

30. Similar sentiments were espoused in the case of **R vs David Mwiraria and 6 others (2018) eKLR** where it was stated that:

> **"the case is ongoing, and with due respect, this court will not start micro managing the lower court on how to conduct its hearing; what to admit and not admit; what to be cross examined on and what not to be cross examined on. If this court does all that at this point then what will it do when the matter comes on appeal in the event that a party is dissatisfied with the judgment"?**

31. It is my finding that the trial court did exercise its discretion in allowing identification of the exhibits and he will decide finally on whether to admit the exhibits or not. Exercise of a discretion based on the understanding or analysis of the law by the trial court does not automatically amount to an illegality nor impropriety. Perceived misinterpretation of the law cannot automatically in all situations be held to be an error calling for revision but a ground for appeal. Courts are bound to make determinations based on varied interpretation of the law. Where the court applies wrong principles of the law and an injustice is bound to arise with no remedy available other than revision, a superior court should intervene at the earliest opportunity possible.

32. Based on the above holding, I do not wish to delve into the merits of the ground cited for revision based on compliance or non - compliance with Section 106B (2) of the Evidence Act. To determine the issue on merit will be prejudicial to the appeal and the appellate court that will be seized of the appeal in case it gets to that level. I leave the merits of the issue at hand to the appellate court should the case eventually get there. I wish to state that from the record, I note that in this same file, I handled a similar issue and delivered a ruling on 27 th September 2018 arriving at a similar finding.

33. For the above stated reasons, I am satisfied that the applicants' application is not merited and the same is disallowed. The original file to be returned to the lower court for proceedings to continue as scheduled.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER, 2019.

J.N. ONYIEGO

JUDGE