**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Misc. Civil Suit 29 of 1998**

**REPUBLIC. OF KENYA. V.J…… PROSECUTOR**

**VERSUS**

**GANSHYAM CHOTABARIPATEL……..…….……. ACCUSED**

**RULING**

One GANSHYAM CHOTABHAI PATEL (the Respondent) is being tried before Mombasa Senior ' Resident Magistrate B. Thuranira on two counts of stealing by servant c/s. 281 of the Penal Code. The particulars of those counts are:--

1. Oh diverse dates between 27.9. 94 and 9.12.94 at Banque Indosuez along

'. Nyerere Avenue Mombasa within Mombasa District, being an Assistant Manager of Banque Indosuez stole.

9,500,000/- from the said Banque

Indosuez

2. On diverse dates between 6.1.95.and

12.10.95 at Banque Indosuez along

Nyerere Avenue Mombasa within

Mombasa District being an Assistant

Manager of Banque indosuez stole

10,939,500/- from the said Banque Indosuez.

In the course of trial the Respondent through his advocate Mr. Wanyonyi applied to have inspection and to take copies of various Bankers Book's in a brief. Ruling made on 12.2.98 the learned trial Magistrate made the following order:

**This court therefore orders for inspectionand/or taking copies of Bankers Books as perthe defense application, i.e.**

**1. Internal Auditors Reports 1995-1996- 1997**

**2. External Auditors Reports withBalance Sheet 1995 - 1996 - 1997.**

**3. . Cheque in hand, statements from July 1996 to April 1997,**

**4. IDF Account Statements 1995 - 1996**

**1997.**

**5. Foreign cheque collection register 1995-1996 - 1997.**

***6.*** **Telegraphic Transfer Send Register 1995 - 1996 - 1997.**

**7. End of Month Reports sent to Nairobi of. Internal A/Cs 1995 - 996 - 1997"**

**M/s. Wanyonyi & co., Advocates then wrote to the Manager of Banque Indosuez (the Bank) on 20.2:98 notifying him of the order and**

**Stating:-**

**" We shall come to the Bank on Monday**

**the 23rd February, 1998 at 9.30 a.m. to inspect the said Books and make copies of the same."**

**It is upon receipt of that letter and the Ruling that the Bank instructed it's Advocates to seek the quashing of the order through Judicial Review.**

**The Bank came before Ang'awa, J on 25.2.98 and sought leave to apply for an order of certiorari to quash the order. Leave was, granted on 27.2.98 and the Notice of Motion was filed on 11.3.98.**

**It is expressed to have been made under Part 6 of the Law Reform Act (Cap. 26), 0.49 r.5 and 0.53 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. That is the Notice of Motion which was argued before me and the subject matter of this Ruling.**

**The grounds upon which the application is made are that the order was:**

**1. Contrary to the provisions of S.179 of the Evidence Act.**

**2. Wrong in law.**

**3. Without or in excess of jurisdiction of the court. ,**

**4. The Magistrate erred in the application of the relevant law.**

**5. There was no full and sufficient inquiry made by the Magistrate prior to the making of the order.**

**6. The order is not sufficiently specific so as to indicate when it is to be carried out against and/or who must comply with the same and/or who is to carry out the orders for inspection and/or taking of copies of the "Bankers Books".**

**7. As the Applicant was not a party to the Criminal Case No.1202/97 an order for the production of any Bankers Books could only be made by an application pursuant to and in-keeping with the provisions of S.178 of the Evidence Act (Cap.80).**

**8. The order has not indicated that the order itself was made for "special cause" as required by S.178 of the Evidence Act.**

**9. The order is flawed and/or defective for the reasons stated above.**

**It would be pertinent at this stage to reproduce Sections 178 and**

**179 of the Evidence Act which are called into question in this**

**matter. They fall under "Chapter VII - BANKER'S BOOKS.**

**"S.178: A banker or officer of a bank shall not in any proceedings to which the Bank is not a party, be compellable to produce any Banker's Books the contents of which can be proved under this Chapter or to appear as a witness to prove the matters, transactions and accounts therein, recorded unless by order of the court made for special cause."**

**S.179: (1) On the application of any party to proceedings a' court may order that such party be at liberty to inspect and take copies of any entries in a Banker's Book for any of the purposes of such proceedings.**

**(2) An order made under this section may be made either with or without summoning the Bank or any other party, and shall be served on the Bank three clear days before it is to be obeyed, unless the court otherwise directs."**

**For the Bank it was submitted by Mr. Akiwumi their learned Counsel that the Bank was not a party to the Criminal proceedings and therefore could not be compelled to produce Banker's Books unless the court makes an order for special cause. That is the**

**provision of S.178 of the Evidence Act. It was therefore erroneous for the trial Magistrate to issue an order pursuant to S.179 which envisages that the Bank be a party to the proceedings. The order issued cited no special cause and was draconian as it was made without hearing the Bank contrary to the Rules of natural justice. He further submitted that the order was too wide on scope and onerous in effect as it covered nine different orders spanning over several years. It is clear from the charge-sheet that only a limited period is referred to, i.e. about 10 weeks in 1994 and about 9 months in 1995. Nevertheless, the order sought and granted spanned three years covering all manner of Accounts of the General Clientelle of the Bank. This is not only a fishing expedition but would lead to a breach of the Banks confidentiality.**

**As for the order itself, Mr. Akiwumi submitted that it was flawed: It is not specifically directed at any. particular Bank Branch, since the Bank has several branches in the country. There is also a Westminster Bank in England which features in the**

**proceedings. It does not say who it is that should be permitted**

**into the Bank premises to inspect the Books or copy -whether it is**

**the Advocate, the Accused or any other person. Finally, it has no**

**time limit and periods of the inspection and copying for an indefinite**

**period of time. In support of this proposition he cited Malborouqh Street Magistrates Court & Anor. Ex Parte Simpson & Others. There the application of S.7 of the Bankers Books Evidence Act 1879, which is in pari materia with S.179 of the Evidence Act**

**was considered.. The Prosecution applied ex parte to inspect the Bank accounts of the Accused. It was held:**

**although there was much to be said for notice being' given to the other side by the police before applying for an order under S.7, and no such notice was given in the instant case and as the application was made ex-parte, that in itself was not enough to quash the orders; however, the orders lacked an essential feature in that they were not limited in time, and for that reason alone the orders surd be quashed . . . . the Magistrate**

**could and should have made the orders run in respect of a limited period of time.**

**For the order to be enforceable it should also be precise as stated**

**in Mutitika & Others -vs- Baharini Farm Ltd., (1982-85) KAR 863.**

**Most importantly Mr. Akiwumi submitted, the order is against**

**Public Policy in that a Bank is supposed to keep public documents**

**and confidentiality would be undermined. The orders should therefore be quashed.**

**Responding to these submissions, Mr. Wanyonyi, learned counsel**

**for the Applicant contended that the Bank is the complainant in the Criminal Case facing the Respondent. The orders were directed at the Bank because it was a party in that sense. A person who stands to lose or gain in legal proceedings is a party.**

**As for the period covered in the order being wide he submitted that the Applicant was arrested in April 1997 although the charge-sheet covers periods in 1994 and 1995. The Bankers Books for all the period from 1994 to the time of arrest is therefore relevant. In his view the order has time limits for the accounts to be inspected. The period covered is 3 years (1995 - 1997). There is also a limit on the number of Accounts to be inspected, which are , only the Accounts relevant to the charge, and not accounts of the General Clientelle of the Bank. It is after inspection of these accounts that copies of what is relevant can be taken. Mr. Wanyonyi cited some examples of how such evidence would apply to assist the respondents case**

**On the submission that the Bank was not heard before the orders were given, Mr. Wanyonyi contended that the application was made in the presence of the Court Prosecutor who raised objections before the Ruling was made. It was not necessary for the Bank itself to be represented in such proceedings. At any rate the Branch Manager was present. There cannot be any doubt to whom the order was directed and in respect of what subject matter. It is also, clear in the order that it was the Respondent and his advocate who were to inspect and take copies. Counsel for the Respondent wrote to the Bank seeking compliance with the order within one week.**

**On all accounts the order issued was a valid and lawful order and ought not to be quashed.**

**I have anxiously considered the application and submissions of counsel.**

**It is beyond argument that this court has the power to quash by way of Judicial Review, the orders issued by the learned trial Magistrate. It matters not that there exists an alternative remedy to an**

**Applicant. The court may do so for any number of reasons since the application of the remedy of "certiorary" orders is not closed as recently observed by Chesoni, C.J. in C.A.265/97 David**

**Mugo (t/a Manvatta Auctioneers) -vs- R.:"So long as orders by way of Judicial Review**

**remain the only legally practical remedies for adiministrative the control of administrative decisions and in view, of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of Judicial Review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions."**

**The decision complained of in this matter was purely judicial and was made by a Judicial Officer. Although several grounds have been laid to challenge the order issued, they boil down to assertions that the orders were issued in excess or lack of jurisdiction; there were errors of law of the face of the record and the orders were issued in breach of the rules of national Justice. The submissions of counsel for the Applicant are subsumed under those**

**broad issues. First the contention that there was breach of the Rules of natural justice.**

**The submission in that regard as stated above was that the Bank was affected by the orders issued and should therefore have been heard before such orders were issued. As a general statement of law that proposition would be valid. But I have set out the provisions of the law which are applicable in this matter and they do expressly provide that orders may be made without summoning the Bank so long as the orders are served three clear days before they are obeyed. It is the procedure provided for and a discretion given to the court to direct otherwise if circumstances so demand.**

**At all events I am not of the view that orders were made without any opportunity being given to the Bank to make representation even if such representations were called for. The difficulty arises from the definition of "Party" in criminal**



**proceedings. None of the Advocates representing the parties referred me to any or any authoritative definition of who the**

**parties are in criminal proceedings. The Applicants counsel simply submitted that the Bank was not a party while the Respondents counsel contended that the Bank was a party by virtue of being the Complainant in the case.**

**The evidence Act does not distinguish between Criminal and Civil matters. It applies to "all Judicial proceedings in or before any court" but excludes Kadhi's Court and arbitrations. It does not define"judicial proceedings" or "proceedings" and does not define "Parties"; which words are used in the two sections cited above.I would think however that "judicial proceedings" or proceedings" as referred to would mean civil or criminal proceeding or inquiry in which evidence is or may be given; and a party would be any person who takes part or is involved in such proceedings. The Dictionary meaning of "Party" is:-**

**each of two or more persons making the two**

**sides in legal action, contract, marriage, etc."the Concise Oxford Dictionary.**

**The application of such meaning to civil proceedings presents no difficulty. There we have**

**"Plaintiff", "Defendant", "Third Party and other specifically named parties. In a criminal matter a complaint is laid either directly to a Magistrate or to the police by a"complainant". The ensuing prosecution is however instituted in. the name of the "Republic". It is a requirement of**

**law. The Attorney-General or a "Prosecutor" appointed by him conducts the case on behalf of the Republic. On the other side is an Accused person although there is no duty on such accused to say anything in the proceedings On the face of it therefore the parties to the proceedings are the "Republic" and the "Accused". For it can be argued, that any person who lays an allegation that some person known or unknown has committed or is guilty of an offence, leaves it to the police to investigate and, if the evidence so warrants, institute criminal proceedings. It is no longer a matter between the "complainant" and the "Accused" and a"complainant" cannot be a party to criminal proceedings as such. This would appear to be the construction touted by counsel for the Bank but I think with respect, that it is a strained construction.**

**For one it has been held before that the word "complainant"**

**includes a Public Prosecutor. That was by Cotran, J. in R. -vs- Ikego, 1979 KLR 209. In so holding he relied on an East African Court of Appeal decision of Nquma -vs- The Republic of Tanzania,**

**(UR) which he cited thus:-**

**" The word "complainant" is not defined in this section nor in the Criminal Procedure Code. But we learn from the judgment of Biron J, a senior judge of considerable experience in the High Court, that the word "complainant" is generally regarded by the judges in the High Court in Tanzania as including a public prosecutor. We would endorse this view which flows logically from the definition of the word "complaint" in section 2 of the Criminal Procedure Code that it is "an allegation that some person known or unknown has committed or is guilty of an offence". It is not usual, and indeed would be superflous, to define a word in a piece of legislation and also include definitions of all derivatives and variations**

**11**

**of the word defined. Normally, where a word is defined in a document, an indication of the meaning of any derivative or variation of the word is thereby indicated, unless, of course, the context otherwise requires. In our view it is logical and within the rules of interpretation to hold that the word "complainant" includes a public prosecutor. What this means in effect is that where a private person complains directly to a magistrate in a criminal matter he is the "complainant". if however, the same person, instead of complaining direct to a magistrate were to complaint to the police and the police brought the complain to court in the name of The Republic then we think it follows that the Republic or the public .. prosecutor ...is .. the "complainant" and the victim of the wrong**

**complained of becomes a witness for the purpose of substantiating the allegation."**

**Underlining mine.**

**Secondly, from the authority produced by counsel for the Bank R.v Marlborough street/magistrates Court and Anor. (above) and Williams & Others v Summerfield,[1972 ] 2Q.B 512 which was also produced and relied on by the Bank, applications were made to inspect the Bank Accounts of the Accused persons. The prosecution made such applications. But there is no indication that the Banks which were holding such accounts were invited to make any representations before the orders were issued. In the Williams case it was stated**

**as part of the facts established,**

**"On 11.1.1972 the male appellants were summoned with criminal offences under the Larceny Act 1961 and the Theft Act 1968 in order that thereby the prosecution became a party ' to legal proceedings and therefore within the definition of S,7."**

**12**

**The prerequisite for one being a party would appear to be the existence of judicial proceedings, in this case, criminal proceedings. One then becomes a party and is entitled to invoke S.179 of the Evidence Act.**

**Being of the view that the Respondent was a party to the criminal proceedings, and being of the further view that it was not necessary to involve the Bank when making an order under S.179 and, even if it was that the Bank was represented by the prosecutor as the complainant, I do not find the complaint valid that there was a breach of the Rules of natural justice before the learned Magistrate issued her orders.**

**Did the learned Magistrate act without or in excess of jurisdiction. I think not. The plain reading of S.179 under which the application was made and orders issued, shows discretion granted to "a court" to make orders for inspection of Bankers Books. "Court" and "Bankers Books" are defined in S.3 (l) of the Act. "Court" includes "all Magistrates" and 'Bankers Books' includes "a ledger, day book, cash book, account book, and any**

**other book used in the ordinary business of the Bank". There was clearly the jurisdiction under the section for the trial Magistrate to issue the orders in respect of the various documents listed in the order.which I find,do not fall outside the definition under the Act.**

**13**

**Were there errors of law apparent in the orders issued I think the Bank is on firmer ground here.**

**The Ruling made was rather brief and gave no reasons for grant of the order. I have not had the benefit of the arguments made for or against the issuing of the said orders either. Attempts**

**were only made by counsel for the Respondent to explain the reasons behind the ruling at the stage of hearing of this application. But as correctly pointed out by counsel for the Bank, those explanations should have been made before the learned trial Magistrate.**

**The starting point is to examine the purpose of Chapter VII of the Evidence Act and S.179 in particular.**

**Although the Evidence Act came into effect in December 1963, S.116-181 were carried forward**

**from Chapter 13, Laws of Kenya which was enacted in 1937. Before then the provisions were lifted word for word from the Bankers Books Evidence Act of India (Act No. 18/1891) which was in turn drawn from the English Law, the "Bankers Books Evidence Act 1879". That Act was passed in order to obviate the inconvenience occassioned to Bankers and their customers, by the removal of ledgers and other account books from banks for the purpose of production in legal proceedings and in order to facilitate proof of transactions recorded in such ledgers and account books (see Archibold, Third Edition, Pg.480).**

**There is a dearth of authorities on the application of the sections in East Africa., But the principles applicable were aptly put in the persuasive authority cited by counsel for the Bank, the Williams case. After likening an order under S.7 (s.179) to a**

**search warrant, which ought to be issued after the most mature, careful consideration of all the facts of the case, since it infringes on the liberty of the individual, Lord Widgery, CJ stated;**

**" I think that in criminal proceedings, justices should warn themselves of the importance of the step which they are taking in making an order under S.7; should always recognise the case with which the jurisdiction should be exercised; should take into account amongst other things whether there is other evidence in the possession of the prosecution to support the charge; or whether the application under S.7 is a fishing expedition in the hope of finding some material on which the charge can be hung.**

**If Justices approach these applications with a due sense of responsibility and a recognition of the importance of that which they are being asked to do, if they are always alive to the requirement of not making the order extend beyond the true purposes of the charge before them, and if in consequence they limit the period of the disclosure of the Bank Account to a period which is stringly relevant to the charge before them, I feel if**

**they observe those precautions and pay heed to those warnings they will in fact produce a situation in which the section is used properly, wisely, and in support of the interests of justice, and will not allow it to be used as an instrument of oppression which on its face it might well be".**

**Underlining provided**

**It is the prosecution which had made the application in that**

**case but the principles would still hold true if the roles were reversed I would respectfully therefore adopt the words of the learned Chief Justice in construing the applicability of S.179 of the Evidence Act.**

**It seems to me on examination of the order made and the principles applicable that the learned trial Magistrate did not "warn herself on the consequences of the orders issued. The orders not only cover periods which are not strictly relevant to the charge but are short on detail. They readily answer to the accusation that the Respondent was engaged in a fishing expedition. They extend beyond the true purpose of the charge laid against the Respondent. More importantly they contain no time limit during-which the inspection should remain. It was a fatal error of law. For those reasons I do not see how the orders can be allowed to stand as framed for execution. A proper basis should have been laid before they were issued and the principles stated above should have been applied. There is no indication that copies of relevant Bankers Books were applied for and not supplied. They are good evidence under S.176 of the Evidence Act.**

**In the result the application is granted.**

**Costs would normally follow the event unless the court for reasons stated decides otherwise. The application emenates from a criminal trial. The Accused person may perhaps have felt justified in seeking the orders he sought in order to prepare his defence**

**although the application was made long before there was a finding that the prosecution had established a prima facie case. But his liberty is threatened. That there were errors of•: law committed in the process of dealing with his prayer should not strictly attract censure against him. The Bank on the other hand has benefited by forestalling a move that in its view would have violated its rights and. those of its customers. In those circumstances I am inclined to order that each party shall bear its own costs.**

**Dated at Mombasa" this 1st day of October, 1998.**

**P.N. WAKI**

**JUDGE**