Republic v Njenga & another (Anti-Corruption Case E017 of 2025) [2025] KEMC 82 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEMC 82 (KLR)

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)

ANTI-CORRUPTION CASE E017 OF 2025

CN ONDIEKI, PM

MAY 5, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

VERONICA NJENGA ..... 1ST ACCUSED

ABDULLAHI ABDI SHEIKH ..... 2ND ACCUSED

RULING

1. This Court has carefully considered the trial objection raised by learned counsel Mr. Masake representing the 1st Accused and learned counsel Prof. Ojienda, SC, representing the 2nd Accused - against production of the documents marked PMFI 2 and 3 - and the grounds canvassed in support thereof. This Court has also carefully considered the response thereto by learned prosecution counsel, Mr. Panyako, representing the state.

2. For clarity, PMFI 2 is a copy of filled Application Form for an Identity Card, Reg. 136C, serial number 240156495 certified as a true copy of the original by the Secretary charge of the National Registration Bureau and PMFI 3 is a copy of a Form, Reg. 101, contained rolled fingerprints, certified as a true copy of the original by the Secretary charge of the National Registration Bureau.

3. Section 3(1) of the *Evidence Act* defines "evidence" as “the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by Accused persons, admissions, and observation by the Court in its judicial capacity.”

4. Section 3(2)-(4) of the *Evidence Act* speaks to circumstances when is a fact deemed to have been proven and provides as follows:

"(2) A fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.

(3) A fact is disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

(4) A fact is not proved when it is neither proved nor disproved."

5. But not all facts require evidence to prove them. In restricted circumstances, the law permits a trier of fact to regard certain facts as proved until they are disproved or if the law so declares a certain fact to be conclusive proof of another, the Court shall upon proof of that fact, regard the other as proved in that event not permit evidence to be given for the purpose of disproving it. Whereas the former is a rebuttable presumption, the rather is an irrebuttable presumption. Section 4 of the *Evidence Act* provides that

"(1) Whenever it is provided by law that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by law that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

(3) When one fact is declared by law to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

6. Enacted in various statutes - notably *the Constitution*, *Evidence Act*, the *Penal Code*, and the *Criminal Procedure Code* (hereinafter "CPC") - are the following instances where proof is not necessary:

a. in circumstances where the law permits the Court to make a rebuttable presumption of fact. See Articles 14(4) and 17(2) of *the Constitution*, read with section 7 (4) of the *Children Act*; sections 24, 27, 45, 77, 78, 78A (4), 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 106E, 106F, 106G, 106H, 106I, 118A and 119 of the *Evidence Act*. See also sections 11, 14 (2), 53 (2), 89 (3) and 248 of the *Penal Code*. See also section 143(1)(b) of the CPC. See also section 166 (2) & (3), 187 2(a) & (b) and 221 (2) of the *Children Act*.

b. In circumstances where the law permits the Court to make irrebutable presumption of law. See sections 44, 47A and 118 of the *Evidence Act*. See also sections 7, 12 and 14(1) of the *Penal Code* read with section 221 (1) of the *Children Act*. See also section 14(3) of the *Penal Code*.

c. In circumstances where either

(i) the facts are deemed to have been proven by consent of parties; or

(ii) matters which a Court is permitted by law to take judicial notice; or

(iii) facts admitted in civil proceedings. See section 59A, 60 and 61 of the Evidence.

7. Although applied by the *Evidence Act*, the Act does not define the term 'objection'. This Court thus resorts to secondary sources of law. The said Black's Law Dictionary (9th ed., 2009), at page 1178, defines the term 'objection' as follows:

"1. A formal statement opposing something that has occurred, or is about to occur, in Court and seeking the judge's immediate ruling on the point. The party objecting must usu. state the basis for the objection to preserve the right to appeal an adverse ruling ..."

8. Simply put, an objection is one of the numerous means of properly founding an evidentiary dispute. An objection can take the shape of either form or substance. Whereas form focuses on the procedure and manner, substance focuses on the content.

9. There are two main classes of objections namely preliminary objections and trial objections, which however share a common denominator of being pure questions of law.

10. Whereas a preliminary objection is a pure question of law raised to forestall a trial (and avoid trial of the dispute by merit)[1], a trial objection is a pure question of law raised during trial of a matter without intention to have the dispute not finally determined on merit, with the sole aim of exclusion of part or all the adversary's proposed evidence or in rare instances, against the conduct of the presiding officer or assessor. See the rare instance in the decision of the Court of Appeal of East Africa in Ndirangu s/o Nyagu vs. R [1959] 1 EA 875, where there was a trial objection against the conduct of an assessor.

11. A trial objection is thus an application, whether written or oral, seeking exclusion of the adversary's proposed piece or pieces of evidence by the Court, on the premise that it is either irrelevant or inadmissible or both or in rare cases, against the conduct of a presiding officer.

12. No doubt, the nature of objections raised in this matter is in the form a trial objection.

13. The constitutional foundation of trial objections, is the inderrogable right of the Accused to challenge evidence as guaranteed by Article 50(2)(k) of *the Constitution* which provides that

"(2) Every Accused person has the right to a fair trial, which includes the right — ... (k) to adduce and challenge evidence."

14. The stated inviolable right to fair hearing and trial is given effect by section 170 of the *Evidence Act* which provides that

"(1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility, but the validity of any such objection shall be tried by the Court.

(2)

(a) The Court, if it sees fit, may inspect the document, unless it is a document to which the provisions of section 131 of this Act are applied, or take other evidence to enable it to determine on its admissibility.

(b) If for such purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence."

15. An ideal trial objection should be characterized with the following:

(i) timely;

(ii) specific;

(iii) disclosure of all the anchorage grounds; and

[1] See Mukisa Biscuit Company vs. West End Distributors Limited [1969] EA 696, per Sir Charles Newbold, P.

(iv) constitutionally and statutorily sound.

16. From objections generally, two fundamental questions arise as follows:

a. Whether it is mandatory to conclusively determine all the trial objections instantaneously - by staying hearing of the matter – or whether production of the document objected can be allowed but determination of the trial objection be deferred and subsumed into a decision of the Court under sections 210 or 211 or 215 of the CPC.

b. The legal tenor of production of a document and in this connection, whether an egregious prejudice will occasion to the objector if the Court permits production of the objected document as an exhibit and the questions of relevancy and admissibility determined in the Ruling to be rendered under sections 210 or 211 of the CPC or a Judgment to be rendered under section 215 of the CPC.

17. Whereas, dictated by the nature of each proposed evidence, some trial objections ought to be determined pronto, some may be deferred to determination under either a Ruling under sections 210/211 or a Judgment under section 215 of the CPC for reasons to be demonstrated hereinafter.

18. In no way does mere production of a document as an exhibit in evidence signify that the document has passed the admissibility and/or relevancy acid test which all forms of evidence must surmount. Put differently, production of a document as an exhibit is no way equivalent to foreclosure of or shield from any challenge on account of admissibility and/or relevancy thereof. Production as an exhibit is not the ultimate stage. The ultimate stage falls in the period the Court finally retires to render a determination on the facts in issue, and this is the stage where the Court determines whether the document has surmounted the acid test of admissibility and/or relevancy. It follows that even after production of a document as an exhibit, the challenge of admissibility and/or relevancy remains a live issue throughout the proceedings, until the Court renders itself finally. In this regard, in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] eKLR (hereinafter "the Kiguta case"), the Court of Appeal (Visram, Mwilu & Odek, JJA, as they then were) discussed at length, both the steps and principles which govern production of documentary evidence as exhibits and laid down the following principles:

"18 The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the Court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the Court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the Court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the Court should be able to identify and know which was the document before the witness.

The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the Court to have the document produced as an exhibit and be part of the Court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account." {Emphasis mine}

19. See also Republic vs. Mark Lloyd Steveson [2016] eKLR (hereinafter "the Stevenson case"), where Prof. Ngugi, J. concurs with the rendition that mere production of a document as an exhibit in evidence does not mean that the document has passed the admissibility and/or relevancy acid test and that production as an exhibit is not the ultimate stage. Prof. Ngugi, J. proceeded to lay down steps admission and consideration of tangible exhibits follow and rendered himself as follows: "38. To avoid confusion, it is important to set out where authentication fits into the evidence map. The admission and consideration of tangible exhibit in evidence follows the following steps: a. First, the Court determines if the proposed evidence is relevant. Here, the Court simply determines the probative value of the proposed evidence: whether the proposed evidence has tendency to make the existence of any fact that is of consequence to the determination of a fact in issue more or less probably that it would be without the evidence. If the proposed evidence passes the Relevancy Test, it proceeds to the second step. b. Second, in the case of tangible exhibits (like the two documents in this case), the Proponent for the evidence authenticates the proposed piece of evidence that is the Proponent must prove that the evidence is what the proponent claims it to be. The Court only proceeds to the third step if the proposed evidence passes muster under the Authentication Test. It is important to explain here that the term "authentication" though the technically correct word which is widely used for this step can be misleading. In fact, what is meant by "authentication" at this stage is merely that a proper foundation for admission of the document or exhibit has been laid. It does not, at all, mean that the exhibit must now be accepted and believed. The Trial Court, as the fact finder, must ultimately weigh (in step 4 below) the admitted evidence in light of all the circumstances. The weighing can only happen after the foundation for the proposed evidence has been laid. c. Third, the Court, at the urging of the parties or on its own motion, determines if there is any other rule of evidence that excludes the proposed evidence. Here is the Court considers whether the evidence is excluded by *the Constitution* (for example the right against self-incrimination discussed above, prohibition against hearsay evidence or whether the proposed evidence would lead to unfair prejudice with its probative value substantially outweighed by the danger of unfair prejudice. If the proposed evidence survives this Exclusion Test, then the proposed evidence is admitted into evidence and the Court proceeds to the fourth step. d. Fourth, the Court considers the weight to be accorded to the admitted evidence. At this stage the opponent may still bring to the Court's attention evidence opposing authenticity of the evidence, thereby allowing the Court to give less weight to the evidence or no weight at all."

20. Perhaps it is instructive to underline now that our *Evidence Act* is supplanted in Kenya from India and the provisions are substantially the same. It follows that the interpretation of the Act by Indian Courts and especially the apex Court thereof, weighs in heavily. In this regard, my judicial rendition is shaped and fortified by the learned authors of Sarkar on Evidence, namely Prabhas C. Sarkar and Sudipto Sarkar (who authored a commentary of The Indian *Evidence Act*, *Act No. 1 of 1872* (which came into force on 15th March 872), which is para materia, similar to our *Evidence Act*, Cap 80 of the Laws of Kenya) and who sounded a caution about speculating issues for determination. While rendering their commentary on objections on relevancy and admissibility, the learned authors stated as follows in the

13th Edition, at page 1321: "Questions of relevancy of evidence cannot be decided before issue have been framed, nor can issues be framed merely for purpose of determining in advance what evidence may or will have to be given or allowed. What evidence will or will not be allowed is not to be anticipated or decided under cover of framing issues, but is to be determined in accordance with provisions of section 136, if and when evidence is offered." {Emphasis supplied}

21. My judicial persuasion is further persuaded by the holding of the Supreme Court of India (K.T. Thomas, R.P. Sethi & B.N. Agarwal, JJ) in Bipin Shantilal Panchal vs. State of Gujarat and Anr on 22 February, 2001, AIR 2001 Supreme Court 1158[2] (hereinafter "the Bipin case"), where, having noted the unreasonable delay which necessarily comes with stay of proceedings to await determination of trial objections especially when raised sporadically multiple times, reasoned that it is an archaic practice that during hearing of witnesses, whenever any objection is raised regarding admissibility of any material in evidence, the Court feels obligated to determine the objection instantly by staying the hearing proceedings. The Court rendered itself as follows: "This is yet another opportunity to inform the trial Courts that despite the procedural trammels and vocational constraints we have reached a stage when no effort shall be spared to speed up trials in the criminal Courts. It causes anguish to us that in spite of the exhortations made by this Court and a few High Courts, time and again, some of the trial Courts exhibit stark insensitivity to the need for swift action, even in cases where the Accused are languishing in prisons for long years as under-trials only on account of the slackness, if not inertia, in accelerating the process during trial stage. We shall narrate, in a brief manner, as to what happened thus far in the present case though this seems to be one of the rare cases in which an under-trial prisoner has been facing a record time for reaching culmination of the trial proceedings... For so many reasons the trial Court could not proceed fast, for which the respondent has also contributed substantially... But the initial alacrity shown by the trial judge did not last long as the swiftness of the trial was bridled on account of trumpery reasons. The defence counsel questioned the admissibility of certain documents and raised objections with regard to the same. Though the trial Court disallowed the objections as per an order passed on 24.7.2000 (presumably after hearing both sides at length) the trial judge adopted a very unwholesome procedure by stopping the trial for a lengthy period, just to enable the defence to take up that order before the High Court. Even though the prosecution brought witnesses to be examined on 8.8.2000, the trial judge hesitated to examine them, and extended the stay granted by himself and did not choose to take the evidence of those witnesses on the said date. However, the defence failed to challenge the said order and hence the trial proceedings were resuscitated on 16.8.2000. On that day the defence raised another objection regarding admissibility of another document. The trial judge heard elaborate arguments thereon and upheld the objection and consequently refused to admit that particular document. What the prosecution did at that stage was to proceed to the High Court against the said order and in the wake of that proceeding respondent filed an application on 9.11.2000, for enlarging him on bail on the strength of the order passed by this

[2] Also cited as 1998 (9) SCC 315, 2001 AIR SCW 841, 1998 AIR SCW 606, 2001 CALCRILR 322, 2001 (2) SCALE 167, 2001 (2) LRI 939, 2001 ALL MR(CRI) 452, 2001 (3) SCC 1, 2001 SCC(CRI) 417, 1998 (2) APLJ(CRI) 156, 1998 CRIAPPR(SC) 63, 1998 SCC(CRI) 1013, 1998 APLJ(CRI) 2 156, (1998) 1 CURCRIR 116, (2001) 3 JT 120 (SC), 1997 (7) SCALE 517, (2001) 1 CGLJ 366, 2001 CRILR(SC&MP) 231, 2001 (3) SRJ 437, 2001 (1) UJ (SC) 573, 1998 CRILR(SC MAH GUJ) 232, 1998 (1) BLJR 421, 2001 CRILR(SC MAH GUJ) 231, (2001) 1 RECCRIR 213, 2000 ALLMR(CRI) 10, (2001) 1 CHANDCRIC 178, (1997) 4 CRIMES 403, (1998) 1 PAT LJR 63, (1997) 10 SUPREME 300, (1998) 22 ALLCRIR 569, (1997) 7 SCALE 517, (2001) 1 ALLCRILR 454, 2001 CHANDLR(CIV&CRI) 498, (2002) 1 MADLW(CRI) 115, (2001) 1 RAJ LW 169, (2001) 1 RECCRIR 859, (2001) 1 SCJ 460, (2001) 1 CURCRIR 278, (2001) 2 SUPREME 65, (2001) 2 SCALE 167, (2001) 1 DMC 30, (2000) 3 MAH LJ 524, 2000 CRILR(SC MAH GUJ) 669, 2000 BOM LR 2 302, (2000) 3 CRIMES 539, (2001) SC CR R 492, (2001) 1 HINDULR 188, (2001) 1 ALLCRILR 320, (1998) 1 ALLCRILR 96, (2001) 2 BLJ 276, (2001) 1 EASTCRIC 295, (2001) 1 EFR 541, (2001) 3 GUJ LR 2024, (2001) 2 GUJ LH 545, (2001) 1 ORISSA LR 428, (2001) 2 PAT LJR 132, (2001) 42 ALLCRIC 635, (2001) 1 CHANDCRIC 177, (2001) 3 ALLCRILR 16, (2001) 1 CRIMES 288, (1998) 1 EASTCRIC 389, (1998) 1 SCJ 295, (2001) 134 ELT 611, (2001) 1 ALLCRIR 800, 2001 (1) ANDHLT(CRI) 230 SC, (2000) 5 BOM CR 554.

Court on 31.3.2000 (extracted above). We are compelled to say that the trial judge should have shown more sensitivity by adopting all measures to accelerate the trial procedure in order to reach its finish within the time frame indicated by this Court in the order dated 31.3.2000 since he knew very well that under his orders an Accused is continuing in jail as an under-trial for a record period of more than seven years. Now, we feel that the Additional Judge, whether the present incumbent or his predecessor, was not serious in complying with the directions issued by this Court, though the parties in the case have also contributed their share in bypassing the said direction. As pointed out earlier, on different occasions the trial judge has chosen to decide questions of admissibility of documents or other items of evidence, as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. The worse part is that after passing the orders the trial Court waited for days and weeks for the concerned parties to go before the higher Courts for the purpose of challenging such interlocutory orders. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional Court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings." {Emphasis supplied}

22. In the Bipin case, the Supreme Court of India thus laid a guideline for the lower Courts that in lieu of staying a hearing to determine a trial objection, a Court should take note of the objection and allow production of the document as an exhibit and the trial objection deferred to determination in the final stage. The Court laid down the following guideline for use henceforth by the lower Courts: "When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.) The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses." {Emphasis supplied}

23. Although highly desirable by the objector to do so, it follows that no prejudice will occasion to any party if a trial objection is not determined instantaneously and instead a determination thereof

subsumed into a Ruling under sections 210/211 of the CPC or a Judgment under section 215 of the CPC.

24. My judicial view is underpinned by at least five reasons.

25. First, that approach commends itself to the principle enshrined in Article 159(2)(d) that justice shall be administered without undue regard to procedural technicalities by uplifting substance over procedural trammels apart from strategically speeding up criminal trials in the direction of avoiding delay of justice consistent with Article 159(2)(b) of *the Constitution*. The approach is consistent with the principle ingrained in the CPC that a right to appeal does not accrue until and unless a trial Court has rendered itself under either section 210 or 211 or 215 of the CPC. Furthermore, this approach addresses the absurdities witnessed in the Bipin case and embraces the innovative strategy therein.

26. Second, whereas a challenge of admissibility, being a pure question of law can possibly be determined even before a determination under sections 210/211 or 215 of the CPC, a challenge of relevancy, being a question of fact, may not be appropriately determined before the Court reaches a stage of determination under sections 210/211 or 215 of the CPC.

27. Third, the tenor of production of a document in proceedings is in no way synonymous to foreclosure of the challenge of admissibility and/or relevancy and in no way does it signify acceptance of the document for purposes of proof or disproof of the facts in issue.

28. Fourth, since this Court adopts a judicial view that as far as practicable, considering the legal effect of production of a document, and since this Court has a final determinative view at the appropriate ultimate stage - the final stage where the question whether the document can be relied upon to prove this fact or the other – as far as practicable, this Court is of the persuasion that it should refrain itself from dictating which document a party should produce or not, and the witness to produce the document. However, this stance translates that a weighty responsibility lies on the shoulders of the party proposing to produce a document to cross-check its consistency with the law. It follows that the principal concern of the objector, therefore, should not be whether a document is on record or not, but whether it surmounts the tests which were enunciated in the Stevenson and Kiguta cases.

29. Fifth, in considering such trial objections, this Court is of the view that it will be imperative and judicious to strike a delicate balance of risks, by opting to take the lower risk of injustice path. In this case, considering the legal implication of production of a document in evidence, the lower risk of injustice lies in allowing the production and deferring and subsuming the determination of the trial objection into the decision to be rendered under section 210 or 211 or 215 of the CPC, when the Court shall ultimately consider the totality of the evidence and the law underpinning the evidence.

30. The next fundamental question – perceptibly of great concern to the objector - is whether there is a safeguard for improper admission or rejection of evidence? If no fundamental prejudice was occasioned thereby, on account of there being other sufficient evidence to justify the course the Court took, then improper admission or rejection of evidence shall not of and by itself be ground for a new trial or for reversal of any decision. See section 175 of the *Evidence Act* which provides that "The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the Court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision."

31. The fact that a Court overrules a trial objection is not tantamount to fait accompli. In such event, the objector reserves the right to a continuing or running objection, which essentially means that the objector reserves the challenge for determination by the appellate Court - if the Accused is convicted

or acquitted- whichever is applicable, depending on the party which raised the objection. The said Black's Law Dictionary (9th ed., 2009), at page 1178, defines a 'continuing objection' as follows: "A single objection to all the questions in a given line of questioning. A judge may allow a lawyer to make a continuing objection when the judge has overruled an objection applicable to many questions, and the lawyer wants to preserve the objection for the appellate record. — Also termed running objection." This view is cemented by the holding of the High Court in both Njuguna Mwangi & Samuel Irungu Mwangi vs. Republic (Anti-Corruption and Economic Crimes Case 10 of 2018) [2018] KEHC 3970 (KLR) (Anti-Corruption and Economic Crimes) (27 September 2018) (Ruling) (hereinafter "the Njuguna case") per J. Onyiego, J. and Boniface Gubimilu vs. *Republic (Criminal Revision 2 of 2018)* [2020] KEHC 913 (KLR) (18 December 2020) (Ruling) (hereinafter "the Gubimilu case") per W. Musyoka, J. In the Njuguna case, Njuguna Mwangi and Samuel Mwangi were arraigned in this Court (The Magistrate's Anti-Corruption Court at Milimani) and charged with diverse corruption-related offences. In the course of hearing, a trial objection was raised by the two Accused persons against production by PW6 of certain documents which had been marked as PMFI 7 & 9, but the Court overruled the objection and admitted them in evidence. The Accused persons sought revision of the ruling of the Magistrate. J. Onyiego, J. held that if the objector is aggrieved by the ruling overruling the objection, the appropriate stage to challenge the wrongful admission of evidence is on appeal, if the objector is at all convicted and not in the midst of trial by the Court which overruled the objection for doing so will be prejudicial to the decisional independence of the trial Magistrate. His Lordship rendered himself as follows and I wish to quote him at length for proper context: "14. What is the effect of admitting an exhibit by the trial Court after overruling an objection raised by the defence or prosecution challenging such admission? Production and admission of exhibits in the course of a trial is governed by laid down procedural and legal requirements whether in criminal or civil proceedings. Ordinarily, objections do arise when a party attempts to produce a document or materials relied on to prove one's case depending on the circumstances and attendant legal provisions governing such production. Depending on the nature of evidence and Exhibit sought to be produced, Courts quite often do make interlocutory rulings allowing or disallowing production of such exhibits. 15. In a situation such as the instant case which is challenging the admission of certain exhibits for failure to comply with certain legal requirements or standards before production and admission, it is perfectly within the purview or discretion of the trial Court to determine the element of admissibility based on the relent law. The consequence of such admission improper or otherwise, would attract a ground of appeal by either party upon conclusion of the case depending on whether there is a conviction or not. That is why the luke Ouma Ochieng vs R(supra) case is not relevant to this case as it was referring to a situation of an Accused person who had already been convicted based on production of exhibits that had been objected to at the trial stage. The admissibility of exhibits objected to should be challenged or raised after conclusion of the trial at the appeal stage and not at the admission stage or in the middle of a trial. 16. The production and admission of the said exhibits does not amount to condemnation of the Accused person. It is not automatic that the Applicants will be adversely affected by being convicted. In case of a conviction based on those exhibits, the Applicants shall have a remedy by way of an appeal. The power to admit exhibits or not is purely a matter of interpretation of the law by a trial Court. It will be prejudicial to the trial and the eventual outcome of the case which is ongoing if this Court were to make a finding that the admission was wrong. A Court handling an application of this nature must act with extreme caution and restraint not to unnecessarily invoke revisionary powers thereby interfering with the trial Court's proceedings thus prematurely jeopardising the appeal process. Courts are not infallible as mistakes may occur but there are properly prescribed remedies e.g appeals where appropriate. 17. It would be a bad precedent for the High Court to intervene and annul each order made by a trial Court in admitting each exhibit against the wish of the defence or prosecution. To allow such a scenario under revisionary powers would amount to anarchy in litigation thus entertaining several mini appeals

in the middle of a trial of a case in the guise of exercising revisionary powers thus micromanaging and clogging the legal system by extension unreasonably delaying the expeditious disposal of cases and administration of justice. 18. Practically, it is inconceivable that every ruling on admission or non-admission of exhibit(s) by a trial Court would automatically attract or generate a ground of revision. The grounds cited herein do not fall within the confines of an error envisaged under Section 362 of the CPC to call for revision. The Applicants have not been prejudiced by the admission of exhibits at this stage. The case is yet to be finalised. They will have a basis on appeal at the conclusion of the case in the event they are found guilty. 19. In the interest of justice, I find this application untenable and misplaced with the sole purpose of delaying the trial and trying to prematurely strangle the process of criminal litigation. It does not meet the legal standards or threshold for revisionary orders to issue (See R vs Wekesa Enock & another (2010) eKLR). Accordingly, the application herein is dismissed for lack of merit. It is hereby ordered that the original file be returned to the trial Court to proceed and fast track the hearing of the case." A similar stance - as taken in the Njuguna case - was taken in the Gubimilu case, where, faced with a similar question where the Accused having sought exclusion of a document which had been produced by the Investigating Officer instead of the maker thereof as desired by the Accused, the learned magistrate overruled the objection and upon an application for revision, W. Musyoka, J. expressed the following judicial view: "6. Let me now turn my attention to the issues raised. I will start with the issue of production of documents. The applicant contends that the documents produced by PW10, the investigating officer, were not produced by their makers and that the same was discriminatory. He seeks to have the same expunged from the records... 8. From the above, it should be clear that the issue of production and admission of documents by the trial Court is purely an issue of discretion, and for this Court to revise the same would amount to sitting on appeal. On the decision of the trial Court while there is no appeal before me. On that basis I shall not interfere with the decision of the trial Court with regard to the documents that PW10 produced and which the Court admitted in evidence. 9. Furthermore, from the record of the trial Court, it would appear that the advocate for the Accused did not object to the production of the documents at examination-in-chief. The record gives no indication at all of his objection, contrary to what is averred in the revision documents lodged in Court. The issue was raised, for the first time, after the advocate had cross-examined PW10. Indeed, the prosecutor mentioned that the advocate for the defence was objecting at the wrong time, since the documents had already been produced. The Court gave the advocate for the defence leave to file a revision application at the High Court. The issue was raised after the documents had already been produced, and I do not see any irregularity or impropriety with the manner the Court the Court handled the matter."

32. It will be noted that this judicial view is profoundly facilitative towards striking a delicate balance between the ever-dicey inderrogable right of the Accused to challenge evidence as guaranteed by Article 50(2)(k) of *the Constitution* on one hand viz aviz the obligation fastened to this Court by Article 159(2)(c) of *the Constitution*, to exercise my judicial authority in a manner which does not offend the principle that justice shall not be delayed, by adopting a trajectory which fundamentally expedites trial.

33. Wherefore I reach a conclusion that unless it is plain and obvious that it will trample upon the objector's right to fair hearing and trial, and/or that it will amount to an egregious travesty of justice and/or that it will occasion a grave prejudice to the objector, production of a contested document will be permitted but determination of the trial objection thereof deferred to either such a time when the Court will render itself under either sections 210/211 of the CPC or 215 of the CPC, since at such a stage, both parties will have an arm's length opportunity to have a bite at the cherry, by submitting on relevancy and/or admissibility of the proposed evidence and in either stage, this Court is permitted to determine the relevancy and/or admissibility issues accordingly and either uphold the objection or sustain it. At either stage, such a challenge will certainly form part of the preliminary questions to

determine on priority basis, before turning to questions of merit. For avoidance of doubt, this position does not apply to objections which in their inherent nature are either

(i) plain and obvious; and/or

(ii) do not call for a protracted interrogation of issues; and/or

(iii) which necessarily require pronto determination including but not limited to objections relating to rules of examinations, hearsay, et alia.

34. For purposes of this trial, therefore, unless it falls under the category of which can be determined instantly - for being either

(i) plain and obvious; and/or

(ii) of such a nature that does not demand a protracted interrogation of issues; and/or

(iii) of such a nature which necessarily require a determination pronto - it will suffice if a party desirous of raising a trial objection:

(a) expressly calls the attention of the Court to the specific trial objection supported by such reasons in support of the trial objection; and

(b) cross-examine the opponent's witness in regard to the trial objection; and

(c) although this Court will permit production of the document, determination thereof will be deferred until a decision of this Court under section 210 or 211 or 215 of the CPC.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MILIMANI ANTI-CORRUPTION COURT THIS 5TH DAY OF MAY, 2025

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

Prosecution Counsel: Mr. Panyako & Mr. Momanyi

Watching brief for EACC: Ms. Makori

Mr. Masake for the 1st Accused

Prof. Ojienda, SC, and Ms. Msando for the 2nd Accused

Court Assistant: Ms. Mutave