



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL REVISION 31 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JANE NDUTA KIGURU & ANOTHER..... RESPONDENTS

RULING

On 15th July 2019 the prosecution counsel Ms Serling Joyce filed the letter dated 15th July 2019 seeking revision of the orders issued by **Hon. J. B. Kalo, Chief Magistrate** on 11th July, 2019. The matter was never placed before a judge for hearing until 30th September, 2019 when it landed in my docket under certificate of urgency.

I directed that the same be served on counsel for the accused persons. Parties appeared before me on 1st November 2019 and it was agreed that the Revision be heard inter- partes on 2nd October, 2019.

Ms. Serling urged the court to find that **Hon. J. B. Kalo's** decision whose effect was to close out the evidence of two (2) witnesses would result in the prosecution losing their case unfairly yet they had complied with the constitutional requirement to disclose and supply the witness statements and the documentary evidence in question in the year 2016.

She relied on the case of **DENNIS EDWARD APAA & 2 OTHERS vs EACC & ANOTHER [2012] eKLR** and the holding in **R vs. WARD [1993] ALL ER 557** whose holding the court therein had adopted.

On his part Mr. Ogolla for the respondents filed skeletal submissions on which he relied. He urged court to go strictly by the provisions of **Section 362** of the **Criminal Procedure Code**, and to be guided by **Articles 165 and 50(2) (j) of the Constitution**, on the right of an accused person to disclosure and receipt of evidence to be used against him. That the issue for determination was whether the proceedings and ruling/orders of learned Magistrate were illegal, incorrect and improper.

He also relied on the authority cited by the prosecution, and **R vs. MARK LLOYD STEVENSON [2016] eKLR** among other authorities.

He submitted further that even at this stage the prosecution had not provided any evidence that the documents were served, that the witnesses had recorded statements – but more importantly, the prosecution had not rebutted the submissions by the defence in the lower court.

Section 362 of the **Criminal Procedure Code** provides; that the High Court: - may call for records 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 on order recorded/passed, and as to the regularity of any proceedings of any subordinate court.

The powers of the High Court with regard to revision are set out at **Section 364 of the Criminal Procedure Code** *inter alia*:

“ a)

b) **In the case of any other order other than an order of acquittal, alter or reverse the order**

c)

d)

From the record of the lower court the relevant parts of those proceedings are those of 10th July, 2019.

1. The prosecuting counsel submitted that she had learnt from the defence that they had not been supplied with the “affidavit that authorized the investigation officer to access the account of the accused person”.
2. She applied to supply the defence with the two (2) documents.
3. She sought to have IP Kitaka testify instead of Cpl Ahmed. The defence opposed the application because;
 - i) It sought to introduce a new witness.
 - ii) Though the alleged affidavit had been prepared in 2016 September, it had never been supplied.
 - iii) The other documents – bank statements appeared to have been procured six (6) years before the alleged request by the investigating officer.
 - iv) All this amounted to trial by ambush – something which violated the accused’s rights to fair trial.

In his ruling delivered on 11th July, 2019 – *J. B. Kalo, CM* – relying on the provisions of **Article 50(2) (j)** of the **Constitution**;

(2) Every accused person has the right to a fair trial, which includes the right—

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

And the holding in **ROBERT MULI MATOLO vs REPUBLIC [2015] eKLR** sustained the objection by the defence, provoking this application.

The issue for determination then, is whether - that ruling falls within the ambit of the revisionary powers of this court as set out under **Section 362 of the Criminal Procedure Code** as read with s. 364 of the same Act

I have carefully considered the submissions by each counsel and the authorities cited and relied upon by each.

The right to a fair trial of an accused persons cannot be limited as it is “*chanda na pete*” with that right carefully crafted under **Article 50 (2) (j) of the Constitution** to be supplied with the prosecution’s evidence in advance to enable the accused person prepare his/her defence. All the authorities cited are to support this position.

What is the purpose of revision?

In **JOSEPH NDUVI MBUVI vs REPUBLIC [2019] eKLR**, the court relied on the holding in the Malaysian High Court case **PUBLIC PROSECUTION vs MUHARI BIN MOHD JANI & ANOTHER [1996] 4 LRC 728 at 734,735 where this purpose was explained:**

“the powers of the High Court in revision are amply provided under Section 325 of the Criminal Procedure Code subject to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer on the High court a kind of “paternal or supervisory jurisdiction ‘in order to correct and prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice....

If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion... this discretion, like other judicial discretions ought as far as practicable to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”

Nevertheless, in the exercise of that power , there must be caution as was set out in the case of **REPUBLIC vs MARK LLYOD STEVENSON [2016] eKLR** that;

“..... the High Court will usually exercise its powers to review/or even exercise an appeal over an interlocutory matter before a magistrate’s court only in exceptional circumstances. While it is difficult to determine with mathematical precision when the court will exercise this power, it is only to be sparingly used where.....” grave injustice might otherwise result or where justice might not by other means be attained.” Hence the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals will not be exercised piece meal.” (**WALHAUS & OTHERS vs ADDITIONAL MAGISTRATE JOHANESBURG & ANOTHER, 1959 (3) SA 113(A) at 120 D S V WESTERN AREAS LIMITED & OTHERS 2005 (5) SA 214 (SCA) at 224 D’**

This is the caution to be found at Section 364(5) of the Criminal Procedure Code – that no proceeding by way of revision shall be entertained at the insistence of a party of who ought to have appealed.

Having said the foregoing was the magistrate's decision correct, legal and proper?

I am of the view that unless it can be demonstrated that the evidence was withheld with malice, the prosecution's duty is continuous; to disclose and avail.

This was the position held in **DENNIS EDMOND APPAA** above, and which I agree with:

*“Although the **Cholmondeley case** was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in the Constitution. Article 50(2)(j) provides that every accused person has the right to a 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 **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.**”

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. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in **R v Stinchcombe (Supra)**, where the **Supreme Court of Canada** observed, “*The obligation to disclose was a continuing one and was to be updated when additional information was received.*”

This position was also recognized in **JOSEPH NDUNG’U KAGIRI vs REPUBLIC [2016] eKLR** where the judge cited the hold in **R vs WARD** above and in **DOMINIC KARIUKI vs REPUBLIC [2018] eKLR** – that the duty of disclosure by the prosecution is continuous.

This in my view is distinguishable from the failure to disclose/supply the evidence and documents. Those are two (2) different things, in my mind – that was the GIST of the **JOSEPH NDUNG’U KAGIRI vs REPUBLIC** case where the full trial was conducted without the witness statements and the exhibits by the prosecution.

Hence in my view the prosecution were within their obligation to apply to supply the two (2) documents to the defence – upon which the defence would have the time to prepare their response.

What about the new witness? This was clearly an ambush. The prosecution was purporting to introduce a new witness at that stage to testify yet he had not recorded any statements nor was the defence aware of anything he was going to say.

The issue of some documents bearing dates showing that they had been obtained years before the alleged date of request was a matter that ought to have been dealt with in evidence – and the trial magistrate would be at liberty to determine the worth/value of such evidence.

IN CONCLUSION

1. The duty of the prosecution to disclose and make available all the relevant material for trial is continuous and each case will be determined on its own facts.
2. In this case the prosecution alleged and the defence denied that the documents were supplied. The issue as to whether the documents had been supplied was not settled. This issue needed to be settled before the trial magistrate shut out the prosecution. To that extent, the decision was not in the interests of justice as without settling that issue – a miscarriage of justice could occur.
3. With regard to the introduction of a new witness who had not recorded any statement that amounted to a violation of the accused's rights under Article 50 (2) (j) and to that extent the decision was correct.
4. Pursuant to Section 367 of the Criminal Procedure Code and taking into consideration the nature of the case – the interests of justice will be served when the court has determined whether or not documents were supplied, and whether they can be availed and the defence given time and facilities to respond.
5. The upshot is that the learned Hon. Chief Magistrate's decision of 11th July, 2019 are revised only in the following terms:
 - a. **That the learned trial magistrate to allow the prosecution to establish whether or not the documents were supplied.**
 - b. **The learned trial magistrate to consider whether the documents can be availed and the defence given time to prepare and respond.**

Orders accordingly.

Dated, delivered and signed at Nakuru this 3rd day of October, 2019.

Mumbua T. Matheka

Judge

In the presence of

Martin/ Edna Court Assistant

Applicant: Ms. Serling for the Prosecution

Respondents Present: Mr. Ogolla for the Respondents