



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 317 of 2012

DENNIS EDMOND APAA ..... 1<sup>ST</sup> PETITIONER

BILLY INDECHE ..... 2<sup>ND</sup> PETITIONER

BROAD VISION UTILITIES LIMITED ..... 3<sup>RD</sup> PETITIONER

AND

ETHICS AND ANTICORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT

JUDGMENT

Introduction

1. This case concerns the right to a fair trial guaranteed under **Article 50** of the Constitution. The issue for determination relates to the nature and extent of disclosure by the prosecution of evidence, material and witnesses to the defence and whether such a duty is one-off at the commencement of the trial or whether it is a continuous duty in light of the circumstances of this case.

2. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners are the directors of the 3<sup>rd</sup> petitioner. They are currently facing various charges under the *Anti Corruption and Economic Crimes Act, (Act No. 3 of 2003)* at the Nairobi Chief Magistrate's Court being *Nairobi Anti-Corruption Criminal Case No. 37 of 2011 (Republic v Lawrence Nguniko Simitu, Isaiah Wamawanzo Benjamin, Samuel Aluoch Otieno Alima, Robert Mati Musyimi, Joseph Mutuku Nzesya, Mwangambo Mwangome Nyamawi, Billy Indeche, Dennis Edmond Apaa, Broad Vision Utilities Limited)*.

3. The petitioners' case is set out in the petition dated 25<sup>th</sup> July 2012 and the affidavit sworn by Billy Indeche, the 1<sup>st</sup> defendant. The matters in contention arise from the proceedings in the subordinate court and I shall set out the material parts of the proceedings necessary for making this determination.

The Proceedings

4. On 19<sup>th</sup> March 2012, John Kiumi Wambugu, the tenth prosecution witness (PW10), was called to the stand to testify. An objection was raised by the petitioners' advocate on the ground that his name and witness statement had not been included in the list of witnesses and statements provided by the prosecution at the commencement of the trial. Counsel for all the accused objected to the witness as they viewed his testimony as an ambush and a breach of the right to a fair trial guaranteed under **Article 50** of the Constitution.

5. The prosecuting counsel informed the Court that the reason the names of witnesses and their statements and the exhibits had not been furnished was because the witnesses had allegedly been threatened. The prosecutor also contended that the duty to disclose the names of witnesses and evidence was a continuous one throughout the trial and that the prosecution should be allowed to proceed with the trial.

6. On 19<sup>th</sup> March 2012, the Honourable Magistrate, while reserving the matter for ruling, stated, ***“Prosecution should disclose all the witnesses they intend to call to the defence and supply the defence with the witnesses statements well in advance but not on the date of the hearing as it happened this morning.”***

7. On 28<sup>th</sup> March 2012, the Honourable Magistrate delivered the following ruling:

### **RULING**

***It is a Fundamental Right of any accused Person to fair trial which includes to have adequate time and facilities to prepare for his defence Article 50(1)(c) of the Constitution. Article 50 (1)(e) to be informed in advance of the evidence prosecution intends to rely on and to have reasonable access to that evidence.***

***It was evident that the witness herein PW10 recorded his statement in February, 2012 while this was ongoing in court. He did not even disclose his name. Though prosecution alleges that witnesses were threatened, there is no evidence of such threat and that should not be used as an excuse in not disclosing the full particulars of the witness. Defence needs to be given all the statements of the witnesses early enough for proper preparation of the case and their defence,***

***The defence alleges that they were not supplied with the statement of PW10 on time and he was not an initial witness and he should not be allowed to testify.***

***This is a court of justice and justice should be seen to have been done all the time. Prosecution should be allowed to avail all the relevant evidence***

***Since it is evident that Defence did not obtain the statement of this witness on time. I will step him down to allow the Defence sufficient time to go through the statement and prepare for the case, I will however not bar him from giving evidence. However, the investigating officer should not investigate the case as it progresses in court. He should disclose all his witnesses to the defence and supply them with the statements of all the witnesses to be called with the full particulars as of the witnesses.***

***Prosecution should adhere to the rules of fair trial as provided for in Article 50 of the Constitution.***

***Prosecution should not introduce any document in court if the same has not been availed to the defence.***

***I will not disallow the testimony of PW10 but will step him down so that Defence can go through his statement and prepare for the case. In any event section 150 of Criminal Procedure Code provides that a court may recall any witness at whatever stage of trial. If his evidence appear to be essential to the just decision of the case.***

***Objection is overruled.***

### **SENIOR PRINCIPAL MAGISTRATE**

8. After the magistrate had given her ruling, the prosecutor informed the court that he still wished to rely on nine witnesses whose names statements had not been disclosed. An objection was raised by counsel for the accused and the magistrate ruled as follows;

### **RULING**

***If all the witnesses statement which have been supplied to the defence do not have particulars of the witnesses. Then the prosecution will not be allowed to rely on them today. The prosecution should supply the defence with statements which have particulars of the witnesses.***

***Accused persons were brought to court because prosecution through the investigating officer had allegedly completed their investigations. Prosecution/or investigating officer should not investigate the case as it is ongoing in court as that is against the rules of fair trial. Accused persons should be informed in advance what evidence the prosecution intends to rely on.***

***No more investigations of the case as it is ongoing in court. No more emerging of fresh documents as the case is ongoing.***

***Defence counsels to be supplied with all the statements of the witnesses with full particulars we take a mention date to confirm that.***

**SENIOR PRINCIPAL MAGISTRATE**

9. To complete the picture, the proceedings after 28<sup>th</sup> March 2012 were as follows;

***Onduso – We have 28 witnesses statements and nine new witnesses. We need a clarification from the prosecution.***

**SENIOR PRINCIPAL MAGISTRATE**

**28.3.2012**

***Gikonyo – the nine witnesses are in addition to the 28 witnesses already in court we confirm that we are not investigating the matter as is ongoing.***

**SENIOR PRINCIPAL MAGISTRATE**

**28.3.2012**

***Court – If no more investigations is ongoing, why has the prosecution not supplied all the witnesses statements and the exhibits. All the witnesses' statement to be supplied to the defence together with the exhibits that prosecution intends to rely on.***

**SENIOR PRINCIPAL MAGISTRATE**

**28.3.2012**

***Court – Further mention 4.4.2012 to confirm that all the statements are in order and the copies of the exhibits.***

**SENIOR PRINCIPAL MAGISTRATE**

**28.3.2012**

**Date 4.4.2012**

***Coram – Hon L N Nyambura (Ms) PM***

***Prosecution – Ms Obuo State Counsel***

***Court clerk – Kiarie***

*Accused 1  
Accused 2  
Accused 3  
Accused 4*

*Accused 5            All Present*

*Accused 6  
Accused 7  
Accused 8  
Accused 9*

*Chief Inspector Kyaa Holding brief for Ms Obuo for the State*

*Mr Kilukumi & Esmale for the 1<sup>st</sup> accused person and holding brief for Guserwa for 3<sup>rd</sup> accused person and Makau for 5<sup>th</sup> and 6<sup>th</sup> accused person.*

*Moturi for 2<sup>nd</sup> accused person  
Mrs Nzei for 4<sup>th</sup> accused absent*

*Mr Musangi & Gitau for 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons – absent*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Motuli – It is to confirm that the prosecution has given us all the witnesses statement and copies of exhibits and I hope that is that last bundle and we are ready to take hearing date.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Mr Kilukumi – I was supplied with statement of witnesses. We can take a hearing date.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Later at 20 minutes same day*

*Kilukumi – We need to put concrete directions on the inventory and later mention the case for further orders.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Nzei – I am in agreement to that.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Kilukumi – We have not been supplied with list of documents i.e. memo to the document examiner but*

*the report is not attached to that memo. The memo is dated 2.4.2012. The investigating officer has violated the court order. That should go on record.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Court – the prosecution through Mr Gikonyo informed the court that additional witnesses statement would be supplied to the defence counsels Memo is dated 2.4.2012. The investigating officer has violated the court order. That should go on record.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Court – The prosecution through Mr Gikonyo informed the court that additional witnesses statement would be supplied to the defence counsels and that there would be no additional witnesses and case is not being investigated as it progresses in court. The parties have signed an inventory of all the witnesses to be called by the prosecution. There will be no more witnesses to be added by the prosecution.*

*The inventory of the list of exhibit is as per this inventory filed in court today.*

**SENIOR PRINCIPAL MAGISTRATE**

**4.4.2012**

*Court – By consent hearing 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> June 2012.*

**SENIOR PRINCIPAL MAGISTRATE**

### **Petitioners' Case**

10. The petitioners grievance is that having ruled on 28<sup>th</sup> March 2012 that the defendants were entitled to be informed in advance of the evidence, the prosecution intended to call, the Magistrate could not thereafter have allowed the prosecution to call any other witnesses whose statements had not been duly furnished, nor to produce any exhibits that were not availed to the defence on the onset of the trial. They contend that it was also wrong in law, for the magistrate to allow the prosecution to call in witnesses whose evidence was taken after the trial had began.

11. The petitioners' contend that the trial has been proceeding over the last six months and over ten witnesses have testified and that the prosecution being aware that the case against them was in danger of collapsing, decided in the course of proceeding, to coach witnesses and bring in evidence to fill in the gaps in their case.

12. The petitioners' argue that their fundamental rights, including the right to a fair hearing guaranteed under **Article 50** have been breached by the magistrate allowing evidence and which had not been made available to the petitioners at the onset to trial and the right to challenge that evidence.

13. The petitioners therefore seek relief from this court as follows;

*(a) A permanent injunction order do issue restraining the 1<sup>st</sup> respondent from adducing any evidence not disclosed to the petitioners pursuant to the commencement of the proceedings in Anti-Corruption Case No. 37 of 2011.*

(b) Further and/or in alternative to prayer A above an order of prohibition do issue to prohibit the respondents from adducing and entertaining respectively the evidence of any witnesses whose statements and exhibits were not disclosed to the petitioners pursuant to the commencement of proceedings in Anti-Corruption case No. 37 of 2011.

(c) A declaration that the respondent's purported calling of witnesses whose statements and exhibits were not disclosed to the petitioners pursuant to the commencement of proceedings aforesaid is unconstitutional, null and void.

(d) Exemplary damages and costs of and incidental to this petition.

14. The petitioners submit that once the Honourable Magistrate has ruled that no further documents or witnesses were to be allowed, she was stopped from making further ruling in the matter. The petitioners rely on the case of **Samuel Muchiri W'Njuguna v Republic Nairobi Criminal App. No. 550 of 2005 [2005] eKLR (Unreported)** to support the proposition that where the court has delivered a ruling on an issue, the court effectively becomes *functus officio* and one cannot appear before the same court seeking a review or variation of the order as the only remedy available is to seek a revision in the High Court or file an appeal.

15. The petitioners aver that it is not in dispute that the Constitution requires the accused to be informed in advance of the evidence that the prosecution intends to rely on. They contend that the law does specifically provide that for the right to a fair trial be guaranteed, the prosecution is under an obligation to provide an accused person, in advance of the trial, all relevant materials such as copies of statements of witnesses who shall testify at the trial, copies of documents, list of witnesses and such like items.

16. It was submitted that the duty of disclosure by the prosecution is firmly established in various foreign jurisdictions like Canada in the cases of **Republic v Stinchcombe [1991] 3 S.C.R 326**, **Boucher v The Queen [1995] S.C.R. 16**. The case of **Thomas Patrick Cholmondeley v Republic CA Criminal Appeal No. 116 of 2007 [2008] eKLR** was also cited to support the case for full disclosure.

17. Counsel for the petitioners also cited the case of **Shabalala & Others v The AG of Transvaal and the Commissioner of Police CCT 23/94, 1995 (1) SA 608 (T)** in which the South Africa Constitutional Court was of the opinion that in the event that there were competing interests, that is the right of a fair trial of the accused and the protection of the witnesses, the rights of the accused would most likely prevail.

18. Mr Singh, counsel for the petitioners, also submitted that the claim by the prosecution that they could not disclose the names of the witnesses as they had been threatened was obviously an afterthought and the Honourable Magistrate rightly dismissed the contention. He urged the court to examine the circumstances of the case and the obvious conclusion that the court draw would be that the petitioners were denied the right to a fair trial by the conduct of the prosecution.

### **Respondents' Case**

19. The respondents oppose the petition. A replying affidavit has been filed on behalf of the 1<sup>st</sup> respondent. The affidavit sworn by Eng Njeri Mburu on 12<sup>th</sup> August 2012 is argumentative and does not necessarily set out factual matters but legal matters which really should be the subject of submissions.

20. In the written submissions dated 4<sup>th</sup> October 2012, the 1<sup>st</sup> respondent contends that the prosecutor's duty of disclosure is not a one-off affair and is a continuous duty on the prosecution throughout the trial. The 1<sup>st</sup> respondent's case is supported by the case of **Thomas Patrick Cholmondeley v Republic (Supra)**. The respondent further submits that the applicable law is set out in the **Article 50(2)(j)** which reinforces the right of disclosure and guarantees the petitioners the rights to have reasonable access to that evidence.

21. The 2<sup>nd</sup> respondent opposed the petition based on the following grounds of opposition dated 4<sup>th</sup> October 2012;

1. *The petitioners herein have been given adequate time and facilities which to prepare their defence.*
2. *The prosecution is not barred by any provisions of law from adducing any additional evidence that was not within its knowledge by the time the accused persons were arraigned in court.*
3. *The duty of disclosing evidence is a continuing one throughout the trial when additional information is received and the defence is informed in good time,*
4. *The accused persons will be given an opportunity to cross examine the additional witnesses who the prosecution intends to call.*
5. *The accused persons will not suffer any prejudice as a result of the additional witnesses as they have had adequate time to study and interrogate the witness statements and documents the prosecution intends to rely on.*

22. Mr Gikonyo, counsel for the 2<sup>nd</sup> respondent, made submissions in line with the grounds of objection. He urged the court to dismiss the petition.

### **Determination**

23. The Court of Appeal dealt with the issue of disclosure of all evidence and material in its possession by the prosecution in the case of ***Thomas Patrick Cholmondeley v Republic (Supra)***. It stated, ***“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.”***

24. The Court of Appeal adopted the dicta in the case of ***R v Ward [1993] 2 ALL ER 557*** where the Court of Appeal in England was unanimous that, ***“The prosecution’s duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.*** [Emphasis Mine]

25. Although the ***Cholmondeley case*** was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in the Constitution. **Article 50(2)(j)** provides that 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.”***

26. 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 (Supra)*** 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 this right of disclosure

is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. **Article 50(2)(c)** guarantees the accused the right, **“to have adequate facilities to prepare a defence.”**

27. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in **R v Stinchcombe (Supra)**, where the Supreme Court of Canada observed, **“The obligation to disclose was a continuing one and was to be updated when additional information was received.”**

28. In the matter before the subordinate court, the Honourable Magistrate addressed herself to the relevant provisions of the Constitution and correctly stepped down PW10 until such time the witness statement was supplied to enable the Defence prepare its case. I do not find any misdirection by the Magistrate in this regard and I also do not find any breach of the petitioners’ right to a fair trial.

29. The petitioners contend that after delivering the ruling on 28<sup>th</sup> March 2010 at paragraph 7 above, the Honourable Magistrate became *functus officio*. In this respect, I do not think the case of **Samuel Muchiri W’Njuguna v Republic** applies as contended by counsel for the petitioners. The finding that the court could not review its decisions was made in the context of an application made under **section 84** of the former Constitution where the Court had delivered a judgment and the court rightly held that in the circumstances of that case it could not re-open its decision. As I understand, the petitioners’ position is that the court could not permit the prosecution to call further witnesses other than those already notified to the defence and whose statements were disclosed.

30. I have considered the proceedings particularly the directions given on 28<sup>th</sup> March 2012 and 4<sup>th</sup> March 2012. The Honourable Magistrate’s direction is clear that the prosecution should hand over the witness list and statements to the defence. The overriding concern of the Honourable Magistrate was to ensure the accused have a fair trial by ensuring that they were provided with the list of witnesses and their statements. The direction given on 4<sup>th</sup> April 2012 prior to fixing the hearing date is clear that the list of witnesses was closed. In these circumstances I do not think the petitioners will suffer any prejudice as the witnesses to be called and evidence to be produced is limited by the inventory filed in court. The accused will have the time and facilities to prepare for their defence and if necessary, they will have the opportunity to recall and cross-examine any witnesses who have given evidence in accordance with **section 150** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

31. The duty of the magistrate conducting a trial is to give any necessary directions to protect the rights of the accused to a fair trial and I am satisfied that on the whole that there was no misdirection on the part of the Honourable Magistrate in **Nairobi Anti-Corruption Criminal Case No. 37 of 2011**.

32. In the circumstances, the petition lacks merit. The trial shall proceed in accordance with the directions issued by the Honourable Magistrate on 28<sup>th</sup> March 2012 and the subsequent directions.

### **Disposition**

33. Consequently, the petition is dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 5<sup>th</sup> day of November 2012

**D. S. MAJANJA**

**JUDGE**

Mr J Singh Gitau instructed for by LJA Advocates for the petitioners.

Mr Waudu, Advocate, instructed by the Ethics and Anti-Corruption Commission.

Mr Gikonyo, Principal State Counsel, instructed by the Director of Public Prosecutions.