REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 179 OF 2016

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

SAMUEL OBUDO OTIENO.....1ST RESPONDENT

MARY GATHIGIA KANYIHA.....2ND RESPONDENT

KEITH MUSYOKI KISINGUH.....3RD RESPONDENT

ALOYS NYAMBARIGA TINEGA.....4TH RESPONDENT

DAVID MULINGE KITHUA.....5TH RESPONDENT

GEORGE OMONDI ARUM.....6TH RESPONDENT

BENJAMIN NJATHI KAGUTU.....7TH RESPONDENT

RULING

Background

By a letter dated 26th September, 2016, the Applicant requests this court to call for and examine the record of proceedings in the **Chief Magistrate's Court Criminal Case No. 1860 of 2015** ***Republic v Samuel Obudo Otieno and 6 Others*** so as to satisfy itself and pronounce on the legality or propriety of the findings and orders as well as the regularity of those proceedings. The Applicant also seeks this court to review and set aside the orders of the trial court made on 22nd September 2012 dismissing the charges against the accused persons and instead order that the matter proceeds to full hearing.

The application for review is sought under Article 165 (3), (6) and (7) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code. The application is premised on the grounds that firstly, the Chief Magistrate acted without powers to interpret the Constitution in dismissing the charges citing violation of the accused persons' right to a fair trial, while the prosecution had supplied all the witness statements and documentary exhibits intended to be relied on in the trial. Secondly, that the court was not fair and impartial by dismissing the charges because the complainant was not accorded an opportunity to be heard, in violation of Article 50(1) of the Constitution. Thirdly, that the court abused the legal process in allowing the Applicant's application under Section 89(5), yet the charges in this case had been

accepted during plea, and production of notices under Section 69 allowed and hearing dates fixed severally. Fourthly, that the court acted against the public interest and that the orders of dismissal were unlawful, irregular and without justification. Further, that the orders undermine the powers of the Director of Public Prosecutions to control criminal proceedings and that the trial magistrate was not impartial since he demonstrated bias towards the innocence of the accused before hearing the prosecution evidence. Finally, that the dismissal does not advance the cause of justice.

The application was opposed by the Respondents. The 1st, 2nd, 3rd and 4th Respondents filed their respective Replying Affidavits while the 5th filed a Supporting Affidavit sworn on 10th October 2016, adopting the averments by the 2nd Respondent. There was no response to the application in respect of the 7th Respondent. In their respective depositions, the Respondents maintained that they could not proceed to defence without the requested documents which related to the procurement processes and decisions of the Parliamentary Service Commission. They deponed that failure to disclose the documents by the prosecution was willful, and deliberate, and a subversion of their right to a fair trial. They maintained that the actions of the Applicant amounted to an abuse of the court process. The Respondents also challenged the assertion of privacy and privilege as a justification for non-disclosure, for the reason that the documents requested for did not touch on privacy of any individuals, and further that the Commission did not challenge the position in court despite having been represented. It was the Respondents 'position that an order to dismiss a complaint or a charge can be made at any stage of the proceedings and not only before plea taking. Furthermore, the Applicant did not contest the jurisdiction of the trial court when the application was argued in the lower court. The Respondents also pointed out that the prosecution particularly the complainant did not object to being denied an opportunity to be heard. They also maintained that the present application was an attempt by the Applicant to appeal the orders of the lower court using the wrong procedure. It is the Respondents' 'view that the trial magistrate acted within his mandate to entertain and determine the application.

Applicant 's submissions.

When the application came up for hearing on 6th December 2016, Mr. Karuri for the Applicant submitted that the court dismissed the charges against the Respondents on the ground that the Respondents would not be accorded a fair trial since the prosecution had failed to supply them with documents, yet the documents referred to were said to be classified and the prosecution had not intended to rely on them during the trial. He added that Section 89(5) only applies to a formal charge which does not disclose an offence which the trial court can decline. He observed that the court did not reject the charge when the charges were preferred, which meant that the offences in the charge sheet were known in law and the Respondents pleaded to the charges without any objection. He added that the case was subsequently fixed for hearing on several occasions.

Counsel reiterated that the prosecution had supplied the documents it intended to rely on and that the documents requested for by the Respondents were in possession of the Parliamentary Service Commission which the prosecution did not intend to rely on. He further submitted that the prosecution objected to the release of the said documents on the basis that it would compromise the rights and interests of other individuals and would undermine the security of Parliament as an institution. Counsel submitted that at the time, there was no enabling statute to give effect to Article 35 of the Constitution on the right to access to information, adding that the Access to Information Act took effect on 21st September, 2016. He pointed out that under the Act, there are limitations to accessing information where national security would be undermined or where there would be unwarranted invasion of the privacy of an individual. He cited the case of ***Diana Kethi Kilonzo v Republic High Court(NBI)*** **Revision No. 47 of 2014**.

Counsel further submitted that the trial magistrate had no powers to determine whether the rights of the Respondents under the Constitution would be violated, which is a power vested with the High Court. He added that acceptance of notices under Section 69(c) of the Evidence Act filed by the Respondents was a clear indication by the trial magistrate that the prosecution had satisfied its duty to furnish the defence with the required documents. Therefore, it was an error to find that the case should be dismissed under

Section 89(5) of the Criminal Procedure Code. He relied on the decision of the High Court in **Petition No. 21 of 2015** ***Director of Public Prosecutions v Nairobi Chief Magistrates Court & Another.***

Respondents' submissions.

Mr. Ochieng Oduor appeared on behalf of the 1st Respondent. Relying on the 1st Respondent's Replying Affidavit, counsel submitted that the order by the trial magistrate was a culmination of failure by the prosecution to supply certain documents, having appeared in court more than 12 times. Counsel submitted that in light of the charges against the Respondents which were touching on procurement, it was important to access minutes of the various meetings which would have assisted the Respondents to establish whether or not the procurement process complained of was authorized. He dismissed assertions that release of the documents would compromise Parliament's security, since the Respondents had requested that the minutes not relevant to their request be redacted. Counsel submitted that the order of the court had not been appealed from, adding that a trial court could also deal with an aspect of a right to a fair trial and further that where there was abuse of process consequential orders ought to be made. He added that failure to supply the documents was meant to cover up that no offence had been committed. Counsel stated that the circumstances in this case differed from cases cited since the Respondents had been specific on the documents they needed. Further, it was not demonstrated how disclosure of those documents would be a security threat. He added that the documents ought to have been produced to the court which would determine the question of alleged breach of security. He maintained that without those documents, the rights of the Respondents would be violated, adding that it was the prosecution's duty to furnish the accused with the documents that the defence would also use. Counsel finally submitted that having failed to challenge the order of the court finding the prosecution in default, the prosecution could not now seek a revision of the court's ruling.

Mr. Otachi for the 2nd and 5th Respondents adopted Mr. Oduor's submissions. He added that in the case of ***Diana Kethi Kilonzo v Republic*** (supra), the prosecution was unable to avail the documents while in this case the prosecution was in a position to avail the documents requested for. Further that in the case of the ***Director of Public Prosecutions v Nairobi Chief Magistrates Court & Another(supra),*** the review had to do with a withdrawal by a complainant, while this case concerns dismissal of a charge under Section 89(5)of the Criminal Procedure Code. He urged the court to find that under Section 364(5) of the Criminal Procedure Code an appeal as opposed to a revision ought to have been filed and that the court can determine a matter where it finds there is a violation of a right to a fair trial. Counsel further submitted that the provision in the Act that was referred to was inconsistent with Article 50 of the Constitution when an accused requires a fair trial. He added that the entire series of documents ought to be availed as they would form part of the entire process that led to the charges. He added that the issue of security was not argued before the magistrate. Counsel pointed out that under Section 8 of the Magistrates' Courts Act, a magistrate can hear matters of violation of a right under the Constitution adding that Article 50 relates to a raft of rights touching on trial matters that magistrates ordinarily deal with.

Mr. Deya for the 3rd Respondent while adopting submissions by the other counsel and the Replying Affidavit by the 3rd Respondent added that the orders of the court were a result of a violation of the right to a fair trial which under Article 25 cannot be derogated from. Mr. Moriasi for the 4th Respondent and appearing on behalf of counsel for the 7th Respondent similarly adopted the submissions by other counsel. He also relied on the Replying Affidavit sworn by the 4th Respondent. The 6th Respondent while appearing in person also associated himself with the submissions made and the Grounds of Opposition and Replying Affidavit.

In response, Mr. Karuri stated that under Section 8 of the Magistrates' Courts Act, a magistrate had no jurisdiction to determine if the rights of the accused were violated, adding that this provision contemplates a violation of Article 25(a) and (b) only, while fair trial is provided for under Article 25(c). He maintained that the prosecution could not supply exculpatory documents on account of privilege.

Determination.

The Respondents have challenged the process invoked by the Applicant in challenging the orders of the trial court. It is the Respondents' view that the Applicant ought to have come to this court by way of an appeal as opposed to seeking a review. The first question for determination therefore, is with respect to the propriety of procedure applied; that is, whether this matter ought to have been instituted by way of a revision or appeal.

Under **Article 165(7)** of the Constitution, the High Court, in exercise of its supervisory powers under clause (6), '***may call for the record of any proceedings before any subordinate court or person, body or authority and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***' Clause 6 gives the High Court Supervisory powers over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

The Criminal Procedure Code provides for the revisionary jurisdiction of the High Court. **Section 362,** gives the High Court power to '***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..'***

Section 364 deals with powers of the High Court upon exercising its jurisdiction upon revision which in part reads:

> ***'(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed****.'*

The Respondents relied on this provision to argue that the matter was not properly before the court. This case is concerned with determining the correctness, legality or propriety of the orders of the trial court made on 22nd September, 2012 dismissing the charges against the accused persons. The Applicant contends that the mater ought to have been allowed to proceed to full hearing. The prosecution also challenged the magistrate's court's jurisdiction to determine the questions of fair trial, and for relying on Section 89(5) to strike out the charges.

Under **section 348(A)** of the Criminal Procedure Code, the applicant ought to have come by way of an appeal. However, this court is enjoined, by virtue of its inherent jurisdiction to promote substantive justice. It is in the interest of justice that this court ought not to deny a party audience purely on the ground that the Applicant ought to have approached the court by way of an appeal. Under **Article 163(3)(a)** of the Constitution, the High Court enjoys unlimited jurisdiction in a criminal matter, while **Article 159(2)** enjoins the court to administer justice without undue regard to technicalities. This position is further buttressed by the holding of the court in ***Republic –vs- Ajit Singh s/o Vir Singh*** **[1952] EA 822** that:

> ***'We are of opinion that sub-s (5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s.(5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect – for instance in the case of a conviction where no offence known to the law has been roved – merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act suo moto even where the matter has been brought to its notice by an aggrieved party who had a right of appeal. In our view Chhgan Raja v. Gordhan Gopal (1) (supra) merely decided that, on the facts of that particular case, the court should not make an order in revision. It emphasizes that the exercise of jurisdiction in revision is discretionary.'***

Other grounds were cited by the Applicant, including that the lower court lacked jurisdiction to determine a question of violation of the right to a fair trial, failure by the court to act with impartiality, that the court improperly acted under Section 89(5) to dismiss the charges, further that the court acted against the public interest and that the orders of dismissal were unlawful, irregular and without justification. It is the Applicant's further contention that the orders undermine the powers of the Director of Public Prosecutions to control criminal proceedings and that the dismissal of charges does not advance the cause of justice.

I will first delve into the question of jurisdiction. That is whether the learned magistrate had the jurisdiction to dismiss the charge on the question of alleged violation of the Respondents' right to a fair trial. The Respondents argued that the court had jurisdiction, citing **Section 8** of the Magistrates' Court Act, No. 26 of 2015.

Article 165(3) (b) of the Constitution provides for the jurisdiction of the High Court ***to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.*** Article 23(2) enjoined Parliament to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It was pursuant to this provision that the Magistrates Court Act, No. 26 of 2015 was enacted

Section 8 of the Act reads as follows:

> ***'(1) Subject to Article 165(3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights***
>
> ***(2)The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.***
>
> ***(3)Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights. (4)The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's courts under this section.'***

A reading of the above makes it clear that jurisdiction of the Magistrates' Courts to determine questions of violation of constitutional rights is limited to the extent allowed by the enabling legislation. **Article 23(b)** shows that such jurisdiction is to be defined for appropriate cases, thus it is not open-ended or unlimited as is the case with the High Court. Thus, the enabling legislation would confer jurisdiction to the subordinate courts only in appropriate cases.

Section 8(2) of the Magistrates Court Act limits that jurisdiction to rights under **Article 25(a)** and **(b)** of the Constitution, which respectively provide for freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude. The right to a fair trial is provided for under clause (c) which is clearly exempted from the provision.

The application leading to the impugned orders of the trial court was brought under **Articles 48** and **50(1), (2) (b), (c), (e), (j), (k)** of the Constitution and **section 89(5)** of the Criminal Procedure Code. Article 48 provides for the right of every person to a fair administrative action while Article 50 deals with rights of an accused person to a fair trial. These two provisions are not envisaged in the jurisdiction donated to the Magistrates Courts in determining a question of violation of a fundamental freedoms and human rights.

The issue in this respect is whether in addressing the legal issues raised and proceeding to dismiss the charges, the court acted within its jurisdiction and applied the proper procedure. A reading of the

application seeking the dismissal of charges against the Respondents is mainly premised on the non-production of the documents requested by the Respondents to enable them proceed to trial. The said production, it was severally pointed out, was crucial to enable the Respondents adequately answer to the charges against them. Indeed, it was pleaded in some of the supporting grounds to the application that the failure to produce the requested documents would subvert the accused person's right to a fair trial, and further that it was important to enable the Respondents have adequate facilities to prepare their defence and sufficient details to answer to the charges, and that such failure prejudiced the Respondents right to be tried without unreasonable delay. This, essentially, ties the application to the core elements of an accused person's right to a fair trial under **Article 50** of the Constitution. As it can be observed in the impugned ruling, where the court said in part:

> ***'The Constitution of Kenya guarantees the right to a fair hearing and administrative justice in a number of provisions...the deduction I got from the above constitutional provision is that the right to a fair trial cannot be derogated and that the same extends to supply of evidence the prosecution intends to use, to availing to the accused facilities that he requires to mount his defence.'***

The application for the striking out of the charges was premised under among others Article 50 of the Constitution. As noted above, the jurisdiction of the Magistrates Court with respect to matters of violation or threatened violation of human rights is limited by Section 8(2) of the Magistrates' Court Act since fair trial concerns are not envisaged under that provision. Therefore, I find that have proceeded to address itself to an application for redress of violation of a right to a fair trial, the trial court acted outside its jurisdiction, and the resulting orders were an illegality.

The other issue is whether the learned magistrate properly dismissed the charge under Section 89(5). This question can only be properly answered by first giving a background to the trial. The Respondents were variously charged in the lower court with nine counts of offences of conspiracy to commit felony contrary to Section 393 of the Penal Code, abuse of the office contrary to Section 101(1) as read with Section 102A of the Penal Code, and of making a document without authority contrary to Section 357(a) of the Penal Code.

All Respondents took plea on 10th November 2015 and pleaded not guilty to the offences as respectively charged. They were released on bond and the matter was then set up for hearing on 25th January 2016, with a mention on 24th November 2015 when the prosecution was directed to supply copies of the witnesses and documentary evidence. On 26th January 2016, respective counsel indicated that they had not been served with the documents, while counsel for the 3rd Respondent had only received part of the statements. The prosecution on its part indicated that it had three witnesses ready to proceed. Parties agreed to have the case adjourned and the court ordered a mention on 4th February 2016 to confirm compliance on service. On 11th February 2016, counsels indicated that they had been informed that copies of were ready, which some of them had accessed. They all agreed to take a hearing date and the case was fixed for hearing on 30th March, 2016, 5th April, 2016 and 8th April, 2016. On 30th March, 2016, the defence counsel indicated that they had made a request by a letter dated 3rd February, 2016 for disclosure of certain documents to which there had been no response. In response, the prosecution indicated that the investigating officers had indicated that he was not in possession of the documents and neither would the prosecution rely on them thus it would be difficult to comply. It was noted however, that the investigating officers had agreed to supply one set of documents comprising of invoices. The court adjourned the matter to 5th and 8th April 2016, to allow parties to have all documents. On 5th April 2016 defence counsels confirmed that they had been served by the investigating officers with the outstanding invoices. However, the other set of documents required from Parliament had not been supplied. Request for more time was made to give time for clarification on documents to be supplied. The case was fixed for hearing on 19th, 20th and 21st July, 2016 with a mention on 4th Jul, 2016 to confirm compliance. On this mention date, counsel asked for a further mention date which was fixed for 12th July 2016. On this date, defence counsel indicated that they had not been supplied with the documents, at which point the court ordered for the investigating officers to be summoned to show cause why the

defence had not been served with the intended exhibits. On 15th July, 2016, defence counsel indicated that there had been partial compliance but added that the other pending documents were necessary for the conduct of their defence. Counsel indicated that the investigating officers had also relayed information that the Clerk of the National Assembly had indicated that documents were privileged. This claim of privilege was challenged by the defence. The trial court noted the non-compliance and set a further hearing on 19th/20th July 2016.

Meanwhile a Notice to Produce was filed by the Respondents on 19th July, 2016 under Section 69 of the Evidence Act, Articles 50, 35, 25(c)and 20(3)(b) of the Constitution. On 19th July, 2016, Mr. Kadebe for the prosecution indicated that he had only been served with the notice and required more time to serve the Clerk of the National Assembly. Counsel for the 1st Respondent challenged the Applicant and asked the court to give strict timelines on compliance. The court adjourned the case and ordered for the matter to proceed on 20th July, 2016. On 20th July, 2016, Mr. Kadebe for the prosecution stated that even though two witnesses were present, he could not proceed since he had just received notices to produce certain documents and needed time to get a response from the Parliamentary Service Commission. The defence did not object to the request owing to the late service. The court fixed a further hearing date of 6th, 7th and 8th September, 2016, with mention on 16th August to confirm compliance. Documents had not been received by this date, and the prosecution indicated that it was still waiting on the Parliamentary Service Commission, adding it would be ready on 29th August, 2016. On this day, the prosecutor indicated that he had copies with him and he had supplied some, except for the policy document governing the proposed changes/restructuring for work place at the Parliamentary Service Commission. Counsel also indicated that the Commission could not release the document owing to the fact the matter was the subject of active consideration. He added that the request for supply of certified copies of full minutes book from 2013 – 2014 related to a wide range of topics and security of Parliament, some of which were classified and could therefore, not be released. Counsel maintained that the prosecution had supplied what it intended to rely on, adding that the bundle requested did not form part of its exhibits. The defence requested for time to review the documents served and in view of the application filed, dated 26th August, 2016. On 30thAugust, 2016 for mention. Defence counsel noted that they had been supplied with the same documents supplied previously on 20th July, 2016, with the exception of only one document on minutes of the full commission that had been requested. Counsel also noted that out of the 27 documents, 17 had not been signed, which raised a question of authenticity. He added that minutes of the 27th meeting of the Commission referred to the full Commission which was not what the defence had sought. Further that all the minutes did not refer to the subject procurements in respect of toners and cartridges. Defence counsel further noted that some of the contents had been redacted, despite being certified as a true copy. Mr. Karuri for the prosecution maintained that it had served what it sought to rely on, thus it was not under obligation to serve other documents. He explained that the redaction was to protect privacy of individuals, while reiterating that others related to security of Parliament thus could not be supplied. In objection, counsel for the defence stated that under Sections 30 and 31 of the Parliamentary Service Act, court orders superseded the right to claim privilege over the documents.

The court observed that it was upon the defence to elect to have the application heard before or during the hearing. On the next day's mention, the prosecution requested for time to reply to the application. The court directed that the case be mentioned for further directions, further directing hearing to be on 6th, 7th and 8th September, 2016. On 6th Sept. 2016, the prosecution sought for time to respond to the application and the court directed that theapplication be heard on 8th Sept. 2016. Parties opted to have the application heard before the hearing commenced. The application was heard as scheduled and a ruling delivered on 22nd September, 2016.

The Applicant challenged the application of this provision since it deals with non-admission of a charge where the court finds that an offence has not been disclosed. This section reads:

> ***'Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to***

admit the complaint or formal charge and shall record his reasons for the order.'

A reading of this provision shows that it is applicable where the court is of the opinion that an offence has not been disclosed. The court can go ahead and decline to admit the charge. In this respect, the court stated as follows:

> ***The Applicants herein came under section 89(5) of the Criminal Procedure Code. It is true that this charge has been presented to court and the accused taken plea. However, in view of the finding above, that the accused would not have been accorded their right to a fair trial if this case proceeded in this state, I am of the view that it is proper and just to refuse this charge.'***

Respectfully, I am of a different view. The application of the provision is very specific, where the court finds that there is no offence disclosed in the charge. The issue of defectiveness of the charges did not arise. I hold the view that it would be improper for a court to extend the scope of application of the above provision beyond what is specifically intended. The charges herein had been admitted, the Respondent had taken plea and the matter set down for hearing severally. It was therefore, improper for the trial court to go back and cite a provision that ceases to have application once the charges are accepted. In any event, the issue of the defect of the charge having not been raised, the application of the provision at the dismissal of the charge was erroneous, improperly and represented an illegality.

Finally, is the issue of whether the order of the court to dismiss the charges on account of non-disclosure was proper in the circumstances. Several cases were cited by all parties. The issue of disclosure of evidence is pertinent to an accused person's right to a fair trial under **Article 50(2)** of the Constitution, particularly the right to be to be informed of the charge, with sufficient detail to answer it, the right to have adequate time and facilities to prepare a defence, the right to have the trial begin and conclude without unreasonable delay and the right to adduce and challenge evidence.

The documents that were the subject of the notice of disclosure were in the possession of the Parliamentary Service Commission. It is true that the Respondents had particularized the documents needed. The Commission on its part had indicated that it could provide all that was required. This, according to the Respondents, affected their right to disclosure of necessary documents to support their defence. The documents as particularized were:

> a) Certified copies of the minutes of the full Commission meeting leading up to the advert in the Daily Nation newspaper on 11th February 2016
>
> b) Certified copies of the policy document(s) governing the proposed changes/resolutions for workplace restructuring at the PSC
>
> c) Certified copies of the full minute book and/or certified copies of the minutes of the PSC for the financial years 2012/13 and 2014/15
>
> d) Certified copies of the full minute book and/or certified copies of the minutes of the PSC tender committee for the financial years 2012/13 and 2014/15

It is not in question that the prosecution had a duty of disclosure to an accused person. This duty extends to evidence that is in possession of the prosecution even though it may not be favourable to the prosecution's case. The question in this case is whether the striking out of the charges was the most appropriate action that the trial court ought to have taken. The cases cited by the Respondents aptly demonstrate the court's position on the prosecution's duty of disclosure. I am in agreement with the principles set out on the duty of the prosecution to disclose. The Court of Appeal in the case of ***Thomas Patrick Gilbert Cholmondeley v Republic*** **Criminal Appeal No. 116 of 2007 [2008]eKLR**

> ***'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. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.'

However, it has also been observed that the duty of disclosure is a continuing one. As stated in ***Dennis Edmond Apaa and 2 Others v Ethics and Anti-Corruption Commission and Another,*** **Petition No.317 of 2012** where the court observed as follows;

'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 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 the right of disclosure is protected by the accused being informed of the evidence having reasonable access to it. This right is to be read together with other rights that constitute the right to a fair trial.'

This case had not gone to full trial when the impugned orders were issued. The court, upon relying on the arguments by the Respondents reached a conclusion that they could not be accorded a fair trial without the requested documents. The Applicant on its part argued that it had supplied the documents it intended to rely on. It is curious, that the trial court determined that the Respondents would not get a fair trial at such a preliminary stage when noting had been tendered before the court. It was also not disputed that the documents in question were in possession of the Commission which was the complainant herein. In my view, the first point of call was not to dismiss the charges. The court was at liberty to exercise its powers of seeking production of the evidence before drastically striking out the charges. Having become clear that the Commission was in possession of the documents, it was open to the court to summon the Commission to determine the question of whether non-disclosure of the documents was justified. When the investigating officer was summoned, he presented the Commission's position. The prudent approach would have been to have the Commission explain why it could not disclose the requested documents.

No such attempt was made. The court instead continued to issue hearing dates even to point when the prosecution indicated that it could no longer comply in light of the reasons given by the Commission. It is also noteworthy that there had been partial compliance with the court's orders of production. Therefore, it was also drastic to proceed to strike out the charges without first exercising alternative means. Furthermore, the prosecution had maintained that is did not intend to rely on the documents being requested to prove its case. Therefore, the case ought to have proceeded to full trial and the prosecution would have been bound by the case it had disclosed to the Respondents. Additionally, it would still be open to the Respondents to object to the production of any evidence that they did not have advance notice of. The court would then make a finding on the objection upon hearing all the parties.

The Commission was the complainant in the subject proceedings and evidently, its representatives would be witnesses at the trial. Nothing precluded the trial court to have the matter commence wherein it could among others exercise its powers under S**ection 144** of the Criminal Procedure Code gives the court power to compel attendance of a witness to produce the documents. This power is couched in the following terms:

'(1) If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or...'

The conduct of a trial calls for the balance of interests, of the right of an accused to a fair trial, while bearing in mind the public interest to have persons charged with offences tried. The court distinguished

the case of ***Diana Kethi Kilonzo v Republic*** (supra) on the basis that the information sought to be disclosed was in the possession of the IEBC, while failing to similarly observe that in this case it has not been disputed that the information sought was in the possession of the Parliamentary Service Commission.

In light of the foregoing, this court is persuaded that the trial court erred in dismissing the charges against the Respondents on the basis of the reasons advanced in its ruling. I find that it was in the interests of justice that the matter in the lower court ought to have been allowed to proceed. I therefore set aside the order of the learned trial magistrate striking out and dismissing the charge against the Respondents. I substitute the same with an order that the charge against the Respondents is hereby reinstated. The Respondents are directed to appear before Court No. 1 at Milimani Law Courts on 9th March, 2017 to take directions on hearing and to take a hearing date for the trial.

It is so ordered.

DATED and **DELIVERED** this **2nd** day of **March, 2017**.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. Mr. Mugo h/b for Karuri for the Applicant

2. Mr. Moriasi for the 4th Respondent and h/b for M/s Mokaya h/b for Otachi for 7th Respondent

3. Juma for 6th Respondent h/b for Ochieng Oduor for the 1st Respondent

4. Otachi for the 2nd and 5th Respondent

5. Deya h/b for Wena for the 3rd Respondent