



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL REVISION NO. 173 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

JUSTINE CAMARA.....RESPONDENT

RULING

This is an application for revision filed by way of a letter by the office of DPP dated 16th September, 2016. The same seeks to vary an order of the learned trial magistrate in **Kibera Cr. Case no 3819 of 2015**. The order related to a rejection of production of an inventory which PW6 Corporal Kenneth Kimeli sought to produce as an exhibit. The inventory had been marked as MFI 7. The defence objected to its production because the copy furnished to them was not signed by one Inspector Ndegwa who was one of the officers who did the recovery of the exhibits found in possession of the Respondent. The Respondent is the accused in the said criminal trial having been charged with trafficking in narcotic drug contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**.

The objection by the defence was majorly that the said Inspector Ndegwa had not signed the inventory. It was also not marked with the words **''suspect refused to sign''**. According to the defence, it meant that the inventory the prosecution intended to produce was not the same as the one they were furnished with and therefore violated **Article 50 (4) of the Constitution**. In response, the prosecution insisted that MFI 7 was one and the same copy that the defence had been furnished with. In any case, the said Inspector Ndegwa who testified as PW2 had indicated in his testimony that he had signed the inventory. The prosecution also argued that the defence had a right to recall the said witness Inspector Ndegwa for further cross-examination on the said document.

In upholding the objection, the learned trial magistrate, Hon. B. Ojoo, SPM stated that she had looked at the two documents namely, MFI 7 and a copy of the inventory supplied to defence. She noted that the copy with the defence was markedly different from the document presented in court as MFI 7. This was with respect to the officers who signed it as witnesses and the marks of the suspect. She noted that the prosecution ought to have supplied the defence with the correct document. As such, she rejected the production of MFI 7 as an exhibit.

Similar arguments were advanced before this court in canvassing the instant application. This court on its own motion requested to see the copy of the inventory supplied to the defence. The defence counsel Mr. Ondieki who also argued this application on behalf of the Respondent exhibited an inventory which clearly had not been signed by the 2nd witness, Inspector Martin Ndegwa. On the copy with the learned State Counsel Miss Kimiri, the said witness had signed. The inventory was titled *'an inventory of all*

items recovered' and was dated 30th August, 2015. This observation vindicated the position taken by the learned trial magistrate.

I have accordingly considered the respective submissions and I take the following view of this application.

Under **Article 50(2)(j) of the Constitution-**

“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. “

This provision informs the mandatory requirement that the prosecution must furnish the defence with a list of the witnesses, the witnesses' statements and exhibits they intend to adduce during the hearing. The failure to do so infringes on the rights of an accused person to a fair hearing as he would not be in a position to adequately prepare his defence. That said, it follows that the prosecution cannot supply to the defence varied exhibits than what they will adduce in evidence. Should the contrary be, it implies that the prosecution would be conducting its case by way of ambush thereby infringing the right of an accused to a fair trial. An objection to this kind of approach is in order and courts must come to the aid of an accused when the situation presents itself. That is why **Article 50(4) of the Constitution** must be read together with **Article 50(2)(j)**. The former provides as follows:

“the 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. “

Needless to say then the prosecution could not purport to adduce an exhibit that was not supplied to the defence as the same would render the trial unfair and be detrimental to the administration of justice. If the Applicant herein were truthful that what they supplied to the defence was MFI 7, its argument would have been that the inventory in possession of the Respondent was not supplied by the prosecution. But that is not the position. The argument by the Applicant was that what learned counsel, Mr. Ondieki showed the court was an original copy and that all the signatures appended to it were original and he could not therefore purport to state that the inventory was not one and the same as MFI7. It is then obvious that the original copy in possession of the defence emanated from the prosecution. And there cannot be any dispute then that that is what was supplied to the defence. Accordingly, it is clear that the inventory that was supplied to the defence had not been signed by the said Inspector Ndegwa as at the time it was issued to them. The learned trial magistrate therefore properly rejected the production of MFI 7 because it was not similar to the copy furnished to the defence. Had the court allowed the admission of MFI 7 as exhibit, the same would have been unfair and violated the Respondent's right to a fair trial and more so negate proper administration of criminal justice.

In view of the foregoing, and pursuant to **Section 362 and 364 of the Criminal Procedure Code**, I do not think that there was any incorrectness, illegality or impropriety in the order of the learned trial magistrate in upholding the objection by the defence to adduce MFI 7 as an exhibit. Accordingly, the application lacks merit and the same is hereby dismissed. The original trial file shall forthwith be remitted back to the trial court for mention on 21st July, 2017 before the trial magistrate for directions on the hearing. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17th JULY, 2017.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Sigei for the Applicant.

2. Respondent present in person.