



**Kihara v Republic (Criminal Appeal E013 of 2023)  
[2023] KEHC 18454 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18454 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E013 OF 2023  
SM MOHOCHI, J  
MAY 29, 2023**

**BETWEEN**

**PETER MWANGI KIHARA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The Appellant/Applicant, was charged with the Offence of Assault Causing Grievous harm contrary to Section 234 of the *Penal Code*, in Nakuru Chief Magistrate’s Criminal Case No. 2687 of 2020, and was convicted on the 26<sup>th</sup> January, 2023, with the sentencing being reserved subject to the Applicant’s mitigation after seven (7) days.
2. On 1<sup>st</sup> February 2023, the date reserved for mitigation, the Complainant moved the trial Court seeking the withdrawal of the case in its entirety, as the complainant had reconciled with the Applicant. The trial Court considered the Application for withdrawal, after directing the filing of written submissions by the Applicant, Complainant/Victim, and the State which failed to file any submissions despite the opportunity, and dismissed the same on 29<sup>th</sup> March 2023, directing the Applicant to prepare for mitigation and sentencing on the 31<sup>st</sup> May 2023.
3. The Applicant being aggrieved of the Ruling dismissing the complainant’s application to withdraw the complaint on 29<sup>th</sup> March 2023, appealed against the trial Court ruling dismissing the withdrawal application.
4. The Petition of Appeal, is premised on the following three (3) grounds that: -



- i. The learned trial magistrate, erred in law, in failing to find that the final order of the Court is a sentence and not a conviction as contemplated under section 204 of the [Criminal Procedure Code](#);
  - ii. The learned trial magistrate, erred in law, in rejecting the withdrawal of the case despite evidence of reconciliation and in the absence of any objection from both the victim/complainant and the state; and
  - iii. The learned trial magistrate, erred in law, in failing to consider that a criminal case may be terminated upon reconciliation of parties under Article 159(2) of the [Constitution of Kenya](#).
5. The Application, (Notice of Motion), filed under certificate of urgency, is dated 17<sup>th</sup> April, 2023, made pursuant to Section 357 of the [Criminal Procedure Code](#) and Articles 48 & 50 of the [Constitution of Kenya](#) and is supported by a sworn Affidavit of the Applicant-Peter Mwangi Kihara dated on the same day.
  6. The Application seeks, to stay proceedings in Nakuru Chief Magistrate's Court Criminal Case No. 2687 of 2020 (*Republic v Peter Mwangi Kihara*), pending the hearing and determination of the Appeal.
  7. This Application is anchored on the following seven (7) grounds: -
    - i. That on the 26<sup>th</sup> of January, 2023, the trial Court convicted the Appellant/Applicant, for the offence of Assault causing grievous harm contrary to section 234 of the [Criminal Penal Code](#) in Nakuru Chief Magistrate's Court Criminal Case No. 2687 of 2020 (*Republic v Peter Mwangi Kihara*);
    - ii. That the Court granted the Appellant/Applicant, seven (7) days to prepare his mitigation prior to sentencing;
    - iii. That on the 1<sup>st</sup> February, 2023, when the matter was scheduled for mitigation, the Complainant/Victim, intimated the Court that he had reconciled with the Appellant/Applicant, and that he was desirous of having the case against the Appellant/Applicant, withdrawn in its entirety;
    - iv. That the trial Court, directed that the Application for withdrawal be canvassed by way of written submissions, and that the Appellant/Applicant and the Complainant/Victim, complied and filed the submissions;
    - v. That the Office of the Director of Public Prosecutions did not file any submissions, it associated itself with the submissions filed by the Appellant/Applicant and the Complainant/Victim;
    - vi. That on the 29<sup>th</sup> March, 2023, the Court dismissed the Application for withdrawal of the Appellant/Applicant's case, and proceeded to fix the matter for mitigation on the 31<sup>st</sup> May, 2023; and
    - vii. That unless this Court urgently intervenes and grants the Order sought, the trial Court shall proceed to sentence the Appellant/Applicant, during pendency of this appeal thereby rendering the appeal nugatory.
  8. The Application came before this Court ex-parte, on the 23rd April 2023, where the Court certified the same as urgent to be heard on priority basis, directed the service upon the Respondent within seven (7)



- days, parties to file written submissions within seven days and that the application was to be canvassed by way of written submissions with an inter-parte mention date fixed for the 8<sup>th</sup> May 2023.
9. On the 8<sup>th</sup> May 2023, the State through Ms. Monicah Mburu, Prosecution Counsel, successfully sought for seven-day leave, to file a response and written submissions, the Court confirmed the Application for hearing on the 24<sup>th</sup> May 2023.
  10. On the hearing date of the instant Application, Ms Korere Advocate for the Applicant indicated that they shall wholly rely on their written submissions dated 25<sup>th</sup> April 2023 and filed on the 3<sup>rd</sup> May, 2023.
  11. The Respondent- State, through Ms. Monicah Mburu, Prosecution Counsel, indicated that, she had filed grounds of opposition and written submissions both dated 23<sup>rd</sup> May 2023 that she wishes to rely on wholly without any need to highlight.
  12. During the hearing of this Application an advocate by the name of Mr. Koome for the victim addressed the Court indicating that the Victim was not opposed to the Application for grant of orders of stay of proceedings.
  13. When Mr. Koome was asked by the Court if he was properly appearing before the Court? and if he had filed the requisite notice to enter on record. He indicated that a notice of appointment had just been filed in the morning but was yet to be availed in the Court file. He further sought a seven (7) day leave to file an affidavit for the victim a plea that this Court disallowed ex-tempore, admitted the counsel on record, directing the filing of the Victim submissions by close of business on the same day.
  14. It is noteworthy that on the 31<sup>st</sup> May, 2023 the Applicant/Appellant is due in the trial Court for mitigation and sentencing and that the earlier determination of the Application shall be in the interest of justice. The attempted further delay in the determination of this Application, by the failed seven (7) day adjournment attempt by an advocate purporting to act for the victim was an unfortunate attempt to “straight-jacket” the Court to issue temporary stay orders and can be deemed an abuse of the process of the Court.
  15. The Court observes, that the manner in which the advocate purporting to appear for the victim and addressed the Court was suspect, the failure to comply with the directions of the Court leaves the Court to conjecture that is neither beneficial to the Applicant/Appellant or the victim.
  16. At the time of writing this Ruling, no notice of appointment of an advocate for the Victim had been filed and no written submission had been filed for the victim. The Court thus proceed to consider the Application without representation of the Victim.

### **Submissions by the Parties**

17. Applicant/Appellant in his written submissions dated 25<sup>th</sup> April 2023, has framed the issue before this Court as, “Whether the Court should stay proceedings in Nakuru Chief Magistrate’s Criminal Case No. 2687 of 2020.
18. The Applicant sought reliance on, and argues that Section 357(1) of the *Criminal Procedure Code* provides that, the Court (the High Court or the Trial Court) may upon the filing of the Appeal contesting conviction, admit the convict to bail pending appeal or suspend execution of the sentence pending appeal.
19. The Applicant relied on the case of *Francis Kirioko Muruatetu v R* (2017) eKLR which held that: -

“Pursuant to sections 216 and 329 of the *Criminal Procedure Code*, mitigation is part of a criminal trial process and that conviction which takes place before mitigation is part of the



trial process and nothing bars the Court from staying criminal proceedings, even in instances of conviction pending sentence”

20. The Applicant relied on the case of *Prasul Jayantilal Shah v R* [2020] eKLR which held that: -
- “The Court would be cautious to make definitive findings on the link between the Appeal preferred and the proceedings sought to be stayed pending appeal, particularly in an application for stay of sentencing and proceedings pending appeal..... that it is not in every case that an Applicant faces jail term that the Court will grant stay of sentencing or proceedings. To be able to obtain stay of proceedings particularly the sentencing part, the Applicant must show that there exist, exceptional and compelling reasons..... The Court found the circumstances of the case to be clearly exceptional and compelling, to stay the criminal proceedings to mitigate the risk of the Appellant losing his liberty”.
21. The Appellant further submitted that this Court has discretion to grant the orders sought and that in considering as to whether to allow the Application there has to be demonstration of exceptional and compelling reason(s) which in this instance was the risk of the Applicant losing his liberty despite the reconciliation between the Applicant and the Victim, which is in issue in the Appeal. That if the order of stay sought is not granted then the Applicant/Appellant shall greatly be prejudiced.
22. The Respondent- State, through Ms. Monicah Mburu, Prosecution Counsel, Opposed the Application vide its six (6) grounds of opposition, namely that: -
- i. The Application is misconceived, frivolous, vexatious, incompetent and an abuse of the process of the Court;
  - ii. That the Application is a derailment of the process of the law;
  - iii. That the Applicant/Appellant was properly convicted based on evidence tendered by the prosecution;
  - iv. That the Appeal by the Applicant/Appellant against conviction is not arguable and has no chance of success;
  - v. That the Applicant/Appellant has not met the pre-requisites for the grant of the order sought; and
  - vi. The Application lacks merit and should be dismissed.
23. The Respondent urged in its written submissions that whereas the Court could exercise its discretion to grant the order sought, such discretion must be exercised judiciously and sparingly especially when dealing with such applications as the instant one. She sought reliance in the case(s) of *Goddy Mwakio & Anor v R* [2011] eKLR and that of the *Kenya Wildlife Service v James Mutembei* (2019) eKLR where the Court cited with approval the case of *Re: Global Tours & Travels Ltd v Five Continents Travel Limited HCWC No 43 of 2000 eKLR* where Ringera J. (as he then was) held that: -
- “As I understand the law, whether or not to grant stay of proceedings or further proceedings on a Decree or Order appealed from is a matter of judicial discretion to be exercised in the interest of justice”. ..... “This Power which it has been emphasized ought to be exercised sparingly, only in exceptional circumstances.” .....”It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless”.



24. The Respondent submitted that the Appeal lacks any conceivable chance of success as no illegality was committed by the Trial Court and urged that, having failed to demonstrate exceptional and compelling reason the Application lacks merit and should thus be dismissed.

### **Jurisdiction and the Law**

25. Article 50(2) of the *Constitution* provides: -

“ Every accused person has the right to a fair trial, which includes the right-

- (q) if convicted, to appeal to, or apply for review by, a higher Court as prescribed by the law.”

26. Article 165(6), of the *Constitution of Kenya*, empowers the High Court to exercise supervisory jurisdiction over subordinate Courts.

27. Section 176, of the *Criminal Procedure Code*, provides for reconciliation in all cases, the Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the Court, and may thereupon order the proceedings to be stayed or terminated.

28. Section 204, of the *Criminal Procedure Code*, provides for withdrawal a complaint, at any time before a final order is passed in a case under this Part, and the Complainant satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the Court may permit him to withdraw it and shall thereupon acquit the accused.

29. Section 357, of the *Criminal Procedure Code*, relied upon by the Applicant/Appellant, relates to applications for Bail pending Appeal and Suspension of Sentence pending Appeal and as such is inapplicable under the circumstances.

30. Section 362 of the *Criminal Procedure* provides: -

“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 subordinate Court.”

31. Section 364, of the *Penal Code*, empowers the High Court to exercise its revisionary powers .... conferred to it as a Court of Appeal by Sections 354, 357 and 358 and may enhance sentence.

### **Issues for Determination**

32. The Court has considered the rival submissions and Applicant’s affidavit. The germane issue in this Application is, whether the criminal proceedings in question, should be stayed pending the hearing and determination of the Appeal?

33. Firstly, this Court shall consider whether the constitutional rights of the applicants have been or were likely to be, violated by the prosecution.



34. In the case of *Anarita Karimi Njeru v Attorney General* (1979) KLR 154/[1976-1980, KLR 1272], the Court held as follows:-

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference of the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

35. The Notice of Motion, invokes Articles 48 and 50. I have closely looked at the applicant’s supporting affidavit and submissions. Nowhere in these pleadings have I found an articulation of how the constitutional provisions cited have been violated.

36. Notwithstanding non-articulation, and to the extent that the Applicant has alleged violation of their rights, the Court will examine the various articles of the Constitution relevant to his claim. The following Articles are pertinent: -

“Article 48– The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 50

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.
- (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;
  - (d) to a public trial before a Court established under this Constitution;
  - (e) to have the trial begin and conclude without unreasonable delay;
  - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
  - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
  - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (i) to remain silent, and not to testify during the proceedings;
  - (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;



- (l) to refuse to give self-incriminating evidence;
  - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
  - (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
    - (i) an offence in Kenya; or
    - (ii) a crime under international law;
  - (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
  - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (q) if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law.
- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
- (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
- (5) An accused person—
- (a) charged with an offence, other than an offence that the Court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and
  - (b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.
- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—
- (a) the person's appeal, if any, has been dismissed by the highest Court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
  - (b) new and compelling evidence has become available.
- (7) In the interest of justice, a Court may allow an intermediary to assist a complainant or an accused person to communicate with the Court.
- (8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and



democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

37. This Court notes that Section 357 of the *Criminal Procedure Code*, is inapplicable in this Application, as the relief sought herein, is to stay the criminal proceedings, in simple terms, stop the trial Court from obtaining the Applicant/Appellant(s) mitigation and pronouncing sentence, to await hearing and determination of the Appeal.

38. In the case of *Masrani v R* [1060] EA 321, it was held that: -

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

39. The Appellant/Applicant, is Convicted from a process of trial and as such, a verdict of “guilty” has been entered against him, he no longer benefits from the age-long cardinal principle of “presumption of innocence”.

40. Before the Court allows a motion to stay criminal proceedings in the subordinate Court, it must be demonstrated in the impugned decision challenged on appeal, that: -

- i. The Appellant/Applicant’s, fundamental right(s) shall or has been, infringed and that the continuance of the proceedings, shall render the right sought to be protected “null and void”;
- ii. Disclosure of all material facts by the Appellant/Applicant, necessary for the exercise of the Courts discretion;
- iii. There exists an arguable appeal, against the impugned decision;
- iv. There exist Special and exceptional circumstances;

41. In determining as to whether the Appeal is arguable, and without considering the merits of the Appeal, the Court has to apply its subjective judgment, weighing the substance of the appeal without determining the merits of the appeal which can be done by perusing the record of appeal as well as a copy of the impugned decision.

42. For the Court to determine at this juncture, whether the Appeal is arguable, this Court recalls the principles applicable, as established by the *New Zealand Supreme Court case of Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1 (Kacem) where it was held [paragraph 32]:

“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:

- (1) error of law or principle;
- (2) taking account of irrelevant considerations;
- (3) failing to take account of a relevant consideration; or
- (4) the decision is plainly wrong.”



43. In the Application herein, only the bare Memorandum of Appeal was availed but not the proceedings, ruling of dismissal or orders from the trial Court.
44. This Court was not availed an opportunity to peruse the record to establish whether an arguable appeal with high chances of success has been disclosed by the grounds of appeal.
45. An order for Stay of Criminal Proceedings, is not granted as a matter of course, and neither is it a mechanical relief, automatically granted upon filing of an Appeal, it is a matter of law and facts and a hard one in their combined content.
46. An order for Stay Criminal of proceedings should not be granted where the appeal following the application for stay of proceedings, would not finally dispose of the case. It is advisable in such a situation that the aggrieved party waits till the final judgment to lodge an all-embracing appeal. In this instance the Appeal is against an impugned ruling disallowing a withdrawal of complaint long after conviction. The impugned decision by the trial Court was in exercise of judicial discretion.
47. In the Case of *Raymond Kipchirchir Cheruiyot & another v Republic* [2021] eKLR Lagat-Korir J. while appreciating the jurisdiction of the Court to stay criminal proceedings, held that: -
- “However, in order to do this, it must satisfy itself that those proceedings, if allowed to proceed, would amount to an illegality, an abuse of the process and further, a travesty of justice”.
48. Undue delay of the conclusion of cases in the judicial system, is a malaise that has bedeviled the judiciary of this country, and which has generated a considerable outcry from the citizenry, especially in high-profile criminal cases. Stay of proceedings, is one of the inbuilt delay mechanisms in our criminal justice system. This is why the Courts have established principles as set out above, that ensure that the application is granted sparingly and only in absolutely deserving cases.
49. The Applicant must satisfy the Court that, the proceedings must not be allowed to continue in the interest of justice. In this instance, the Applicant has not shown this Court the interest of justice, warranting issuance of stay orders.
50. In this instance, the Applicant had an option of invoking the supervisory jurisdiction for review, urging the Court to call for and examine the entire proceedings and impugned ruling to satisfy itself on the correctness, legality, propriety of the Ruling dismissing the Application for withdrawal of Complaint and this would have been a more ideal approach.
51. It thus follows that; a Court shall grant stay of proceedings where it has been cogently presented that the Arguable Appeal seeks to reverse:-
- a. A grossly erroneous decision;
  - b. Non-compliance with a provision of the law;
  - c. A finding of fact affecting the decision not based on evidence or it is result of misreading or non-reading of evidence on record;
  - d. Non-Consideration of material evidence presented by the Applicant; and
  - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower Court ignores facts and tries the accused of lesser offence.



52. In my view the supporting Affidavit of the Applicant, depones that, a reconciliation with the complainant had occurred and compensation of kshs 250,000/- had been made to the complainant, with the intention of settling the matter out of Court but no evidence in support of the reconciliation was tendered to this Court.
53. In accordance with Section 204 of the CPC, a complainant may withdraw the complaint before the Court makes a final order in the matter and the trial Court has the discretion, to allow or reject an Application to withdraw a complaint, when satisfied with existence or otherwise of sufficient grounds for permitting such a withdrawal.
54. The Applicant has the right pursuant to Section 357(1) of the Criminal Procedure Code, to apply before the trial Court or the High Court for suspension of sentence or bail pending hearing of the appeal.
55. Additionally, this Court observes that, the Applicant has not demonstrated the existence of exceptional or unusual circumstance to warrant grant of Orders of stay of Proceedings. The fact that the Applicant faces the risk of being sentenced to imprisonment in a conviction he is yet to contest, is not and cannot be, exceptional and unusual circumstances, to warrant and order of stay of Proceedings.
56. In conclusion, this Court finds no merit in the Application and is therefore dismissed. The Applicant may seek leave to amend his petition of appeal and prepare his record of appeal for the hearing of the appeal to be fixed on a priority basis.

It is so ordered.

**DATED AND DELIVERED AT NAKURU ON THIS 29<sup>TH</sup> MAY 2023**

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**MOHOCHI S.M**

**JUDGE**

