



**Muteshi v Odundo & another (Criminal Appeal E064 of 2024)
[2024] KEHC 11709 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E064 OF 2024
SC CHIRCHIR, J
SEPTEMBER 26, 2024**

BETWEEN

SYLVIA ATAMBA MUTESHI APPLICANT

AND

VICTORINE ATEMBA ODUNDO 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

RULING

1. There are two, yet similar Applications coming up for determination. The first Application was filed in the present Appeal. It was filed by Sylvia Atamba Muteshi, (The Appellant) and is dated 26th June 2024. . The second was filed by Director of public prosecution (DPP), the 2nd respondent herein . It is dated 5th June 2024 and was filed under Miscellaneous Application number E 083 of 2024. There two were consolidated and this Appeal was designated as the lead file.
2. The Application seek for the following orders:-
 - i). Spent
 - ii). There be a stay of the Ruling and Orders passed against the Appellant/Applicant herein in Kakamega Chief Magistrate’s Miscellaneous Criminal Case No E035 of 2024 between Victorine Atemba Odundo v Sylvia Atamba Muteshi & DPP delivered on 4/6/2024 by Honourable A. Adawo, pending the determination of the Applicant’s Appeal herein.
 - iii). That the court do grant any other orders it deems fit and just.

The Applicant’s case

3. The Appellant faults the Lower Court for allowing the 1st Respondent to commence private prosecution against her, when the case had been resolved through diversion by the 2nd Respondent ;



that allowing such private prosecution amounts to double jeopardy. It is further stated that if the Ruling is implemented it will render the Appeal nugatory. It is further stated that for the aforesaid reasons, the Appeal has high chances of success.

4. On the part of the 2nd Respondent, it is further stated that the Lower court lacked the jurisdiction because any decision challenging the decision of the DPP. under diversion policy guidelines ought to have been brought by way of Judicial review ; that the conditions for commencing private prosecution were not met. It is further stated that commencement of private prosecution goes against the doctrine of exhaustion as there is procedure provided under the aforesaid diversion policy, to be followed by a party, who feels aggrieved aggrieved by the decision of the DPP.

Respondent's case

5. It is the Respondent's case that the Appellant has never been prosecuted and therefore cannot plead the double jeopardy principle.
6. On the diversion agreement, the 1st Respondent states that she was never involved in the diversion agreement and was only asked to sign it at the tail end of the agreement.
7. On Jurisdiction, it is argued that, the 1st respondent chose to apply for private prosecution, and not Judicial review and that the 2nd Respondent's cannot dictate the appropriate procedure; that in any event, judicial reviews as a process of challenging DPP's decision is not a compulsory process.
8. The parties filed submissions which were largely a repeat of their averments in the Affidavits . I have however considered the said submissions.

Determination

9. The 1st Respondent filed charges related to attempted killing by the Appellant herein. The record shows that investigations were carried and the matter forwarded to the 2nd respondent to consider prosecution of the Appellant. It is apparent that at some point, the 2nd respondent had confirmed the decision to charge, but later there was a change of mind and opted for diversion. The diversion agreement was reportedly signed.
10. The 1st respondent was aggrieved and sought orders for private prosecution. The prayers for private prosecution was allowed by the trial court. The Appellant and the 2nd respondent were aggrieved and they filed the two separate Appeals and Applications for stay as stated above.
11. The Application has been brought under Section 35 of the *Criminal Procedure Code*. Sub Section 1 of section 35 provides as follows "the high court, or the subordinate court which has convicted or sentenced a person may grant bail or may stay execution on a sentence or order pending the entering of an Appeal on such terms as security for the payment of money or the performance of non-performance any act or the suffering of any punishment ordered by or in the sentence of order as my seem reasonable to the High Court or Subordinate Court"
12. In an Application of this nature, the Applicant must show interalalaia that there are unique and exceptional circumstances warranting orders of stay , and that the Appeal is arguable.(see *Kihara v Republic* (2023) KEHC 1854(KLR))
13. All the parties in this case have confined their arguments on whether the Appeal is arguable or not. Indeed reading their Affidavits and submissions one would be mistaken to think that the parties are arguing the Appeal itself. None of them has addressed the court on the other conditions for granting stay pending Appeal.



14. Nevertheless, on whether the Appeal is arguable, I have perused the memorandums of Appeal. I have noted that the Appeal intends to challenge the Jurisdiction of the Lower Court to issue the orders for private prosecution, the doctrine of double jeopardy and exhaustion doctrine. I am satisfied that these are arguable issues.
15. On whether the Appeal will be rendered nugatory, the 2nd Respondent has submitted that any private prosecution if allowed to proceed will render the substratum of the Appeal nugatory.
16. In the case of *Wainaina & another v Republic* (2023) KECA 727(KLR) the court of Appeal stated as follows, (i.e on the question of whether an Appeal may be rendered nugatory) “ factors which can render an Appeal nugatory are to be considered within the circumstances of each case....” The court then on to state “ we are persuaded that even if the Appeals does not succeed, the Applicant’s will still be available to take their defences. As a corollary, if the orders are not granted and the Applicants undergo the process, the intended Appeals will be rendered an academic exercise. Take for instance if the Applicants are found guilty and start serving sentence when the Appeal is pending, it is obvious that the Applicant’s will be prejudiced. If the sentences are served wholly or partially which can neither be undone, nor can compensation by way of damages do. In any event a party cannot be told to wait the outcome of a process he is challenging and thereafter appeal.
17. I am persuaded that the circumstances of this case are unique. For instance it raises the question of diversion policy of ODPP versus the place of private prosecution and whether prosecution ,after the parties have entered into a diversion agreement constitutes double jeopardy.
18. The Application for stay is warranted.
19. Consequently I hereby order that pending the hearing and determination of High Court Criminal Appeals No E064 of 2024 and No E057 of 2024, there shall be stay of the ruling of the Lower Court in Criminal Miscellaneous Application No E035 of 2024 and any consequential orders emanating therefrom.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER, 2024.

S. CHIRCHIR

JUDGE

In presence of:-

Okinyo for the Applicant

Ms. Osoro for DPP

Khaya for the Respondent

Directions on Appeal 28/11/2024.

