



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**IN THE ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CORAM: MUMBI NGUGI J**

**REVISION APPLICATION NO. 8 OF 2020**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE'S COURT MILIMANI ANTI-CORRUPTION.....RESPONDENT**

**AND**

**KIOKO MIKE SONKO MBUVI GIDION.....1<sup>ST</sup> INTERESTED PARTY**

**PETER MBUGUA KARIUKI.....2<sup>ND</sup> INTERESTED PARTY**

**PATRICK MWANGANGI.....3<sup>RD</sup> INTERESTED PARTY**

**WAMBUA NDAKA.....4<sup>TH</sup> INTERESTED PARTY**

**ANDREW NYASIEGO.....5<sup>TH</sup> INTERESTED PARTY**

**SAMUEL MWANGI NDUNG'U.....6<sup>TH</sup> INTERESTED PARTY**

**EDWIN KARIUKI MURIMI.....7<sup>TH</sup> INTERESTED PARTY**

**LAWRENCE MWANGI MUKURU.....8<sup>TH</sup> INTERESTED PARTY**

**PRESTON MWANDIKI MIRITI.....9<sup>TH</sup> INTERESTED PARTY**

**HARDI ENTERPRISES LIMITED.....10<sup>TH</sup> INTERESTED PARTY**

**TODDY CIVIL ENGINEERING LIMITED.....11<sup>TH</sup> INTERESTED PARTY**

**ANTHONY MWAURA NGANGA.....12<sup>TH</sup> INTERESTED PARTY**

ROSE NJERI NGANGA.....	13 <sup>TH</sup> INTERESTED PARTY
ARBAB AUTO LIMITED.....	14 <sup>TH</sup> INTERESTED PARTY
ROG SECURITY LIMITED.....	15 <sup>TH</sup> INTERESTED PARTY
HIGH ENERGY PETROLEUM LIMITED.....	16 <sup>TH</sup> INTERESTED PARTY
ANTONY OTIENO OMBOK ALIAS JAMAL.....	17 <sup>TH</sup> INTERESTED PARTY
ETHICS & ANTI-CORRUPTION COMMISSION.....	18 <sup>TH</sup> INTERESTED PARTY
INSPECTOR GENERAL.....	19 <sup>TH</sup> INTERESTED PARTY

(Being an application for revision of the ruling and orders of the Chief Magistrate's Court

(Hon. D. Ogoti, CM) in Milimani Anti – Corruption Case Numbers 32 of 2019)

#### RULING

1. In a ruling dated 14<sup>th</sup> May 2020, the trial court (Hon. D. Ogoti, CM) made orders in **Milimani Anti – Corruption Case Number 32 of 2019 Republic vs. Mike Mbuvi Sonko Gidion & 16 others** in which he directed investigative agencies and the Director of Public Prosecutions (DPP) to henceforth ensure that disclosure in each prosecution file is done prior to the filing of plea. He also directed immediate compliance with the order in all matters to be registered before the Anti-Corruption Court.

2. The DPP was dissatisfied with the orders of the court and asks the court to exercise its supervisory powers under Article 165 (6) and (7) of the Constitution of Kenya and section 362 of the Criminal Procedure Code (CPC) in respect of the ruling and orders in the matter. In his application dated 19<sup>th</sup> May 2020, the DPP seeks the following orders:

1. *(spent).*

2. *(spent)*

3. ***THAT this Honourable Court be pleased to call for and examine the record of the proceedings in the Anti – Corruption Chief Magistrate Court Nairobi at Milimani in Milimani Anti – Corruption Case Number 32 of 2019 Republic vs. Mike Mbuvi Sonko Gidion for the purpose of satisfying itself and pronouncing the correctness, legality or propriety of the order issued on 14<sup>th</sup> May, 2020 by Hon D. Ogoti.***

4. ***THAT the Court be pleased to review, vary, reverse and/or alter the orders issued on 14<sup>th</sup> May, 2020 by Hon. D. Ogoti relating to pre plea disclosure in the Anti - Corruption Chief Magistrate's Court Nairobi.***

5. ***THAT the Honourable Court be pleased to make any other order that it deems fit in the interests of justice.***

3. This court granted interim orders staying the directions of the trial court on 20<sup>th</sup> May 2020 and directed that the application be served on the respondent and the Interested Parties. Parties were also directed to file submissions on their respective positions on the application. The respondent, who should have participated in these proceedings through the office of the Attorney General, did not file any response.

4. The application is supported by an affidavit sworn by Ms. Judy Thuguri the prosecution counsel in the office of the DPP seized of the matter, and is based on the following grounds:

(i) **THAT the Learned Chief Magistrate ordered that the Prosecution do disclose all the evidence it intends to rely on prior to the registration of plea in the Anti-Corruption Court.**

(ii) **THAT there was no factual or legal basis showing or even indication from the Respondent that Prosecution had failed in discharging its duty to fair trial under Article 50(2)(c) and (j) of the Constitution to warrant the Honourable Court's intervention to safeguard the rights of the Respondents.**

(iii) **THAT the Learned Chief Magistrate misdirected himself by acting suo moto and subsequently delivering a ruling on matters not in issue before it.**

(iv) **THAT the Learned Chief Magistrate erred by ordering and directing the Prosecution on the manner it shall conduct disclosure prior to the registration of charges in the Anti-Corruption Court.**

(v) **THAT the Learned Chief Magistrate erred in law by misconstruing the Applicant's duty of disclosure under Article 50(2)(j) and as laid out in the active case management for criminal cases.**

(vi) **THAT the Learned magistrate erred in law by exercising jurisdiction it does not possess by issuing orders is rem.**

5. It is averred on behalf of the DPP that on 9<sup>th</sup> December 2019, the DPP had instituted criminal proceedings against the respondents (the 1<sup>st</sup> -17<sup>th</sup> Interested Parties) by charging them with various offences. All had pleaded not guilty and a plea of not guilty entered. The court had thereafter consolidated ACC 31 and 32 of 2019 for the limited purpose of hearing and determining the issues of bail and bond. Thereafter, the court had directed that the prosecution disclose to the defence the evidence relevant to the matter before the court. The matter was on 15<sup>th</sup> January, 2020 scheduled for a mention for directions on the manner in which disclosure was to be conducted, which directions were not issued but the matter was re-scheduled for further mention on 27<sup>th</sup> January, 2020 on which date the court directed that the prosecution disclose evidence to the defence within two weeks. The matter was then fixed for mention on 18<sup>th</sup> February, 2020.

6. On that date, the court directed that the prosecution files inventories capturing every document that it had supplied to the defence, and for the defence to confirm the contents of the inventory by signing the said inventory. The matter was then scheduled for pre-trial directions on 26<sup>th</sup> February, 2020.

7. When the matter came up as scheduled on that date, the prosecution informed the court that it had disclosed all the documents to the defence but that it needed another four days to comply with directions given by the court on the 18<sup>th</sup> February 2020 regarding filing of inventories as the documents supplied by the prosecution were bulky and the process of preparing the inventories was ongoing. In response, the defence prayed that the court grants the prosecution 14 days to comply, and the defence a further 14 days to confirm the contents of the inventories.

8. However, *suo moto*, the court posed the question why the prosecution or the investigating agencies could not, at the time of arrest, just before plea, disclose the material it was going to rely on, observing that the "*investigations are complete by then*". The court also asked the parties to respond to its question regarding disclosure prior to the taking of plea, and it scheduled the ruling on its question for 23<sup>rd</sup> March, 2020.

9. In its ruling delivered on 14<sup>th</sup> May, 2020, the court ordered that "**Henceforth, the relevant agencies to ensure that at the time of filing of the charge(s) in the Anti-Corruption Court, they simultaneously file a copy of a duly executed inventory as above guided. It is upon the satisfaction of the above requirements that the plea will be accepted for registration and only then will a matter be fixed for plea taking.**"

10. Ms. Thuguri avers that prior to the court raising the above question, none of the parties had raised an issue with regard to the disclosure, the prosecution having supplied all the evidence in its possession within the 14 day timeline issues by the court. As at 26<sup>th</sup> February, 2020 when the matter came up for pre-trial directions, there had not been any delay in disclosure occasioned either by the prosecution or any of the parties.

11. It is deposed on behalf of the DPP that under Article 50(2)(j), the Constitution provides for the threshold of reasonable access to accused persons of all evidence which the prosecution intends to rely on during trial. The Constitution is clear with regard to whom disclosure is to be made, such persons being accused persons, not suspects. Ms Thuguri asserts that the constitutional duty of disclosure by the prosecution means the giving of reasonable access to accused persons of all evidence it intends to rely on. The constitutional provision does not clothe the court with jurisdiction to direct the DPP to disclose evidence prior to the registration of charges. Ms. Thuguri notes that the court made its ruling without being moved by either party, or it adjudicated on a dispute that was not before it. It thus stopped being an impartial arbiter and descended into the arena of the parties.

12. It is also her averment that in granting a ruling over a matter not in issue, the court purported to give an advisory opinion, which is *ultra vires* its powers. Further, that the court issued orders *in rem*, binding parties that were not before it.

13. The DPP argues that the orders made by the trial court go against Article 157 of the Constitution. He asks this court to review, vary, reverse or alter the order of the trial court directing the applicant on the management of the prosecution case as regards disclosure. It is the DPP's case that the order violates the provisions of Article 50(2)(j) of the Constitution, section 207 of the CPC and provisions of the Judiciary Bar Bench book.

### **Submissions by the DPP**

14. In his submissions, the DPP asks the court to determine three questions. The first is whether this court has the jurisdiction to issue the orders that the applicant seeks. His submissions in this regard is that the court does have this jurisdiction. He cites the decision in **HCC Rev. No 4-2020 -R v Perry Kansangara & Others** to submit that in exercise of its revisionary and supervisory jurisdiction, the High Court may correct errors, mistakes and omissions of a subordinate court or tribunal. Such jurisdiction extends to instances where the subordinate court has acted *ultra vires* of its jurisdiction. It further extends to instances where the subordinate court has exercised jurisdiction in a manner which has occasioned grave injustice or failure of justice.

15. The second issue relates to the grounds on which a court may reject a charge sheet. The applicant poses the question whether the court would be acting under the purview of the law if it were to reject a charge sheet on the basis that it was not accompanied by an inventory as the trial court held in its ruling. It is the applicant's submission that the only provision in law granting the court power to reject a charge sheet is provided for in section 89(5) of the CPC, which stipulates that the complaint or charge may be rejected only when it does not disclose an offence.

16. The DPP relies on the case of **Public Prosecutions v Kuldip Madan & Another [2019] eKLR** in which the Learned Judge held that charges should only be rejected by a magistrate if they have not been framed within the provisions of section 134 to 137 of the CPC. In the applicant's view, for the court to refuse to register a charge because an inventory proving disclosure to the defence has not been filed is a clear misapprehension of the provisions of the Constitution and the CPC. It is the DPP's submission that from a reading of Articles 49 and 50 of the Constitution or sections 89 and 134 to 137 of the CPC, nothing clothes the Magistrate's Court with power to reject a charge sheet based on the absence of an inventory.

17. The third issue identified by the applicant is whether there was a grievance before the trial court to warrant the orders that it issued. The applicant submits that as admitted by the trial court, there was no dispute between the parties before it. All documents that the prosecution intended to rely on had been supplied to the defence and what was pending was a compilation of an inventory as directed by the court. Accordingly, the decision rendered by the court was not as a result of a matter in issue before the court and between the parties before it. Further, whether the accused persons had sufficient knowledge to respond to the plea as per the evidence in the possession of the prosecution was not a matter in issue. Nor was it in dispute that the prosecution had disclosed the evidence in its possession to the defence. The DPP submits that the only outstanding issue was whether an inventory had been filed as directed by the court.

18. The applicant submits that the decision by the court to formulate its own dispute and then determine the said dispute was illegal and improper. Should there have been a lacuna, which in the DPP's view there wasn't, in the question of time when disclosure was to be done, the Magistrate's court is not the appropriate forum to issue guidelines thereon. The DPP's submission was that this is a problem for law reform and court users committees and not a matter to be resolved by the orders issued by the trial court. The DPP argues that the court resolves disputes presented by the parties and give orders with a view to arriving at a decision, and it is not the place of the court to invent its own dispute and invite parties to present their submissions on it without notice.

19. The DPP further submits that the court has the jurisdiction to deal with matters before it. In the DPP's view, the orders issued in the impugned ruling were not applicable to the parties before it as plea had already been taken. The court had no jurisdiction to issue orders in respect of parties that were not before it or in anticipation of a future event that has not crystallized.

20. The DPP further submits that jurisdiction is a creature of statute and the court cannot create its own jurisdiction in the absence of a law permitting such exercise of jurisdiction. The DPP's submission was that the order of the trial court was issued in a vacuum, has no basis in law and should be set aside.

21. According to the DPP, under Article 50(2)(a) of the Constitution, an accused person has the right to a fair trial which includes the right to be informed of the charge, with sufficient detail to answer it. It is the DPP's submission that Article 50(2)(a) addresses the rights of an accused person, and one can only be determined to be an accused person once the charge sheet has been registered and the suspect presented and takes plea before the court. That before such plea is taken, there is no accused but only a suspect who is clearly not within the jurisdiction of the court. It is the DPP's submission that whether the constitutional right to pre-trial disclosure extends to include disclosure before plea-taking can be determined by examining when a criminal trial commences under Kenyan law. The DPP submits that this issue was adverted to in the case of **Kimani v Kahara [1985] eKLR** in which it was held that:

*"It is we think clear that the trial of the case cannot start before the accused person is before the court. As soon as an accused person is before him in court for the purpose of pleading to a formal charge no magistrate can properly be described as "trying a case."*

22. Reference is also made to the case of **Otieno Clifford Richard v Republic [2006] eKLR** in which the court cited with approval the interpretation adopted by the court in **Kimani vs. Kahara** (supra) to be saying that:

*"... "trying a case" includes taking a plea and that no criminal trial can start before the accused is before the court to plead to the charge."*

23. The DPP argues that from the determination that the trial of an accused person commences upon the suspect appearing before the trial court, an interpretation of Article 50(2) (j) is clear that disclosure may only be made after plea has been taken. The DPP notes that in its decision in **Hussein Khalid & 16 Others v The Attorney General & 2 others Petition Number 21 of 2017** the Supreme Court considered whether the law requires that an accused person be supplied with evidence prior to taking plea and held that this right accrues to an accused person as opposed to a suspect or an arrested person.

24. The Court had gone on to note, in reliance on PLO Lumumba's book **Criminal Procedure in Kenya**, that a criminal trial commences when an accused person is called to take his place in the dock. The DPP further cites the case of **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** in which the court held that the right to be provided with material that the prosecution wishes to rely on is a process that continues throughout the trial from the time the trial starts when the plea is taken.

25. The DPP reiterates that Article 50(2)(j) is clear with regard to whose rights are protected and to whom disclosure is to be made. In the absence of ambiguity, the court cannot purport to give the Article a different meaning. According to the DPP, the intention of Article 50(2)(j) was to enable the accused person prepare his defence and challenge the prosecution's evidence at the opportune time in cross-examination and in his defence. In the DPP's view, an interpretation that requires that disclosure under Article 50(2) is conducted before plea is misinformed.

26. The DPP submits that the Magistrate's Court does not have jurisdiction to issue generic directions to be applied broadly in all matters *in rem*. He cites section 6 of the Magistrate Courts Act which contains the criminal jurisdiction of a Magistrate's Court as being such as may be conferred on it by the CPC or any other written law. The DPP relies on the decision of the Supreme Court in **Samuel Kamau Macharia & Another v KCB Ltd & 2 Others [2012] eKLR** to submit that outside the four corners of a statute or of constitutional provisions, a court has no jurisdiction. In the absence of constitutional or legislative provisions arrogating power to a Magistrate's Court to issue rulings or judgments *in rem*, exercise of such powers must fail.

27. According to the DPP, the Magistrate's Court purports in its ruling, to direct the parties on how to conduct the process of plea

registration not for the matter before it, but for future cases. His submission is that the architecture of our criminal law provides that a criminal trial is handled by a specific magistrate and the magistrate's jurisdiction only extends to the accused person before the court and not to the world at large, and the trial court could not therefore direct parties who are not before it.

### Submissions by the EACC

28. The application was supported by the 18<sup>th</sup> Interested Party, the EACC, which filed written submissions in support. The EACC notes that in the ruling, the court had directed that henceforth, the relevant agencies must ensure that at the time of filing of the charges in the anti-corruption court, they simultaneously file a copy of a duly executed inventory, and only upon satisfaction of this requirement would the plea be accepted for registration and the matter fixed for plea taking. It further submits that the court directed that the inventory should contain, among others, the date of exchange of documents, the signatures, full names and descriptions of the parties exchanging the documents, their emails, phone numbers and physical addresses of the accused and or their advocates.

29. EACC submits, first, that there was no non-disclosure on its part to warrant the ruling. It notes that **Legal Notice No. 1340 of 2016**, which contains the guidelines relating to active case management of criminal cases in magistrate's courts and the High Court of Kenya, that the overriding objective under Clause 1.0 which requires that courts deal with criminal cases justly and expeditiously includes *inter alia* dealing with the prosecution and the defence fairly, respecting the interests of witnesses and victims by keeping them informed of the progress of the case and protecting the rights of the victim under the law; and dealing with the case in a way that takes into account first, the gravity of the offence alleged; the complexity of the issues involved; the severity of the consequences faced by the accused, the victims, witnesses and all others affected; the needs of accused persons who are unrepresented and the needs of other cases.

30. EACC submits that ACC No. 32 of 2019 contained some complex issues in which the prosecution and EACC needed the guidance of the court. These included how to proceed with disclosure of the documents in excess of 120 voluminous exhibits to the 17 accused persons, some of whom had about 15 legal Counsel on record, and the protection of witnesses in accordance with the Witness Protection Order dated 9<sup>th</sup> January 2020 in both ACC 31 and 32 of 2019 both of which were being dealt with by the court. In compliance with the guidelines in LN 1340 of 2015, all parties needed further directions on disclosure in order to ensure unity of disclosed exhibits as well as safety of all witnesses.

31. The EACC further submits that as averred on behalf of the applicant, the court had given directions on disclosure on 27<sup>th</sup> January 2020 and EACC had complied with the order of the court. It submits that when the parties went back to court on 18<sup>th</sup> February 2020, the court ordered a repeat of the process in line with the newly preferred format of inventories identifying each document 'singularly' and not document by document. It is its case that it again complied with this order to confirm the already supplied documents. In its view, the issue of disclosure clearly did not therefore warrant any issue to be raised by the court with regard to delay, especially because disclosure directions had been complied with. Further, the issue should not have arisen as the delay of the necessary disclosure directions from 11<sup>th</sup> December 2019 to 27<sup>th</sup> January 2020 was as a result of the court's adjournment and not as a result of failure by any of the parties. Accordingly, its disclosure and that of the prosecution was not in issue in the matter before the court as it had already been made. The court had also made further directions with regard to how disclosures would be re-performed, which caused understandable and reasonable delays in the matter.

32. EACC submits that Legal Notice 1340 of 2016 is a complete code for case management of criminal cases in the subordinate courts. In its view, the trial court went outside its mandate by making an omnibus directive regulating the practice and procedure in the Anti-Corruption Court, thereby usurping the powers of the Chief Justice as provided under Article 161 (2) (a), sections 5 (1) and 2 (c) of the Judicial Service Act, section 10 of the Judicature Act and section 20 (2) (b) of the Magistrates' Courts Act.

33. It is also the position of EACC that the trial magistrate acted unprocedurally and descended into the arena of the parties. EACC refers the Court to the discussion of the *suo moto* doctrine in the case of **Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 others (Interested parties)** [2019] eKLR; **Nagendra Saxena vs. Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993**; **Habig Nig Bank Limited vs. Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04** and **Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts** by Adam M Milani and Michael R. Smith, *Tennessee Law Review* {VOL. 69 XXX 2002}.

34. It notes that *suo moto* is defined as 'one acting spontaneously without prompting from another party', while **Black's Law**

Dictionary defines "*sua sponte*" as "**of his or its own will or motion, voluntarily and without prompting or suggestion**". EACC notes that in matters *sua moto*, the court usually, on perusing the file before it, comes by a matter of law or procedure that is of the essence of the case but not raised by the parties, and it is then considered by the judge who rules on it.

35. According to EACC, the court in the **Accounting Officer Kenya Ports Authority** case held that '*court cannot raise an issue suo moto and determine it suo moto without giving an affected party a chance to be heard on the issue*'. It submits that it is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. EACC argues that where a party has a right to be heard, that right cannot be taken away merely because the Tribunal considers that its contribution is unlikely to affect the court's decision.

36. It is the EACC's submission that in the present case, the parties directly affected by the court's ruling, which requires pre-plea disclosure, are not only the prosecution and the defense Counsels, but also the investigative bodies which the trial court ordered to be served with a copy of the ruling. It submits that it was present in court when the court raised the issue *sua moto* and without prior notice to any of the parties. EACC submits that in the **Accounting Officer Kenya Ports Authority** case, the court held that there is a presumption in the interpretation of statutes that rules of natural justice will apply. Accordingly, a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. This is because if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.

37. EACC submits that since the investigative bodies affected by the ruling in this case were not afforded the right to be heard, and since the court raised an issue that it deemed relevant and proceeded to be an arbiter in it without giving the parties an adequate chance to respond, the court descended into the arena of the parties by raising an issue, asking for opinions from some of the parties, and going ahead to make a determination favourable to its opinion. EACC asserts that the Court should be an arbiter of matters placed before it or which are relevant to the matters before it.

38. It is EACC's case further that the trial court usurped the jurisdiction of the High Court, a preserve recognized under Article 165 (3) of the Constitution. Reference is made in this regard to the decision in **Director of Public Prosecutions (DPP) vs. Nairobi Chief Magistrate's Court & another [2016] eKLR** in which the court held that the interpretation of the Constitution is the mandate of the High Court, the mandate of the Magistrate's Courts being to apply the Constitution as interpreted by the higher courts.

39. EACC argues that the trial court erred in putting pre-conditions on registration of a charge sheet and the taking of pleas. It observes that in the impugned ruling, the trial court gave pre-conditions on when a charge sheet can be accepted for registration by the Anti-Corruption Court, and when an accused person can take plea. It submits that these pre-conditions do not have the backing of any law or procedures in Kenya. EACC cites the case of **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** and **Joseph Ndungu Kagiri v Republic [2016] eKLR** in which the court held that the right to be provided with material that the prosecution wishes to rely on is a process that continues throughout the trial period, from the time the trial starts when the plea is taken.

40. It further submits that the words '*accused*' and '*suspect*' have different meanings. It notes that an accused person is defined in **Black's Law Dictionary** as '*a person against whom legal proceedings have been initiated*', while a '*suspect*' is defined as '*a person suspected to have committed an offence*'. It submits further that the differences between an arrested person and an accused person are respectively clearly brought out under Articles 49 and 50 of the Constitution, and the rights of an arrested person differ from those of an accused person as the former becomes the latter upon taking plea. This is why, in its view, Article 50 (2) (j) requires that every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. In its view, this right, which must be read in conjunction with section 89 and 134 of the CPC, can only be accorded to an accused person, not to an arrested person, and is only invoked after an arrested person takes plea.

41. EACC further argues that by the court placing a pre-condition of filing a duly executed inventory together with the charge sheet, it interferes with the State powers of prosecution that are given to the DPP under Article 157 (6) of the Constitution. It is its case therefore that the ruling interferes with the constitutional power of prosecution which is vested in the DPP and not the judiciary. In addition, in the absence of a law providing for such a requirement, the trial court had no jurisdiction to create one.

42. With specific reference to its work, EACC submits that section 33 of the Anti-Corruption and Economic Crimes Act (ACECA)

prohibits disclosure by any person that may affect an investigation, except with leave of the Director, or with other lawful excuse. According to the EACC, such disclosure includes the identity of anyone being investigated. Further, that section 33 (2) of the ACECA makes such disclosure an offence. In its view, the ruling impugned in this application directs the EACC to disclose the evidence against the arrested persons, and that the inventories are to contain the physical addresses, email addresses and even phone numbers of arrested persons, which information is to go hand in hand with the charge sheet, which is a public document. In its view, the content of the inventory should not contain such details.

43. EACC submits further that releasing evidence to persons who have not even taken plea is highly prejudicial to witnesses in corruption cases since the charge sheet is not a formal document unless and until it has been registered in a court of law. That this is even more prejudicial to witnesses who are usually either under witness protection or whose evidence is crucial to the prosecution proving the cases brought before court. It would therefore be highly unfair to the State which is trying hard to combat corruption through pursuing justice in court, hence the requirement in law that discovery should take place within a given timeline after an accused person takes plea.

44. EACC further cites section 35 of ACECA which it submits only requires that following an investigation, it reports to the DPP on the results of the investigation, recommending whether a person should or should not be prosecuted for corruption or economic crimes. It refers to the case of **Ethics and Anti-Corruption Commission v Miriam Riungu & 7 others; Director of Public Prosecution (Interested Party) [2019] eKLR** in which the court held that the report submitted under section 35 of ACECA is not one of the documents or matters contemplated under Article 50 (2)(j) of the Constitution.

45. EACC submits that the DPP's decision to charge is also an independent decision made upon review of the report. Reliance for this submission is sought in the decision of Ong'udi J in **Mary Moraa Angwenyi v Republic [2018] eKLR** in which the court held that section 35 does not make it mandatory for the DPP to give consent to a prosecution. Further reliance is placed on the case of **Thuita Mwangi** (supra) in which it was held that investigation is an ongoing process that does not come to a conclusion at this point. This means that the magistrate erred when he presumed that upon the section 35 report being forwarded to DPP, investigations have concluded.

46. It is EACC's submission that in any event, if there is an issue in respect of disclosure after plea taking or with any direction issued by the trial court, the CPC provides the court with powers to deal with such instances of non-compliance with its orders, but it makes no provision for a trial court to propose an issue and determine it without input from the parties to be affected by the ensuing order.

47. EACC submits that the impugned ruling is not tenable as it interfered with the prosecutorial powers of the DPP, sections 33 and 35 of ACECA, which binds EACC to ensure confidentiality in the course of undertaking investigations, fails to properly distinguish and appreciate the rights of the arrested persons as against those of an accused person, and puts witnesses at risk by making evidence public before a matter has formally been filed in court. It is also its view that such directions as were given in the ruling have the effect of giving subjective powers to the court registry staff to determine the competence of charges before accepting them for filing, powers which it terms arbitrary and with no basis in law.

#### **Submissions by the 1<sup>st</sup> Interested Party**

48. The 1<sup>st</sup> interested party, who is the 1<sup>st</sup> accused person before the trial court, opposes the application and has filed written submissions in which he asks this court to dismiss the application. He sets out the factual background leading to the ruling of the court impugned in the said application and the directions of the court that the prosecution should supply the defence with the evidence it seeks to rely on count by count.

49. The 1<sup>st</sup> interested party submits that the trial court directed that the collection and verification of documentary exhibits would be conducted between 9:00 a.m. and 5:00 p.m. to avoid instances where the defence Counsel would be kept waiting till late at night by disorganized officers of the 18<sup>th</sup> Interested Party.

50. The 1<sup>st</sup> interested party submits that between the 27<sup>th</sup> February 2020 and 6<sup>th</sup> March 2020, his Advocates on record dutifully attended the offices of the 18<sup>th</sup> Interested Party (EACC) to collect and verify the documents that the prosecution intends to rely on in this case. The 1<sup>st</sup> interested party makes detailed submissions with respect to the law and jurisprudence on discovery, the requirement that evidence must be paginated and legible and where an accused is facing more than one count, must be supplied



count by count. It submits that in this case, the documents supplied had not been properly paginated. It cites the definition of pagination in the Oxford, Cambridge and Merriam-Webster dictionaries to submit that the documents supplied to him had not been properly paginated as directed by the trial court, and that only the inventory had been paginated.

51. The 1<sup>st</sup> Interested Party also makes detailed submissions with respect to the meaning of the word 'verification', the purport of which was to support his contention that the 18<sup>th</sup> Interested party did not comply with the court's directions on verification.

52. While relying on Articles 25 and Article 50 (2) (j) of the Constitution and various paragraphs of the Judiciary's **Criminal Procedure Bench Book 2018** regarding disclosure of evidence, the 1<sup>st</sup> Interested Party submits that the applicant did not conform with the principles of disclosure of evidence and that such non-conformity impairs his right to make full answer and defence. The actions of the applicant also violate the provisions of the **Judiciary Criminal Procedure Bench Book 2018** as regards fair trial. Reliance is also placed on **High Court Misc. Criminal Application No. 345 of 2001-George Ngodhe Juma & 2 others v The Attorney General and Court of Appeal, Criminal Appeal No. 116 of 2007- Thomas Patrick Gilbert Cholmondeley v Republic** with respect to the duty of disclosure placed on the prosecution.

53. With regard to the ruling of 14<sup>th</sup> May 2020, the 1<sup>st</sup> Interested Party submits that the applicant's conduct during the pre-trial informed the court's raising of the issue in contention *suo motu*. He submits that a court takes *suo motu* cognizance of a legal matter when there is a blatant violation of rights or breach of duty and are intended to promote the speedy delivery of justice. The 1<sup>st</sup> Interested Party submits that the court properly applied itself in the impugned ruling. It relies in support on the case of **Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 Others** (supra) on the meaning of *suo motu*.

#### **Submissions by the 12<sup>th</sup>, 13<sup>th</sup> 14<sup>th</sup> & 15<sup>th</sup> Interested Parties.**

54. Like the 1<sup>st</sup> Interested Party, these Interested Parties opposed the application. They filed Grounds of Opposition which are somewhat in the form of submissions. They argue, first, that Article 25(c) of the Constitution bestows the right to a fair trial that shall not be limited, and that this right, as enshrined in Article 50, is the main objective of the criminal justice system and procedure. Accordingly, it is the duty of the court to ensure that such fairness is not hampered or threatened by any of the parties. They note that Article 50(2) (j) provides the right of every accused person to be informed of the evidence that the prosecution intends to rely on and to have reasonable access to that evidence. They further cite Article 159 which bestows judicial authority on courts to exercise their duties in line with the purposes and principals of the Constitution. They argue that an interpretation of this duty in the present case is that the court has the power to give orders or directions that promote the spirit of the Constitution such as the right to a fair trial.

55. The Interested Parties concede that this court has powers of revision of decisions of subordinate courts as provided for under section 362 as read with section 364 of the CPC. They contend, however, that the applicant in this case has not demonstrated any illegality or impropriety in the impugned ruling or in the proceedings before the trial court. The applicant has therefore not met the threshold required for the exercise of the revisionary jurisdiction of this court. In their view, the application lacks merit as it is a disguised appeal against the order of the trial court.

56. The Interested Parties submit that Gazette Notice 1340 of 2016- **Guidelines Relating to Active Case Management of Criminal Cases in Magistrate Courts and High Courts of Kenya** whose overriding objective is to ensure that criminal cases are dealt with justly and expeditiously under the laws of Kenya, give the Chief Magistrate's Court the power to make such orders in furtherance of this overriding objective. They rely on guidelines 5.1 and 6.1 which they argue give the court power to give any directions and take any step to actively manage a case. In their view, an interpretation of these guidelines shows that the trial court was well within its powers and was performing its duty in granting the orders of 14<sup>th</sup> May, 2020.

57. It is also their contention that the applicant seeks to micro manage the proceedings before the trial court. It will make it impossible for the case to proceed to its logical conclusion, and will also, if allowed, prejudice their right to fair trial as envisaged by article 25 of the Constitution, which is absolute and non derogable.

#### **Analysis and Determination**

58. I have considered the application before me and the averments and the submissions with respect thereto. I have also read the ruling of the court that precipitated this application. I note from the pleadings of the parties and their submissions that four main issues arise for determination. These are, first, whether this court has the jurisdiction to issue the orders that the applicant seeks. Secondly, whether there was a grievance before the trial court to warrant the orders issued. Thirdly, what the grounds on which a court can reject a charge sheet are, and finally, whether the trial court had the jurisdiction to issue the orders that it did, applying not just to the matter before it but also to all matters to be filed before the Anti-corruption Magistrates Courts.

59. I note further that the parties, particularly the EACC, have made lengthy submissions on the question of when a court can deal with an issue *suo moto*, and the right of parties to be affected by the decision to be heard. I believe that the decisions cited by EACC captured in this ruling adequately address this issue, and I need not labour the point, particularly in light of the fact that a determination of the application before me turns mainly on a determination of the four main issues that I have set out above.

## **Jurisdiction**

60. The applicant seeks this court's exercise of supervisory powers under Article 165(6) and (7) of the Constitution, which provide that:

*(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*

61. The applicant also asks the court to exercise powers of revision under section 362 of the CPC which provides that:

*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. (Emphasis added)*

62. At section 364, the CPC grants power to the court in the following terms:

*(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.*

....

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:*

...

*(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*

63. The CPC gives the High Court the jurisdiction to call for and examine the record of the trial court to satisfy itself as to the the correctness, legality or propriety of any finding, sentence or order of the subordinate court. This provision has constitutional

underpinning in Article 165(6) and (7) set out above.

64. In its decision in **Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR**, the Court held that it could exercise supervisory or powers of revision and correct errors, mistakes and omissions of a subordinate court or tribunal. I agree with the view that such jurisdiction extends to instances where the subordinate court has acted outside its jurisdiction, as the DPP and the EACC allege the trial court has done in the impugned ruling.

#### **Whether there was a grievance before the trial court to warrant the orders that the trial court issued**

65. The DPP and the EACC complain that at the time the court made the ruling impugned in the present application, there was no grievance before it to warrant the raising of the issue by the court, or the issuance of the orders and directions that it did. The EACC argues, as a corollary to this issue, that there was no failure on its part in disclosing evidence as required under Article 50(2) (j) of the Constitution to warrant the issuance of the impugned orders. The Interested Parties support the orders, their submission being essentially that the court was entitled to issue the orders to safeguard their right to a fair hearing.

66. I have considered the record of the trial court's proceedings leading to the ruling impugned by the applicant in this matter, with the support of the 18<sup>th</sup> Interested Party, as well as the ruling itself. At the stage at which the ruling, was delivered, the court was dealing with the process of disclosure that is mandated under Article 50(2)(j) of the Constitution. From the material placed before me, the court had already given directions on disclosure, and the prosecution had complied with the directions and had furnished the defence with the documentary evidence that it intended to rely on at the hearing. What had not been done was to complete and furnish an inventory of the documents as had been further directed by the court.

67. Again, gauging from the material before me, the defence did not have any complaint with regard to the manner in which the applicant had complied with the orders of the court regarding disclosure. As averred by Ms. Thuguri and not disputed by the Interested Parties who oppose the application, the defence had no objection to the trial court granting the prosecution time to complete the inventory and file it in accordance with the court's direction. At the time the court posed its question and thereafter asked the parties to submit thereon, there was no contention that the accused person's rights under Article 50(2)(j) had not been safeguarded.

68. It seems to me, therefore, that at the time that the trial court raised, on its own motion, the question why the investigative agencies could not provide the evidence they intended to rely on before plea, there was no issue, in so far as the cases before the court were concerned, that there had been a failure of compliance with the disclosure requirements and directions. It is my view therefore that this issue must be resolved in favour of the applicant.

69. I observe in closing on this issue that while the trial court made the directions and orders in **Milimani Anti – Corruption Case Numbers 32 of 2019**, its concern extended to what it viewed as undue delay in disclosure in other matters before it. It illustrated this concern by citing the delays in disclosure in ACC No. 10 of 2018, ACC 45 of 2018; ACC 49 of 2019; and ACC 18 and 19 of 2019. It notes that the cases illustrate the skewed manner of disclosure even though the court had given directions thereon at the first appearance. It notes that the prosecution would fail to disclose and give various reasons for its failures before finally complying with the directions on disclosure. This, then, demonstrates the need, properly identified by the court, for there to be provision with regard to timelines for disclosure. In the court's view, such timeline would be at the time of registering the charge sheet, and no case should be registered before the prosecution has made disclosure to the person to be brought before the court. Which brings me to the third issue that arises in this matter.

#### **Whether a court can reject a charge sheet on the basis that there has been no disclosure prior to registering the charge sheet**

70. This issue calls for an examination of the constitutional requirement for disclosure, as well as the grounds on which a court can lawfully reject a charge sheet placed before it by the prosecution.

71. The Interested Parties who oppose the application have submitted that the court properly made the orders that it did in order to safeguard their right to a fair hearing guaranteed under Article 50(2) of the Constitution, which, as provided under Article 25(c), cannot be derogated from. This Article, so far as is relevant for the present matter, provides as follows:

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

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to

answer it;

(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;

(k) to adduce and challenge evidence;...

72. The purpose of the specific provisions in the Bill of Rights with regard to disclosure of evidence is to safeguard the right of accused persons to a fair hearing. In order to safeguard this right, the trial court is empowered to issue directions on disclosure as part of the process of case management.

73. In the opening paragraphs of the ruling impugned in this application, the trial court states as follows:

*“Plea in this matter was taken on the 26<sup>th</sup> February 2020 and not much progress has been posted. The reason is simple. There has been no properly organized disclosure. This has become common as there are other cases some of which I will mention later where disclosure was delayed leading to delay in the commencement of the cases, a scenario that can be avoided.*

*If one bothers to peruse any or all of the cases to be mentioned hereunder, it will be noticed that the reasons for non-disclosure were within either the control of the prosecution or the respective investigation agencies. With the above in mind and in order to get the respective positions in this worrying and very dangerous trend, the court framed a question and then invited the parties to respond there to and either agree giving reasons or disagreement in the same vein. The question that was posed to the parties was as follows and I quote:*

*“It is apparent that parties are held at ransom after plea has been taken. The parties and the court are taken in circles. It is heading three months without due disclosure. Why can't the DPP/Investigating agencies disclose at the time of arrest before plea in any case investigations are complete by then. I know that there are no legal provisions dealing with specific timelines on disclosure. The constitution only requires disclosure of a charge to accused with sufficient information to answer charges at art. 50(2) and also disclosure of evidence before trial.”*

74. In its ruling, the court makes an in-depth analysis of the right of accused persons to disclosure as guaranteed under Article 50(2). It notes the judicial precedents that underscore the right, beginning with the Court of Appeal decision in **Thomas Patrick Gilbert Cholmondeley v Republic**[2008] eKLR and the High Court decision in **George Ngodhe Juma & Two Others vs. The Attorney General Miscellaneous Criminal Application No. 345 of 2001 (unreported)** with regard to the duty placed by the Constitution on the prosecution to supply an accused person with all the relevant material in its possession prior to the commencement of his trial so that the accused person is aware of the case against him and is able to prepare his defence.

75. It seems to me that there is no longer any dispute that the prosecution is under a duty to disclose to the defence all the material it intends to rely on at the trial. The issue which the court recognized and intended to address by its ruling was the timeline within which disclosure should take place. The trial court recognized that there were no rules with regard to the timeline within which disclosure should take place. It noted that the **Guidelines Relating to Active Case Management of Criminal Cases in Magistrates Courts and the High Court of Kenya Gazette Notice No. 1340 of 2016**, do not also contain the timeliness within which disclosure should take place.

76. The trial court made reference to a new law in New York that requires that the prosecution to turn over most evidence to the defence 15 days after the appearance of a defendant in court. Reference is also made to section 35 of ACECA, with the interpretation that by the time a file is handed over by the EACC to the DPP and the DPP makes the decision to prosecute, the investigations are complete. The court therefore concludes that by the time a charge is preferred in court, the prosecution is presumed to be in possession of all the evidence forwarded to the DPP and that all the evidence needed to prosecute a case is ready.

77. While referring to the decision of Otieno J in **R v Omar Mwinyi Musimba (2017)eKLR**, the trial court cited the observations of the Court as follows:

*“15. A judicial officer is therefore bound from the day the criminal case (is) registered in court to conceive a timetable and chart a route that would enable him expeditiously meet the core and overriding objectives of the court. In setting out to execute active case management the court as the driver gets foresighted and envisages possible pit falls and impediments to its core mandate, to defeat delay and eradicate ‘case backlog’. It is therefore critical to set a timetable for surmounting such pitfalls and impediments or just dealing with them at an appropriate time noting that some of those issues considered pitfalls may have a determinant effect on the case as to be able to conclude it.*

*16. It is thus within a courts mandate that on the date the charge is registered, the court should prior to taking plea consider basic threshold issues like jurisdictions and propriety or legality of the charge.”*

78. I note that the issue before the court in the **Mwinyi** case related to the propriety of the charges before the court. The court was dealing with the question whether the prosecution could properly charge an offence allegedly committed in political party primaries as an offence under the Penal Code. The High Court recognized that the trial court had the duty and the jurisdiction to give the prosecution direction to reconsider the charges against the accused person, which the trial court had noted were duplex and offended the provision of section 134 -137 of the Criminal Procedure Code As the court observed:

*“17. If that be the accepted position and regard being had to the existence of the Magistrates powers under section 89(5), it must equally be accepted that it would be futile to proceed with a matter by taking the plea and setting a date and maybe inviting the witness to give evidence before the issues of propriety of the charge is dealt with and determined. (Emphasis added)*

79. The trial court further relied on the decision in **Joshua Njiri v R (2017)eKLR**. In that case, the High Court, in exercising powers of revision, noted that the applicant had not been supplied with the charge sheet showing that he had committed an offence. He thus had no opportunity to seek legal Counsel. The court concluded that:

*“According to the facts of this case the trial court held unreasonably hasty plea without factoring in the provisions of Article 50 (2) (b) (c) (j) and (m) of the Constitution.”*

80. I agree with the submissions by EAC that the two decisions of the High Court are clearly distinguishable from the facts at issues in this case.

81. Finally, in its impugned ruling, the trial court noted that bullet 5.1 of the **Guidelines on Case Management** requires that a pre-trial conference be held as soon as possible, preferably not later than fourteen days after a plea of not guilty is entered. The court noted that the purpose of a pre-trial conference is for the trial court to ensure that disclosure taken place and has met the threshold to enable a fair trial. Accordingly, there has to be proper disclosure before a pre-trial conference is held.

82. Section 89 of the Criminal Procedure Code contains the statutory provisions with respect to complaints and charges. It provides as follows:

*(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.*

*(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.*

*(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.*

*(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.*

*(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.* (Emphasis add)

83. It is evident from the provisions of section 89(5) that the power granted to a court by the CPC is to reject a charge where the charge sheet, complaint or formal charge presented to it does not disclose an offence. Section 134 of the CPC provides with respect to the offence contained in a charge sheet that:

*Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

84. Having carefully considered the law with respect to charges, I can find no provision in the CPC that empowers the court before which a charge sheet is placed for purposes of taking plea to reject the charge sheet on the basis that it is not accompanied by an inventory of the evidence that the prosecution intends to rely on. In the impugned ruling, the trial court directed that no anti-corruption matter would be accepted for plea unless it was accompanied by witness statements, criminal records where relevant, expert evidence, including forensic and medical evidence, transcripts of interviews, video and audio recordings photographs, telephone and listening device intercepts, and the charge sheet. It would also not be accepted if it was not accompanied by a check list or an inventory containing the date of exchange of documents, signatures of the parties exchanging the documents, their full names and description, their physical and email addresses, mobile phone numbers(s) and description of the advocate for the accused.

85. Having considered the ruling and the law relating to the filing of charges for purposes of taking plea in court, it seems to me that a court purporting to reject a charge sheet on the basis that the inventory identified by the trial court in its impugned ruling had not been filed would be arrogating to itself powers that have no basis in law. Unless there is specific legislation or directions by a person or body mandated by law to demand such compliance, then such exercise of powers by any court would be in excess of jurisdiction. It is trite that any action done without jurisdiction is null and void.

#### **Whether the trial court had the jurisdiction to issue the impugned orders**

86. The rationale that the trial court used in reaching the decision it did is commendable. It is motivated, to my understanding, by the need to ensure that a person brought before the court has full information relating to the charges against him or her in a timely manner to facilitate the preparation of the defence case. It also seems to arise from frustration with the conduct of the prosecution in complying with directions on disclosure as emerges from the recitation by the court of several cases that it was aware of in which the prosecution had failed to comply with directions for disclosure in a timely manner, thus leading to delay in prosecution of the criminal matters. The question, however, is whether, even given the perceived need to expedite the process of disclosure, the trial court had the jurisdiction to issue the directions it did, which were directions *in rem*, applying not just to the matter before the court, but to all matters coming up before the anti-corruption courts. Does the law vest the magistrate's court with such powers? If not, in whom do such powers inhere?"

87. Further, two collateral questions also arise. Does the Constitution and jurisprudence from our courts really support the demand that disclosure should be made before an accused person takes plea? To whom are the rights guaranteed under Article 50(2) directed?"

#### **Jurisdiction to issue Directions and Guidelines**

88. The DPP and EACC have addressed the court at length on the law and jurisprudence relating to jurisdiction. They submit that outside the four corners of a statute or of constitutional provisions, a court has no jurisdiction to deal with a matter. They have referred the court to the decisions of the Supreme Court on the subject as enunciated in **Samuel Kamau Macharia & Another v KCB Ltd & 2 Others [2012] eKLR** in which the Court stated as follows:

*“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

89. Reference is also made to the decision of the Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR** in which the court stated:

*“[35] ...Halsbury’s Laws of England ...defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision..... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. ...[I]t is clear that the term “jurisdiction”, ... is the Court’s power to entertain, hear and determine a dispute before it.”*

90. Thus, a magistrate’s court can only exercise jurisdiction in such matters as are specifically vested in it by law. The law that pronounces the jurisdiction of Magistrates Courts is contained in the Magistrates’ Courts Act, No. 26 of 2015. Section 6 thereof, which is titled ‘*Criminal jurisdiction of a magistrate’s court*’ provides as follows:

*A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by —*

*(a) the Criminal Procedure Code (Cap. 75); or*

*(b) any other written law.*

91. I have perused the provisions of the Criminal Procedure Code. I note that magistrates’ courts have power conferred on them in relation to matters before them. Such powers start from the registration of charges under section 89(5) which I have considered earlier in this ruling. The court seized of a matter is granted powers in relation to the conduct of a matter before it. I have not, however, been able to find any provision in the CPC that vests general power in the magistrate’s court to make directions and orders that apply to other matters not before it, or that generally apply, as in this case, to anti-corruption matters filed before the Anti-corruption Magistrates Courts.

92. Rules and guidelines that apply generally in respect to all matters before courts in Kenya fall, in my view, within the jurisdiction of the Chief Justice. This office has overall direction and control of the judiciary as set out in Article 160(2), section 5 of the Judicial Service Act, and section 10 of the Judicature Act. With respect to the subordinate courts, section 20 of the Magistrates Courts Act provides that:

*(1) The Chief Justice may make Rules generally for the effective organization and administration of the Magistrates’ Court.*

*(2) Without prejudice to the generality of subsection (1), such Rules may provide for the —*

*(a) procedure of handling claims relating to violation of human rights;*

*(b) general practice and procedure of Magistrates’ Courts;*

93. Thus, in the event of a lacuna in general directions on disclosure applicable to all matters before Magistrate’s Courts, the mandate would lie on the Chief Justice to make such rules. However, as all parties to this matter recognize, guidelines with regard to active case management in the conduct of criminal matters before magistrates’ courts and the High Court are in place. These were enacted and published by the Chief Justice in **Gazette Notice 1340 of 2016- Guidelines Relating to Active Case Management of**

**Criminal Cases in Magistrate Courts and High Courts of Kenya.** The Guidelines were enacted in February 2016 by the Chief Justice under powers vested in his office under Articles 159 and 161(2) (a) of the Constitution, section 10 of the Judicature Act, and the Criminal Procedure Code.

94. As stated in the Guidelines, they are intended to guide the conduct of criminal cases in Kenya, with the main objective of giving effect to Article 159 of the Constitution, *“particularly in reducing delay, case backlog, and ensuring that justice is done irrespective status.”* Thus, where directions of a general nature intended to apply *in rem* as opposed to a particular matter before a magistrate's court are required, the jurisdiction to issue such guidelines are vested in the Chief Justice. It appears to me therefore to be quite an overreach for the court in the ruling impugned in this matter to purport to issue directions applicable to all anti-corruption matters filed before the magistrates' courts.

95. A further issue for consideration is whether, as the court did in the impugned ruling, directions can be given for making disclosure to a suspect as opposed to an accused person. I observe, first, that a distinction is made in law and the Constitution with respect to these two categories of persons. A court dealing with a criminal matter is concerned with the latter category. As was held in **Kimani v Kahara [1985] eKLR**:

*“It is we think clear that the trial of the case cannot start before the accused person is before the court. As soon as an accused person is before him in court for the purpose of pleading to a formal charge no magistrate can properly be described as “trying a case.”*

96. In **Otieno Clifford Richard v Republic [2006] eKLR**, the court cited with approval the interpretation adopted by the court in **Kimani vs. Kahara** (supra) that:

*“...“trying a case” includes taking a plea and that no criminal trial can start before the accused is before the court to plead to the charge.”*

97. The implication of these holdings, in my view, is that before a person is presented before a court for plea taking, the court has no jurisdiction with respect to such a person.

98. In its decision in **Hussein Khalid & 16 Others v The Attorney General & 2 others (2019) eKLR** the Supreme Court considered whether the law requires that an accused person be supplied with evidence prior to taking plea and held that the right to fair trial under Article 50(2)(j) accrues to an accused person as opposed to an arrested person. This is the argument advanced by the applicant and the EACC, who submit that the rights under Article 50(2) of the Constitution are granted to an ‘accused person’. It is specifically provided in this Article, with respect to disclosure, that

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

...

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

99. The Supreme Court decision in **Hussein Khalid & 16 Others v The Attorney General & 2 others (supra)** indeed, addresses many of the concerns raised by the applicant in this matter. The Court stated, at paragraph 91 *et seq*, as follows:

*[91] Further, 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] [T]he 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."*

*[92] Note also that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents 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...*

*[93] It is also worth noting that the right to a fair trial under Article 50(2)(j) accrues to an accused person, as opposed to an arrested person whose rights are provided by Article 49 of the Constitution.... Suffices it to say that the right provided under Article 50(2)(j) is to be enjoyed in the course of the trial.*

...

*[97] It therefore follows that someone is first arrested, then presented to the court and accused by way of charge before taking plea. In that context, the provisions merely restate that the substance and particulars of the charge are given in form of a statement. At no point is there mention of evidence being adduced at the point of charge and/or plea. This is because of the possibility that the trial may not proceed in respect of the charge if the Magistrate is of the opinion that no offence is disclosed.*

(Emphasis added)

100. What emerges from the above decision of the Supreme Court, a decision which is binding on all other courts in Kenya, is that the constitutional guarantee to a fair trial, which includes the right to access in advance the evidence that the prosecution intends to rely on, cannot be properly extended to a suspect before the charge is registered in court. What a suspect is entitled to is set out in Article 49. It includes, among others, the right to remain silent, the right to bond, and the right to be brought before a court within 24 hours. He is also entitled to the charge sheet upon arraignment in court, and such charge sheet, as provided in section 134 of the CPC, must contain a statement of the specific offence or offences with which the accused person is charged, and it must contain particulars necessary to give the person to be charged reasonable information on the nature of the offence he is charged with.

101. It is my finding therefore that the directions of the court issued on 14<sup>th</sup> May 2020 are irregular. The court purported to issue directions in matters that are outside its jurisdiction.

102. I accordingly exercise powers of revision as granted under Article 165(6) and (7) and section 362 of the CPC and hereby set aside the said orders.

**Dated Delivered and Signed at Nairobi this 17<sup>th</sup> day of July 2020**

**MUMBI NGUGI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online.

**MUMBI NGUGI**

**JUDGE**



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