



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO. 137 OF 2013

REPUBLIC.....APPLICANT

VERSUS

SAMUEL NDUNDA MUTUNGA1ST RESPONDENT

FREDDIE MBILA MUIA2ND RESPONDENT

RULING

Introduction

1. This is a Revision application by the Applicant/State, which originated by way of a letter dated 26th August, 2013. In it the State seeks revision of orders granted by the trial magistrate in **Nairobi Cr. Case 1105 of 2013**, on 14th August 2013 for the contract documents to be released to the defence.

The Applicant's case

2. Mr. Kabaka, the learned state counsel argued that the contract documents were the prosecution's evidence, and therefore, the orders of the trial magistrate to release them to the defence were illegal and improper. The documents were said to have been recovered from the applicants prior to their being charged, pursuant to police investigations for an offence of cheating contrary to **Section 315** of the **Penal Code**, and that they were the only documents available at the execution of the contract which is the subject of the prosecution.
3. Mr. Kabaka contended that no prejudice would be suffered by the Respondents if the documents are retained by the prosecution to be used in evidence since the Respondents are not opposed to their use in evidence. The Applicant/State denies that these were duplicate copies and that the original documents were in the custody of the complainant in the lower court trial, and contends that since the criminal case has not been concluded, the release of the documents would defeat the ends of justice.
4. To counter the Respondent's argument that the applicant should have come to the High Court by way of appeal and not Revision application, Mr. Kabaka urged the court not to sacrifice justice at the altar of technicalities. Mr. Kabaka prayed for the setting aside of the decision of the lower court so that the case could proceed to its logical conclusion.

The Respondents case

5. Mr. Maina the learned counsel for the respondents opposed the application, and reiterated the contents of the affidavit of Mr. Samuel Ndunda, the 1st Respondent which was also sworn on behalf of the 2nd Respondent. Mr. Maina maintained that the lower court properly exercised its discretion in granting the orders dated 14th August 2013 which this application seeks to review. He argued that whereas the Respondents were not opposed to the said contracts forming part of the prosecution exhibits, but were opposed to their employment contracts being used to prosecute them.
6. Mr. Maina averred that since the Applicant's intention for retaining the agreements, was to subject them to the analysis of a Document Examiner to establish whether the signature therein belonged to any of the Respondents; that this contravened **Article 50(1)** of the **Constitution** which gives an Accused person the right to refuse to give self-incriminating evidence. It was also argued that the Applicant's proper cause of action lay in an appeal and not review and lastly, that the Respondents required the two contracts at a later date to prove that this is purely a contractual matter.

Analysis of the evidence

7. **Section 362 Criminal Procedure Code** states as follows:

“The High Court may 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.” (*emphasis mine*)

8. The documents at the centre of this application were obtained by the police in the normal cause of investigation and were intended to form part of the prosecution evidence. In my view and in the circumstances of this case, it would be improper and or irregular for the trial court to make an order for their release to the respondents before the prosecution has had a chance to use them in evidence as intended, as this would defeat the end of justice.
9. It is envisaged that at the close of the trial the said documents will be released by order of court to the appropriate party. The Respondents cannot use **Article 50(2)(l)** of the **Constitution** to shut out evidence properly obtained during investigation since they shall have recourse during trial, to **Article 50 (2)** and **(k)** of the **Constitution** which confers the right to adequate time and facilities to prepare defence and also to adduce their own evidence and further to challenge the evidence tendered by the prosecution. In **Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another (No. 2) Misc. Civil App. No. 54 Of 2006, [2006] Eklr**, Lesiit, Wendoh and Emukule JJ stated as follows:

“Clearly under Section 77(7) of the Constitution the Constitutional right against self-incrimination is only available where a person has been charged with a criminal offence. It is not under the clear language of our Constitution available during investigations or prior to being charged. Besides, if life may be taken away, by order of court as prescribed under section 71(1) of the Constitution, why would a right not to self-incriminate not be limited to the time of testimony after being charged? It is the same Constitution and no right is superior or higher than another.”

In the current constitution the right to refuse to give self-incriminating evidence is not one of the non-derogable rights under clause 25 of the Constitution.

Findings and conclusion

10. After a careful consideration of the submissions from both sides, I find that the application is properly before this court since in the circumstances of this case, the decision of court to order

release of the exhibits held by the prosecution to the Accused persons before they are used in evidence as intended at the time of recovery was improper and/or irregular.

The application is therefore found to have merit and is allowed.

SIGNED DATED and **DELIVERED** in open court this 7th day of **November 2013**.

L. A. ACHODE

JUDGE