

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 59 OF 2019

REPUBLIC.....APPELLANT

VERSUS

LISPER KANANU MUCHIRI...RESPONDENT

RULING

1. **Lisper Kananu Muchiri**, the Respondent herein is facing criminal charges in **Thika CM's Criminal Case No. 2581 of 2017**, namely, Stealing by servant contrary to section 281 of the Penal Code. The trial was underway when on 18th July 2019 the court delivered a ruling declaring a document earlier marked for identification (MFI) as inadmissible in evidence. The prosecution was aggrieved by the decision for reasons, *inter alia* that the rejected document was used by the document examiner for purposes of comparison with other documents which were however allowed in evidence; that the exclusion of the document marked **MFI 8** would render the document examiner's report incomplete ; and the exclusion would diminish probative value of the document examiner's report.

2. The Director of Public Prosecutions (DPP) has therefore filed an appeal in respect of the said ruling and an application, dated 16th September 2019 to stay the proceedings in the lower court pending the hearing and determination of the appeal. The application is supported by the affidavit of **P.C Ayoti** the investigating officer in the lower court case. The deponent reiterates the grounds on the face of the motion and expresses apprehension that if the trial were to proceed as already scheduled, the prosecution would be compelled to close its case without having laid a crucial piece of evidence before the court.

3. The application was opposed by the Respondent through a replying affidavit. The respondent asserts that **PC Ayoti** is not the investigating officer in the case facing her and that if the orders sought are granted, she would be put to great suffering and prejudice as the trial in the court below was drawing to conclusion with only one witness remaining. She views the motion as mischievous attempt by the prosecution to derail the said trial.

4. The court directed on 29th October 2019 that the motion be canvassed by way of written submissions. Only the DPP filed submissions. Restating the grounds upon which the motion is premised, the DPP asserted that the intended appeal is arguable, and not frivolous and that if the stay orders are not granted the appeal would be rendered nugatory. The DPP asserted that the appeal raises serious questions of law as to whether the exclusion of the marked document was based on sound legal principles and the provisions of the Evidence Act. Secondly, the DPP stated that if the trial in the lower court is allowed to proceed to conclusion, the prosecution case would be adversely impacted, and this appeal rendered nugatory. Reliance was placed on the decision of the Court of Appeal in **Mark Kibia Njihia v DPP [2015] eKLR**.

5. The court has considered the material canvassed in respect of the motion. As stated in **Njihia's** case, two considerations are relevant in determining an application of this nature, namely, whether the intended appeal is arguable and whether the appeal would be rendered nugatory if the interim relief is denied.

6. On the first question, the court is not in doubt, looking at the Petition of appeal and the Applicant's material that the appeal indeed raises serious questions for determination by the appellate court, thus, the appeal is arguable. Secondly, only one witness is outstanding in the trial and if the proceedings are not stayed, the trial would have been concluded before this appeal was determined, which would mean that the evidence which the DPP considers critical to his case would have been shut out. In the circumstances the court will allow the application and direct the DPP to file the record of appeal without further delay so that the appeal is perfected for hearing during the next term.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 30TH DAY OF JULY, 2020

C. MEOLI

JUDGE

In the virtual presence of :

Ms. Oyagi for DPP

Respondent - Absent

C/A Kevin Ndege