



**Republic v Namuye & 4 others (Anti-Corruption Case 13 of 2016) [2017] KEMC 119 (KLR)
(Anti-Corruption and Economic Crimes) (20 January 2017) (Ruling)**

Republic v Catherine Akello Namuye & 4 others [2017] eKLR

Neutral citation: [2017] KEMC 119 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 13 OF 2016
LN MUGAMBI, CM
JANUARY 20, 2017**

BETWEEN

REPUBLIC PROSECUTION

AND

**CATHERINE AKELLO NAMUYE 1ST ACCUSED
BRUCE DOMINICK ODHIAMBO 2ND ACCUSED
MUKURIA NGAMAU 3RD ACCUSED
DOREEN W NG'ANG'A 4TH ACCUSED
QUORANDUM LIMITED 5TH ACCUSED**

RULING

1. By notice of motion dated 11th November 2016, and filed in this court on 18th November, 2016; Catherine Namuye, the 1st Accused herein filed this application seeking orders against:
 - (1) Youth Enterprise Development fund
 - (2) Director of Public Prosecutions
 - (3) Ethics & Anti-corruption commission who are named as 1st accused, 2nd & 3rd respondents respectively. She applied to be supplied with the various documents enumerated in the application in order to adequately prepare her defence against the charges facing her in this case.



2. In particular, she is seeking documents for financial years 2011/12,2012/2013,2013/2014,2014/2015&2015/2016.She has specified the documents of interest to her as follows:
 - 1) Signed Board audit committee notification notices
 - 2) Board Audit Committee minutes
 - 3) Board audit committee signed registers
 - 4) Board audit committee payments vouchers
 - 5) Full board minutes (board minute book)
 - 6) Approved budget
 - 7) Approved procurement plan
 - 8) Investment committee minutes
 - 9) Investment committee appointment letter
 - 10) Tender committee members appointment letter.
3. The grounds are as set out in the application and supported by the affidavit of the applicant.
4. The applicant Catherine Akello Namuye depones that she was Chief Executive Officer of the 1st respondent and the offences against her relate to the period she served the 1st respondent as the CEO.
5. As part of preparing her defense in this trial, she wrote through her Counsel on record to the 3rd respondent seeking the documents enumerated in the notice of motion as she considers them vital to defending herself. However, the 3rd respondent declined the request citing the fact that those documents are not within its possession and that it had supplied all the documents it intends to rely on in the trial.
6. As a consequence, her advocate wrote to the 1st respondent asking to be supplied with the said documents, which to her knowledge are in custody of the 1st respondent but 1st respondent did not respond to the letter from the advocate.
7. She swore that it is her constitutional right to be granted adequate facilities by the state to prepare her defense and the refusal by the respondents to supply those documents was prejudicial to her right to a fair trial before this court.
8. She annexed the letters referred to in her affidavit that were sent to the respondents.
9. The second accused, Bruce Dominic Odhiambo supported the application and filed the affidavit which also seeks the supply of various documents to enable him prepare his defense .With very slight modifications, I would say the list resembles that of the applicant.
10. The 1st, 2nd, 3rd respondents filed replying affidavits in response.
11. Maryline Kemei on behalf of the 3rd respondent, that is, EACC basically re-affirms the position that the investigators from the commission only gathered documents that they believed will prove the case against the accused and subsequent to their being charged in court, EACC, served them with all the documents that it will rely on to prove those charges. EACC therefore did not have other documents such as those the applicant seeks to be supplied with.



12. The 2nd respondent, the DPP, took a similar stand as that taken by the 3rd respondent in its affidavit sworn on 6th December 2016.
13. The 1st respondent, Youth Enterprise Development Fund (YEDF) in the replying affidavit of Moriasi Arabu Josiah in brief swore that the applicant was supplied with all the documents the prosecution intends to rely on, that applicant failed to specifically identify the particular documents she wants with clear dates and by demonstrating the relationship those documents have with the charges before the court and hence she is on a fishing expedition.
14. Submissions were made on behalf of the applicants and the respondents by their Advocates on record.
15. Mr. Munyua for the 1st accused/applicant, Catherine Akello Namuye pointed out the notice of motion application was premised upon articles 25(c),35(1)(a) and (b),50(1)(a),50 (2) (j) and k of the Constitution as well as Section 42(a) of the CPC.
16. Mr. Munyua argued that while the 3rd respondent had unlimited access to documents in the custody of the 1st respondent and was allowed to pick out what they wanted ,the three respondents are now joining hands to restrict the applicant from accessing the documents which she requires to prepare for her defense ,he stated:

“Investigation agencies had access to those documents, selectively picked what they wanted and now they intend to block the accused from accessing or to have the same in order to use them in preparation of the their defense. It is unclear how the accused will be expected to advance and challenge evidence if they cannot access the set of documents which will enable them rebut the prosecution case “
17. Mr. Munyua argued that under article 35 of the Constitution, a citizen has right of access of information held by state when that document is required for protection of a right or fundamental freedom. He relied on various authorities to buttress his arguments before the court. He relied in particular on, Fredrick Kirimi Mugiri and Republic 2016 eKR, Thomas Gilbert Chomodley Vs Republic (2008) eKR, Republic Vs Ward (1993) Vol.11 ALLER where the duty cast on prosecution to disclose evidence on criminal cases was judiciary considered.
18. Mr. Amollo for 2nd accused and who supports the application reiterated the position taken by the 1st accused /applicant advocate .He emphasized that it is not the EACC or the DPP to tell defense what documents they need and that it is enough to say that they need them ,he said and I quote him verbatim;

“It is not the DPP or the state or EACC to decide what we want.When I wear a shoe, it is me who knows where it pinches .It is also not the court to say ,Mr. Amollo you do not need this; I have asked for it and it is enough that I have done so. I am not interested in what they will rely on; I am in interested in what will assist me to prepare my case”
19. Mr. Amollo castigated the Youth Fund for stating that they had supplied DPP and EACC with documents as a basis for absolving the fund from the obligation to supply the defense with documents they needed.
20. Mr. Mogere for 3rd and 4th accused argued alongside the lines adopted by Mr. Munyua and Mr. Amollo stating that unlike the prosecution which was interested in documents that would possibly lead to a conviction, the defense was interested in those documents that would cast doubt in the prosecution case.



21. He argued that under section 80 of *Evidence Act*, they are entitled to be supplied with certified copies of documents they required.
22. Mr. Maramba appearing for Youth Fund (YEDF) submitted that the 1st respondent did not conduct any investigations and was thus not in a position of knowing which documents the prosecution would rely on during the trial.
23. He further pointed out that going by the application, the documents required by the applicant were literally all the operational documents in the custody of the 1st respondent for the last 5 years, he stated:

“The 1st respondent appreciates the right to fair hearing and would be willing to assist them get a fair hearing .What 1st respondent is asking for is for the applicant to be specific on documents they are asking for.”

He continued;

“We looked at the charge sheet and is clear on the dates and specific transactions that have given rise to this matter before you.”

24. Mr. Mutuku appearing for the 2nd respondent, the DPP took the position that the prosecution had given the defense reasonable access to all the material it intends to rely on and this fact had been confirmed .He submitted that the documents listed in the application are not in the possession of the prosecution. He further submitted the DPP did not consider the same at the time the decision to prosecute was made. His stark response was that the DPP does not know those documents, he does not possess them and he did not use them.
25. He further contended that there was no obligation placed on the prosecution to assist the defense access documents in the hands of other state agencies, insisting that *the constitution* only places the duty on the prosecution to allow access to evidence it intends to use to prove the case against the accused.
26. He went ahead and took a swipe at the application by the defence saying that the application was not even specific on the documents sought. He wondered:

“No dates of board committee minutes are specified, tender committee minutes, which dates? You cannot ask for documents by generalizing documents assigned to a financial year.”

The issues to be determined by this court are:

- (1) What is the obligation and extent thereof, on the part of the prosecution in so far as providing access to the evidential material in a criminal case is concerned?
 - (2) Is the first respondent Youth Enterprise Development Fund which is neither an investigator nor a prosecutor in this case bound to provide access to documents shown to be under its custody or care to the defence /applicants if such documents are vital in their preparation of defence?
 - (3) Are the documents sought by the defence /applicants properly defined or is it a sweeping and speculative request that would be oppressive to implement?
27. The first issue is on the obligation and extent thereof on the part of the prosecution in so far as providing /disclosing evidential material to the defence in a criminal case as concerned.



28. This is a matter that is not only provided for in *the Constitution* but has received extensive judicial consideration.
29. Under article 50(2)(j) of *the Constitution*, it is the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. It is not in contention that the prosecution has so far fulfilled this duty in this case.
30. However, judicial interpretation has stretched this duty further.
31. In *Thomas Patrick Gilbert Cholmodely vs Republic Criminal Appeal No 116 of 2007(NRB)*
The judges observed that the duty on the part of prosecution was to disclose not only the evidence the prosecution intends to rely on in support of its case but also evidence which the prosecution has in its possession but which it does not intend to use at the trial. Such evidence would include evidence which if adduced could weaken the prosecution case and strengthen the defence. This duty, the judges observed, continues during the trial, and any time it is discovered, it must be disclosed even if it is during trial.
32. Nevertheless, it must be appreciated that the Judges were clear that the duty extends only to the evidence that the prosecution had in “its possession”.

In;

Diana Kethi Kilonzo vs Republic Criminal Appeal no 129/2016 (Court of Appeal, NRB)

The later point was more succinctly expounded:

Their lordships stated:

“It is however, clear beyond pre-adventure that the simple controversy between the parties herein is whether the respondent can be compelled to disclose evidence requested for by the applicant even if the evidence is not in its custody and will not be relied upon by the respondent.

We have our doubt that however modern democratic or progressive our Constitution is , it envisages compelling any party even if that party has awesome power of state to disclose that which it does not have”

33. In the present application the DPP and EACC, (2nd and 3rd respondents respectively) have argued that they do not have the documents sought, they will not relying on them and they did not come across them during investigation as when the decision to prosecute was made. In my view, applying the reasoning of the court of appeal in *Diana Kilonzo* case, the DPP and EACC cannot be compelled to supply the said documents to the defence.
34. What about the 1st respondent Youth Enterprise Development Fund (YEDF). It is to be appreciated that Youth Enterprise Development fund is neither a prosecutor nor did it investigate this case.

How then does it come into the picture?

36. The 1st accused/applicant worked in that agency as a CEO.
37. The charges she faces before this court relate to the work or activities carried out in the said agency as an employee. It is therefore to be reasonably expected that the bulk of witnesses and documents to be relied upon in this case will come from YEDF. Clearly therefore, there is a way, and very closely so, that Youth Fund Enterprise Development fund is connected to this case.



38. It is the source of the charges before court, hence the application by the applicant that she believes she can obtain documents from that body which she can use to challenge the case against her is not far-fetched. As such, YEDF cannot claim not to be an interested party in this application. I find that the agency was properly joined in this application.
39. Besides this fact, Youth Development Enterprise Fund is a state agency. Accused persons are charged for offences arising out of the operations at the agency and it is their submission some of the documents held by this Agency would assist them in their defence and asserting their rights before a court of law. In essence, I find under article 35(1) (b) of *the Constitution*, this court is entitled to uphold this right and require the 1st respondent to furnish such documents which are in its possession to enable the accused challenge the evidence against them.
40. Article 35(1) (b) provides:
- “Every citizen has the right of access to-
- (b) Information held by another person required for the exercise or protection of any right or fundamental freedom.”
41. The rights of the accused to a fair trial will be greatly curtailed if they are to be denied documents that would give them an opportunity to mount effective cross-examination in rebutting the prosecution’s narrative against them.
42. This court would be failing in its constitutional and statutory obligations if it were to deny them access to such documents whether they are in the hands of 3rd party or not and the court believes it has the requisite power to compel compliance.
43. Having said so I will now deal with the 3rd and final issue, namely
- whether the documents sought by the defence/applicants have been sufficiently and properly defined or whether the request is sweeping generalization that would be oppressive to implement.
44. In the submission by Mr Maramba who appeared for Youth Enterprise Development Fund, he seemed to me to concede that indeed the 1st respondent was not necessarily averse to the idea of providing the applicant with documents needed. In fact, he did not dispute that the documents sought are available. His biggest concern and which made this court to frame the 3rd issue was the scale or magnitude of the documents sought from the first respondent. To put those concerns into clear perspective, Mr. Maramba’s verbatim submission was rendered as follows:
- “We see the documents being sought by the application are literally all documents relating to the 1st respondent for the last five years. The 1st respondent appreciates the right to a fair trial for the accused and would be willing to assist to have them get a fair hearing. What the 1st respondent is asking for is for the application to be specific on the documents they are asking for.”
45. Looking at the way the order prayed is worded; it is not difficult to understand why the 1st respondent is apprehensive.
46. The applicant seeks documents covering an entire financial year in relation to Audit committee meetings, Tender committee meetings, Board audit committee vouchers with all supporting documents, Board minutes, and it is not just for one financial year only, but five full years!



47. Such a blanket order in my view would be akin to transferring the entire records registry of YEDF in terms of those documents for the five years to the defence.
48. In my view the way the prayer for the supply of the documents is cast is not sharp or properly focused. It looks speculative and granting the order sought would be oppressive to the 1st respondent.
49. The applicants should provide further particulars such as specific dates for the meetings whose minutes they seek. There are however certain documents such as approved budgets and approved procurement plans which by their nature are annual documents for a given financial year and these in my view there is nothing wrong in making reference to them on a yearly basis.
50. I am aware that the applicants have already left the organization and as such it might not be humanly possible to recall each and every particular date of meeting held in span of five years. I would suggest that she could probably start with the documents that probably show a summary of such meetings such as registers and then work out from there on what she exactly requires. This might in the end also scale down the volume of what she requires.
51. In allowing this process, I am alive to the fact that it is also a constitutional requirement for cases to be concluded expeditiously. I expect maximum cooperation in this process. Being mindful of the delay this process might occasion, I must set a time frame for its completion of that exercise.
52. I will allocate that exercise two weeks. The defence /applicants shall write to the Youth Enterprise Development Fund forthwith with necessary and further particulars as ordered by this court and the YEDF will respond within the next (7)days. All correspondence exchange must be copied to all the parties and the court.
53. On the 21st day from today's date, this matter shall be mentioned in court to fix new hearing dates for the trial to commence.

RULING READ IN OPEN COURT IN PRESENCE OF AMOLO FOR 2ND ACCUSED, ALSO HOLDING BRIEF FOR MR. GUTO FOR ACCUSED 3RD AND 5TH ACCUSED.

Mr. Amolo:

I have not seen Mr Munyua for accused 1 and Mboya for accused 4.

Mr. Maramba, for 1st respondent present.

M/s Muthuli holding brief for Mutuku for state

cc:Pretty

L MUGAMBI [MR]

CHIEF MAGISTRATE

20.1.2017

