



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION NO.22 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PAUL KITHUMU MUNYAO.....1<sup>ST</sup> RESPONDENT**

**DAVID MUSAU MUTEI .....2<sup>ND</sup> RESPONDENT**

**RULING**

This application for revision is brought by way of Amended Chamber Summons dated 26<sup>th</sup> August, 2015. It follows an order given by the magistrate in Criminal Case Number 1160 of 2013 directing the Applicant (who was then the Republic) to furnish the Respondents (who were then the accused) with certain documents which they intended to use before the hearing date. The Applicant prays that this court sets aside the order since the required documents are not in their custody and they do not intend to use them during the trial and that the Applicant has in fact already furnished the Respondent with the documents that the Applicant will use in the trial court. Further, that the Applicant is apprehensive that the lower court case may proceed to trial without the revision orders being granted.

The application is supported by the affidavit of Victor Inyanje Kabaka sworn on 23<sup>rd</sup> October, 2014 in which he deponed that at the time the Respondent made the application, the Applicant did not have the advantage of reading the police file therefore the application was not opposed. The deponent reiterated that the said documents were neither in the Applicant's possession nor do they intend to use them at the trial. He added that the order which was given by the trial magistrate was against the spirit of Article 50(2)(j) of the Constitution.

The Respondent's response is contained in the Replying Affidavit sworn on 4<sup>th</sup> November, 2015 by the 1<sup>st</sup> Respondent. He deponed that the Applicant did not oppose the application at the time it was made. He added that the documents would enable the Respondents to come up with a defence against the charges faced. He deponed that the required documents were in possession of the Applicant and failure to supply them was against the spirit of Article 50(2)(c) of the Constitution which requires the accused person to be accorded facilities to prepare their defence. He stressed that the order of the trial magistrate was not illegal, improper or given irregularly and that an application for revision could not be entertained where the Applicant had the right to appeal. He deponed that at the time of taking the plea the Applicants were in a position to ascertain whether or not the required documents were available. He deponed that it is in the best interest of justice that the documents sought are supplied.

In her submissions, Miss Aluda, counsel for the Applicant stated that the Applicant did all that was

required, that is, to supply only the documents the prosecution intended to use for their case. She submitted that the prosecution erroneously conceded to the Respondents' request without consulting the Investigating Officer and prayed that the order by the magistrate be revised.

Mr. Kalwa, counsel for the Respondents opposed the application. He reiterated that the Applicant had the option to appeal against the Magistrate's order and that revision is not a fall back to aid an indolent party. He submitted that an accused must be furnished with materials that would aid in the conduct of his defence especially if the said documents form the basis of the allegations against him or her. He submitted that failure to avail the required documents prejudiced the Respondents' defence.

First and foremost, the essence of a revision powers is for the court to satisfy 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. This is provided in **Section 362 of the Criminal Procedure Code**. Under **Section 364(1)(b)**, the court may then alter or reverse such order with the exception of an order for acquittal.

From what is on record of proceedings of the lower court file, it is true that on 15<sup>th</sup> August, 2013 the Respondents prayed that certain documents be supplied by the Applicant before the hearing date. The said documents were;

- a. Audited reports from 2004 to 2012 accompanied by the management letters for each year.
- b. Master Pay Rfor 2004 to july 2013.
- c. Income Tax Returns from 2004 to 2012
- d. Employer Certificate for each year for PAYE showing monthly tax deductions and submissions
- e. Certificate of Exemption from Income Tax for the year 2004 to 2013
- f. Income Tax Returns for the business ventures of the redeemed Gospel church between the year 2007 to 2012
- g. Financial Policy and Book for the redeemed GospelChurch
- h. Staff files for David Musau Muteti.

The court ordered that the above documents be supplied within 15 days from the date they were requested for.

On 24/9/2013 the Applicant produced and supplied to the Respondents the documents which they were to rely on. The documents included;

- a. Tax Deduction Cards and pay slips of Muteti.
- b. Appointment Letters and Appraisal of the first respondent
- c. Diverted cheques and specimen signatures
- d. A bundle of bank transfers.

The Respondents' counsel then raised the issue that the documents which were requested for were not supplied. The court ordered that the remaining documents be supplied before the date for mention.

On 14/1/14 the Applicant informed the court that they were not able to comply with the magistrate's order and gave notice of intention to appeal against it. However, later on they opted to send the file to this court for revision.

From the record of the lower court, it is clear that the Applicant intimated that the documents required of them were not in their custody. Neither were they going to be relied on during the trial. The Applicant furnished the Respondents with the documents which they were to rely on. This satisfied the requirement under **Article 50(2)(j) of the Constitution**. The same provides that **an accused person has the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence**.

That having been said, I find that the prosecution played its part. In my view it is not proper to

consistently demand for documents which are not in the custody of the person from whom they are demanded. The duty of the prosecution as clearly spelt out under the Constitution is limited to the documents they will call in their evidence. To do the contrary as demanded by the Respondents would open a Pandora's Box whereby trials do not proceed because the prosecution cannot provide what is not in their possession. That would otherwise appear to be a delaying tactic on the part of the person seeking the documents. It would amount to an injustice to the entire criminal justice system. After all the defence is at liberty to call such evidence if they require it for their case.

That having been said and by virtue of the principle that justice should not be delayed, I find the request for revision merited. There was an apparent error on the part of the trial court in ordering that the prosecution supply the defence with documents that were not in their possession. I hereby set aside the said order issued on 15<sup>th</sup> August, 2013. I substitute it with an order that the prosecution shall supply to the defence only the documents they shall rely on in their case. The lower court file shall forthwith be remitted to the Chief Magistrate for mention on 8<sup>th</sup> December, 2015 for allocation of a hearing date.

**DATED and DELIVERED 4<sup>TH</sup> day of DECEMBER, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. M/s Atina for the Applicant.***
- 2. No appearance for the Respondents.***