



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO.166 OF 2016

REPUBLIC.....APPLICANT

VERSUS

MOHAMED ABDI ALI1ST RESPONDENT

NUSEIBA MOHAMED HAJI OSMAN.....2NDRESPONDENT

RULING

The Director of Public Prosecution (the prosecution) was aggrieved by the decision of the trial magistrate’s court which ordered the prosecution to provide the Respondents with witnesses’ statements and disclosure at the prosecution’s own expense. The prosecution moved this court under **Section 362** of the **Criminal Procedure Code** seeking to have that decision set aside and substituted by a decision of this court requiring the Respondents to foot the cost of photocopying of the witnesses’ statements and other exhibits that the prosecution intended to rely on during trial. Mr. Ondimu for the State submitted that although **Article 50(2)(j)** of the **Constitution** requires the prosecution to avail to the accused all the evidence that it intends to rely on during trial, such requirement did not imply that the prosecution was required to shoulder the costs of duplicating the witnesses’ statements and exhibits. Mr. Ondimu explained that if such requirement that the prosecutions meets the costs of providing witnesses’ statements was contemplated by the **Constitution**, then such right was progressive and not immediate. He urged the court to set aside the order of trial magistrate’s court and substitute it with an order of this court requiring the Respondents to meet the costs for the provision of the witnesses’ statements and exhibits. Learned prosecutor submitted that the prosecution was willing to provide the said statements and exhibits in soft copy.

Mr. Mureithi for the Respondents opposed the application. He submitted that one of the Respondents was in remand custody and therefore could not access the evidence and be able to adequately prepare for his defence if the evidence was supplied only in soft copy. Learned counsel submitted that the prosecution was under constitutional obligation to supply the evidence in hard copy to the Respondents and the prosecution could not shirk away from the responsibility by requiring the Respondents to meet the cost of photocopying the said exhibits and witnesses’ statements. To do so, would amount to the Respondents assisting the Director of Public Prosecution in their own prosecution. He urged the court not to make a decision that would render illusory the constitutional right that the Respondents are supposed to enjoy. He urged the court to dismiss the application. Learned counsel relied on several decided cases in opposition to the Applicant’s application.

This court has carefully considered the rival submission made by the parties to this application. The issue

for determination by this court is whether the prosecution made a case for this court to set aside the order issued by the trial magistrate's court that compelled the prosecution to supply the Respondents with evidence at its own cost. **Section 362 of the Criminal Procedure Code** grants this court jurisdiction 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.”***

In the present application, both parties agree that under **Article 50(2)(j) of the Constitution**, the prosecution is required to provide the Respondents with the evidence that it intends to rely on during trial. **Article 50(2)(j) of the Constitution** provides that every accused person has the right ***“to be informed in advance of the evidence the prosecution intends to rely on, and to have a reasonable access to that evidence.”*** Where the prosecution and the Respondents diverge is on the question who as between the prosecution and the Respondents is to bear the costs of photocopying the said evidence. Whereas the prosecution contends that it is the Respondents who should bear such cost, the Respondents are of the firm view that it is the prosecution that is under constitutional obligation to provide the said evidence to the Respondents at its own cost.

This question has been given judicial interpretation by various courts. In **Paul Thiba Ndungu –vs- Republic [2014] eKLR** it was held:

“The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is so fundamental in criminal justice system that it cannot be denied an accused person for whatever reasons. In fact at no time should an accused person be required to meet any costs associated therewith.”

In **Simon Kithaka Malombe –vs- Republic [2015] eKLR** the Court of Appeal sitting at Nyeri held thus:

“It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail copies at State expense. It is for that office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2)(c) and (j) be real.”

In **Musembi Kuli –vs- Republic [2013] eKLR** the Court of Appeal held that:

“True is that since it is the State that brought the appellant to court and was prosecuting him on a criminal charge, the onus was on the prosecution to avail the statements to him. Much as it may be the practice, as was pointed out to us by Mr. Kamula, the learned Senior Assistant Director of Public Prosecutions, that accused persons normally pay the photocopying charges, we do not see why it should be so. The accused has a right to receive, and the prosecution bears the concomitant duty to supply, all the materials it intends to rely on so that the accused is not hampered in the preparation of his defence. The witness statements are an integral part of those materials. The prosecution ought to be able to discharge that burden without requiring the monetary input of the accused.”

In the present application, this court was made to understand that the witnesses' statements and the exhibits that the prosecution intends to rely on during the trial of the Respondents run into 9,000 pages. It is for this reasons that the prosecution requests that it supplies the Respondents with a soft copy instead of hard copy of the said evidence. The Respondents have demurred. They are of the view that the prosecution has a legal obligation to supply them with hard copies of the said evidence.

This court is of the considered view, that taking into account the circumstances of this case, and the fact that some of the accused in the case have been in remand custody for more than one year, that the prosecution should supply the Respondents with both soft and hard copies of the evidence that it intends

to rely on. The prosecution is under legal obligation, where it is established that the accused persons cannot afford or are unable to photocopy the evidence supplied to them, to meet the costs of photocopying of the evidence and supplying the same to the accused persons. The present application is one of those cases where the prosecution, due to the circumstances of the case, must supply the Respondents with hard and soft copies of the evidence at its own cost. The prosecution is ordered to supply the said evidence within twenty-one (21) days of today's date.

In the premises therefore, this court finds no merit with the prosecution's application for revision. It is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2017

L. KIMARU

JUDGE