IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU, M'INOTI, JJ.A.)

CIVIL APPEAL NO. 266 OF 2018

BETWEEN

ALPHONCE MUNENE MUTINDA.....APPELLANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT

(An appeal from the Ruling and Order of the Anti-Corruption and Economic Crimes Court of Kenya at Nairobi (H. I. Ongudi, J.) delivered on 7th June 2018

in

A.C.E.C.C. Suit No. 15 of 2016

Formerly HCCC No. 400 of 2012.)

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JUDGMENT OF THE COURT

1. On 2nd November 2017, the respondent filed an application in the Anti-Corruption & Economic Crimes Division of the High Court, Nairobi, seeking to have the statement of one ***Henry Musyoki Kilonzi***, (deceased), admitted as evidence without calling him as a witness.

2. The application was made under ***Articles 50(1)*** and ***159(2) (d)*** of the ***Constitution***, ***sections 1A, 1B, 3A*** of the ***Civil Procedure Act*** and ***Orders 11 rule 3(2) (c)*** and ***50 rule 1*** of the ***Civil Procedure Rules***.

3. The said statement had been filed together with the Plaint by the respondent on 13th August 2012 in ***HCCC No. 400 of 2012*** in conformity with the provisions of ***Order 11 rule 2*** of the ***Civil Procedure Rules***. The Plaint and all the witness statements had long been served upon the appellant, who had since filed his defence. Unfortunately, the deceased passed away in July 2016 while the suit was pending.

4. The respondent had filed a recovery suit against the appellant arising from a transaction wherein the City Council of Nairobi lost money in a fraudulent transaction. The Council paid Kshs.283,200,200 purportedly to purchase a parcel of land, ***L.R No.14759/2*** which belonged to the deceased for use as a public cemetery.

5. Before his demise, the deceased had recorded and signed the statement at the respondent's offices on 24th April 2009 and testified as a prosecution witness in a related case, ***Nairobi Anti-Corruption Criminal Case No. 20 of 2010*** on 18th November 2014.

6. In the application, the respondent told the trial court that it intended to have the deceased's witness statement produced by the investigating officer, "***not to prove its contents, but to prove the fact that the statement was made by the deceased***."

7. The appellant was served with the application but did not file any response, despite several adjournments granted by the court. The application was heard on 14th May 2018 in the absence of the appellant. The ruling was set to be delivered on 23rd May 2018 but before that date the appellant filed an application to set aside the proceedings of 14th May 2018. The court declined to set aside the proceedings but allowed the appellant's counsel to submit on points of law.

8. Allowing the application, the learned judge (***H. I. Ong'udi, J***.) said of the statement as follows:

> ***"23. It is not for purposes of confirming the contents of the said statement. Such production would not prejudice the defendant/applicant in any way, as was held in the case of*** *Subramaniam v Public Prosecutor (supra)* ***and in line with Order 11 Rule 3(2) Civil Procedure Rules. Secondly, the statement (MG1) had been filed together with the plaint in line with order 11 Rule 2 Civil Procedure Rules. It is not therefore taking the defendant/respondent by surprise.***
>
> ***24. I therefore allow the application dated 1st November 2017 in terms of prayer No.1. The same shall be produced by the Investigating Officer only to prove that the deceased gave the statement and nothing beyond that.***
>
> ***Costs shall be in the cause. Orders accordingly*****."**

9. Aggrieved by the said ruling, the appellant preferred an appeal to this Court stating, *inter alia*, that the learned judge misdirected herself in finding that there would be no prejudice occasioned to the appellant by the production of the deceased's statement; that the High Court failed to consider the appellant's submissions that he was not a party to a suit where the statement was used; that the High Court failed to find that there was no evidence of death of Henry Musyoki Kilonzi as no Death Certificate was produced; and that the High Court failed to appreciate that the respondent's application was seeking to introduce the deceased's evidence without having the opportunity to cross examine him.

10. When the appeal came up for hearing, both ***Ms. Makori*** and ***Ms. Kibogy***, learned counsel for the appellant and the respondent respectively chose to rely entirely on their written submissions.

11. The appellant's counsel submitted that under ***Article 25(c)*** of the ***Constitution***, the right to a fair trial cannot be limited; that the appellant shall not have a fair trial if the witness statement is admitted; that ***Article 50(2)(k)*** of the ***Constitution*** provides that every accused person has the right to a fair trial which includes the right to adduce and challenge evidence; and that the statement sought to be produced does not fall under any of the situations envisaged under ***section 33*** of the ***Evidence Act***

12. On the other hand, the respondent submitted that this Court has no jurisdiction to hear the appeal because the appellant did not seek leave of the trial court to institute the same and therefore no right of appeal existed; that the learned judge exercised her discretion in allowing the production of the deceased's statement and this Court should not interfere with the exercise of that discretion; that ***sections 35*** and ***36*** of the ***Evidence Act*** permit the production of such a statement; that it is the Investigating Officer who will prove that Henry Musyoki Kilonzi is deceased at the time of producing the statement; and that the learned judge did not err in relying on the affidavit of the respondent's counsel in allowing the application.

13. We shall start by determining whether in the absence of leave to appeal granted by the trial court this Court has jurisdiction to hear the appeal. As ***Nyarangi, J.*** held in the ***Owners of Motor Vehicle "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1:***

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

14. In our view, the above issue was well determined by this Court in ***Judicial Service Commission v Kalpana H. Rawal [2015] eKLR. G.B.M. Kariuki, JA***. held that:

> ***"the right of appeal should exist to challenge in this Court decisions of the High Court as they appertain to determination of the question whether a right or fundamental freedom in the Bill of Rights has been breached, violated, infringed or threatened or any question respecting the interpretation and application of the Constitution."***

15. The learned judge went on to state that *"****the right of appeal is subsumed in Article 164 (3) which also confers jurisdiction to this Court to hear appeals from decisions of the High Court on the Bill of Rights*****."**

16. Since the appellant's contention was that the admission of the deceased's statement would amount to a breach of his fundamental freedom in the Bill of Rights, we hold and find that this Court has jurisdiction to consider the appeal before it, even in the absence of leave to appeal, if at all such leave was necessary in the first place.

17. Having so held, we shall now proceed to determine the grounds of appeal that were raised by the appellant.

18. In his written submissions, the appellant compressed the grounds of appeal into one substantive issue for determination, which is, "*whether the witness statement should have been admitted.*" The appellant's contention, in the main, is that he shall not have a fair trial if the witness statement is admitted as he will not be able to challenge it by way of cross examination.

19. The appellant sought to rely on a High Court decision by ***Ngugi, J., Republic v John Ng'ang'a Njeri (2018) eKLR***, where the learned judge held:

> ***"For all scenarios where Parliament has not, by creating a statutory exception to the hearsay rule, it is assumed that admissibility of statements which will not be subjected to cross-examination or confrontation is per se prohibited as definitionally violative of Article 50(2)(k) of the Constitution."***

20. In the same decision, the Court went on to state:

"There are certain situations where statements of witnesses who are not available can be admitted as evidence. This only applies where such statements meet three criteria:

a. The witness must be unavailable (through death; physical infirmity; mental illness; absence from the jurisdiction, and so forth);

b. The statement must have sufficient indicia of reliability; and

c. The statement must be admissible vide a statutorily created exception to the hearsay rule or where the statement or evidence has been subjected to cross-examination or an opportunity for such cross-examination was made available to the Accused Person or that the statement was given under oath."

21. The appellant's counsel submitted that the statement that was sought to be produced does not satisfy the above conditions and urged us to allow the appeal.

22. On the other hand, the respondent's counsel submitted that the learned judge in allowing the application exercised her judicial discretion and the appellant had not shown that the judge had misdirected himself in some matter or took into account an irrelevant consideration or failed to take into account a relevant issue or was clearly wrong in the exercise of her discretion, as was held by the predecessor of this Court in ***Mbogo v Shah [1968] E.A.93***. Counsel therefore urged us not to interfere with the exercise of the learned judge's discretion.

23. The respondent's counsel further urged us to take into consideration the circumstances leading to the recording of the statement; the fact that it had been filed and served with the plaint years before the application was filed; and that the maker thereof had already testified and cross-examined in a related criminal case, although the appellant was not one of the accused in that case.

24. Lastly, the respondent's counsel submitted that under ***sections 35*** and ***36*** of the ***Evidence Act***, where a witness cannot be called to give evidence either because he/she is dead or cannot be found, or is incapable of giving evidence, or if his/her attendance cannot be procured without an amount of delay or expense, the Court can allow production of a statement by the maker thereof.

25. We have considered the record of appeal and submissions by counsel. It is not disputed that Henry Musyoki Kilonzi (deceased), was the registered owner of land parcel L.R No.14759/2; that the appellant acted for the deceased in a sale transaction in respect of the land that gave rise to Anti-Corruption Case No.400 of 2012 where the appellant is the defendant. It is also not disputed that HCC No.400 of 2012 was filed by the respondent on 13th August 2012 and that the appellant was served with the plaint and the statement recorded by the deceased, among other documents.

26. The appellant filed his statement of defence on 20th September 2012. The deceased testified and was cross-examined in the aforesaid case on 18th November 2014. The respondent relied on the statement now in issue.

27. In the impugned ruling, the learned judge held that the statement would be produced by the investigating officer "***only to prove that the deceased gave the statement and nothing beyond that***."

28. We do not see how such a statement can be said to be prejudicial to the appellant if it were to be produced for the said purpose only. Ultimately, it is the trial court that will determine what weight to give to it. The appellant has been in possession of a copy of the statement since August 2012 and the statement has already been relied upon in the aforesaid criminal case. The production of the statement shall not breach the appellant's fundamental right to a fair trial as alleged.

29. Besides, the learned judge held that it is the Investigating Officer who will lay the basis for the actual production of the statement and produce evidence to confirm the death of Henry Musyoki Kilonzi.

30. The statement, in our view, is admissible under ***section 34*** of the ***Evidence Act***, having been given in previous proceedings as aforesaid.

31. In allowing production of the said statement the learned judge exercised her discretion judiciously and there is no basis of interfering with the same. We find this appeal lacking in merit and dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 24th day of April, 2020

D.K. MUSINGA

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR