



**Spana v Office of the Director of Public Prosecutions (Criminal Miscellaneous Application E053 of 2024) [2026] KEHC 4543 (KLR) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4543 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CRIMINAL MISCELLANEOUS APPLICATION E053 OF 2024**

**F ANDAYI, J**

**MARCH 19, 2026**

**BETWEEN**

**MUSA IBRAHIM SPANA ..... APPLICANT**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. The applicant, Musa Ibrahim Spana, filed the present application by way of notice of motion dated 19th December 2024 under sections 362 and 364 of the Criminal Procedure Code (Cap. 75) Laws of Kenya, article 165 (6) and (7) of *the Constitution* of Kenya and all other enabling provisions of the law. He prays for an order that this court does call and examine the record of a criminal case in which he is the accused person undergoing trial for purposes of satisfying itself of the orders given on 22nd August 2022 allowing the prosecution the prosecution to supply to the defence documents that had not been supplied at the pre-trial stage and after the complainant had already testified.
2. The grounds in support of the application as stated on the face thereof and expounded in the supporting affidavit sworn on 19th December 2024 by Yusuf M. Aboubakar, advocate are that counsel is conducting the case on behalf of the applicant and he believes that the orders issued by the trial court as stated above are in contravention of Article 50(2)(c) and (j) of *the constitution* of Kenya and so they were illegal and went against the essence of a pre-trial conference.
3. A brief background to this application is that the applicant Musa Ibrahim Spana is charged before the magistrate's court at Kwale in Criminal Case No. 125 of 2019, Republic v. Musa Ibrahim Spana with the offence of defilement contrary to section 8(1), (4) and in the alternative with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* (Cap. 63B) Laws of Kenya. The hearing is ongoing with the complainant having testified.



4. Immediately after the complainant had testified as PW 1, the learned prosecution counsel informed the court that she remained with two more witnesses to call and applied for adjournment. At the same time, he sought leave to supply the defence counsel with what he said were remaining documents. He named them as:
  - i. burial permit dated 16/12/2020;
  - ii. birth notification dated 27/7/2020;
  - iii. scan (ob/gyn) dated 23/12/2019;
  - iv. birth certificate S/No. 58 for L. M. the complainant and
  - v. post mortem report for A. S. dated 16/12/2020.
5. From the evidence tendered by the complainant, she alleged that she had contracted a pregnancy from her relationship with the applicant and delivered herself of a child who however passed on afterwards.
6. Learned counsel for the accused person, the applicant herein objected to the application for leave being granted to the prosecution to supply and rely on the said documents indicating that there was no provision of law cited by the learned prosecution counsel. He said that no explanation had been offered why the defence had not been supplied with the said documents. He submitted that the law required that the prosecution through the police ought to finalize their investigations before a charge was preferred so that by the time of plea-taking the file should be ready and the defence should be served with all the requisite documents in accordance with the constitutional provisions on fair hearing. That the accused was charged with the offence way back in 2019 and the documents had not been supplied since then. Learned counsel submitted that they had every reason to believe that the State had been cooking the case and coming up with documents as it suits them. According to learned counsel, there were no good reasons for failure to furnish the documents and he urged the court to decline the invitation to grant leave for their supply.
7. In his ruling, the learned trial magistrate overruled the objection raised by the defence counsel and allowed the application by the prosecution to supply the documents to the defence at the time.
8. That decision is what led to the present application for revision.
9. The application was disposed of by way of written submissions filed by counsels for both the applicant and the respondent.
10. The applicant submits through his learned counsel that the respondent did not file a response to the application. However, considering that this is an application for revision, the respondent need not file a response and the submissions filed suffice.
11. The applicant submits that after the victim had testified on 22nd August 2022, the prosecution applied for leave to supply additional documents. Counsel for the applicant objected to the application but the trial court allowed it. The applicant contends that the prosecution had failed to supply the documents either through negligence, carelessness, recklessness, maliciously or inadvertently.
12. The applicant posed two issues for this court's determination namely:
  - i. Whether the prosecution can produce evidence not supplied at the pre-trial stage after PW 1 had already testified?
  - ii. Whether the trial court erred in law by allowing the application in violation of the applicant's right to a fair trial under article 50(2)(j) of *the constitution*?



13. Learned counsel for the applicant submits that for the prosecution to make available evidentiary material after the complainant had given her testimony, it failed in its obligation to protect the applicant's right to a fair trial. That this action was prejudicial to the applicant and it denied him the chance to prepare and mount his defence on time and to question the said documents during the testimony of the complainant.
14. The applicant submits that the right to fair trial cannot be derogated from as espoused in Article 25 of *the Constitution* of Kenya and producing the documents after pre-trial and when the complainant had testified amounts to trial by ambush which is against the social foundation of fundamental rights and principles of fairness and justice. In support of that submission learned counsel cites the case of *The Applicant invites the court to look at the sentiments of the superior court in Omanwa v Kanyuku & 2 others; Maina (Plaintiff to the Counterclaim); Omanwa & 4 others (Defendant to the Counterclaim) [2023] KEELC 17834 (KLR)* where the Court was considering the provisions of Order 11 Rule 5 on the importance of pre-trial conferences and held that:

“..... where documents have not been identified and particularized in the final list of documents, like in the instant case, the honorable court cannot grant liberty for any witness, to produce such documents before the court. Instructively, if such a course was to be allowed, then the adverse party would stand prejudiced and the purpose of case conference and Pre-Trial, shall be negated and vitiated.”
15. Learned counsel submits that in spite of the above decision being rendered in a civil case, it underscores the importance of pre-trial as an important exercise in protecting the rights and fundamental freedoms of parties in a trial.
16. The applicant further submits that the decision of the trial court to allow the application by the prosecution undermined the applicant's right under article 50(2)(j) of *the Constitution* and thus the right to a fair hearing by sanctioning trial by ambush and denied the applicant of the opportunity to question the complainant of the contents of the documents tendered after hearing had commenced. The applicant cited two other cases, *Juma v Republic [2024] KECA 1206 (KLR)* decided by the Court of Appeal and *Republic v Francis Muniu Kariuki [2017] KEHC 8312 (KLR)* decided by the High Court to support his application. In both cases, the superior courts underscored the constitutional requirement under article 50(2)(c) and (j) that the prosecution should furnish the accused person in advance with all the witness statements and exhibits which it intends to rely on in their evidence so as to accord an accused person sufficient time to mount a defence. The superior courts also emphasized that courts must therefore be steadfast and remain the guardian against any infringement against the right to a fair trial, a right which must not be violated. However, none of the cases was dealing with the issue of supply of the documents in the course of an ongoing trial. Both courts however found that in the circumstances of each of the cases, the accused persons' rights to a fair trial had not been breached in spite of their allegations that they had not been supplied with the witness statements at all.
17. Learned counsel for the respondent on her part submits that the prosecution's duty of disclosure is continuous from the pre-trial stage and throughout the trial. She relies on the case of *Thomas Patrick Gilbert Cholmondeley v Republic [2008] KECA 319 (KLR)* and *Dennis Edmond Apaa & 2 Others v Ethics and Anticorruption Commission & another [2012] KEHC 1352 (KLR)*.
18. I have considered the application by the applicant and the submissions by learned counsels for the applicant and the respondent. The point for determination is whether the learned trial magistrate's decision should be revised by this court.



19. Article 165(6) and (7) of *the Constitution* which gives the High Court supervisory jurisdiction over subordinate courts provides as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

20. These constitutional provisions are further given effect through the Criminal Procedure Code. Section 362 of the Criminal Procedure Code provides for the supervisory power of the High Court over proceedings before the magistrates’ courts as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

21. Section 364 CPC provides for the powers of the High Court on revision thus:

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
- b. in the case of any other order other than an order of acquittal, alter or reverse the order.
- c. ....

22. The proceedings and decision of the trial court have been provided to this court through the applicant’s supporting affidavit.

23. I have considered the proceedings before the trial court as well as the decision of the learned trial magistrate. In the ruling delivered ex-tempore the learned magistrate considered the provisions of article 50(2)(c) and (j) of *the Constitution*. He found that in his understanding, the accused person’s right to be informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence meant that the same should be provided at the pre-trial stage or any time during the hearing so long as the defence was given adequate time to respond or plan for their defence.

24. Article 50(2)(c) and (j) of *the constitution* which the applicant complains that have been violated by both the prosecution in the lower court and the trial court in its decision provide that:

50(2) Every accused person has the right to a fair trial, which includes the right—

- (c) to have adequate time and facilities to prepare a defence;
- .....



- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

25. Learned counsel for the defence submits that this court should revise the learned magistrate's decision. In revision proceedings this court's concern is with the correctness, legality or propriety of the finding, sentence or order recorded or passed by the lower court, and as to the regularity of the proceedings before the court. The issues set out by the applicant for determination must therefore be considered within these parameters. However, looking at the decision of the learned magistrate I do not find any incorrectness, illegality or impropriety in the decision made and neither do I find any irregularity in the proceedings. The decision by the trial magistrate follows authority from superior courts on the issue. For instance, in the case of Joseph Ndungu Kagiri v Republic [2016] KEHC 4153 (KLR), the High Court, Mativo, J. (as he then was) considered the issue extensively as follows:

In R v Ward [ {1993} 2 ALL ER 557] the Court of Appeal in England was unanimous that:-  
“The prosecution's duty at common law is 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 by the Judge adopted by this court

As pointed out earlier, although the Cholmondeley case (Thomas Patrick Gilbert Cholmondeley Vs. Republic [{2008} eKLR]) was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in *the Constitution* of Kenya 2010 as stipulated under Article 50(2)(j) cited above.

The case of R v Ward[supra] 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 defense.”

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[ {1992} LRC (Cri) 68] 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.”



26. In the case of *Jones Muthui Ngeu v Republic* [2022] KEHC 1661 (KLR) which is almost on all fours with the present case, the High Court held that:

“The only issue is that the defence was not supplied with the said exhibits as stipulated under Article 50 (2) of *the Constitution* of Kenya. The mischief was however cured when the court allowed more time to the defence to peruse the said exhibits. The trial court went further directed for recalling of the complainant with a view to identifying the said photographs. That in my view was in order because for the interest of justice cuts both ways. The interests of the complainant as well as the accused must be balanced delicately on the scales of justice. It is not in the interest of justice to hinder unnecessarily a party from accessing justice by denying him/her a chance to present evidence in court so long as the defence is given adequate opportunity to interrogate and challenge the authenticity of the same.”

27. I am persuaded to follow these decisions as I agree that in a trial, there are always two parties and their rights must be balanced in order to achieve justice. It is true that the prosecution does not seem to have offered any plausible reason as to why it had delayed to supply the documents. Take for instance the certificate of birth for the complainant. It is such a crucial document in a case of defilement that cases fall or survive on its production or failure to produce. It is so crucial in cases such as this one where the complainant was approaching the age of 18 years that when the age of a complainant is not proved conclusively, the prosecution’s case will fail. Therefore, where it has not been supplied to the defence beforehand, it becomes one of the defence strategies of an important ingredient of the offence, the age of the complainant, not having been proved. No doubt, the defence becomes disoriented when during the hearing a document to support that ingredient is brought up to support the complainant’s evidence. However, if indeed such a document is available, the ends of justice are better served by the same being supplied and the defence being given a chance to challenge it.

28. Learned counsel for the applicant also relied on the case of *Khalid & 16 others v Attorney General & 2 others* [2019] KESC 93 (KLR) where the Supreme Court considered and explained the purport and meaning of article 50(2)(c) and (j) of *the constitution*. However, I note that learned counsel chose to cite only a portion of the holding that would favour the applicant’s case. The extended holding supports the learned magistrate’s decision and is as follows:

“... our jurisprudence is replete with authorities to the effect that presentation of evidence is a continuous process during the trial process provided that the accused has not been put to his defence. We draw an answer to the appellants’ complaints under article 50(2)(j) of *the Constitution* from the case of *Dennis Edmond Apaa and others v Ethics and Anti-Corruption Commission, Nairobi* Petition No. 317 of 2012, [2012]eKLR which dealt with the issue of disclosure of documents by the prosecution as follows:

“(26) 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

... The obligation to disclose was a continuing one and was to be updated when additional information was received.”

Note also that the 2nd (The Inspector General of Police) and 3rd (The Director of Public Prosecutions) respondents (names of respondents added by this court from the heading of the case for clarity) are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is to bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence (See *George Taitumu v Chief Magistrates Court, Kibera & 2 others* [2014] eKLR ).”

29. I am bound to follow this decision and find that given the crucial importance of the documents sought to be supplied and obviously to be relied upon by the prosecution, it is my considered view that unless it can be inferred that the prosecution acted intentionally, willfully, deliberately or actuated by mala fides in failing to supply the evidence sought to be introduced, that in so doing it had the intention to ambush the defence with such evidence and proceed upon it, and that under those circumstances the defence will not be in a position to mount its defence, the same can be produced at any stage before the accused person has been put to his defence, if at all. That was not the case herein and I think it is not proper to outrightly reject the supply to the defence and reliance on those documents by the prosecution. The evidence should be allowed and the defence given the opportunity and time to study it before proceeding with the case.
30. In the case at hand, the complainant had just been discharged from the witness stand and the case was going to be adjourned. The defence would have sufficient time to study the documents and if need be would ask for the recall of the complainant for further cross-examination on the documents supplied later, if that was necessary. That should be the case going forward.
31. Consequently, I find that the learned trial magistrate did not err in allowing the prosecution to supply the additional documents to the defence at that point in time. The application for revision is found to be without merit and the same is dismissed.
32. This court had sked learned counsel for the applicant to ensure that the applicant attends court for the ruling so that directions are given for his appearance before the magistrate’s court for the continuation of the case but on all occasions he has not attended.
33. Mention shall be before the trial or duty court on 30th March 2026 for further directions on the hearing.
34. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED ON THE VIRTUAL PLATFORM, MICROSOFTTEAMS THIS 19TH DAY OF MARCH 2026.**



**HON. ANDAYI W. F.**

**JUDGE**

In the presence of: - N/A for the applicant.

M/s Vallerie for the State

Ummu - Court Assistant

