



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 175 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SALIM ABOUD ALI *alias* SALIM ABOUD SULTRI SALIM**

**ABUDA KHALID *alias* SURVIVOR.....RESPONDENT**

**RULING ON REVISION**

1. On 17th July, 2020, the Office of the Director of Public Prosecutions (ODPP) filed an application by way of a letter dated 15<sup>th</sup> July, 2020 seeking revision of the order made by the lower court on 2nd January, 2020 denying the prosecution the right to rely on an inventory which had not been supplied to the defence during pre-trial stage. On 27<sup>th</sup> July, 2020 when this matter came up for directions, Mr. Muthomi, Prosecution Counsel, brought to this court's attention another application by way of a letter from the said office, dated 17<sup>th</sup> July, 2020 which was supplemental to the application dated 15th July, 2020.
2. In the application dated 17<sup>th</sup> July, 2020, the ODPP sought an order for stay of the lower court proceedings until the hearing and determination of their application for revision, dated 15<sup>th</sup> July, 2020.
3. Mr. Aboubakar, Counsel for the respondent strongly opposed the application for stay of the lower court proceedings. He submitted that his client was at Shimo-la-Tewa Prison with bullet wounds and needed treatment which was not available in the said prison. He pointed out that the respondent had not been able to secure a surety in his case and that was the reason why he was still in custody. It was stated that in the lower court case, PW1 was stood down after he tried to produce an inventory which had not been available to the defence before the hearing of the prosecution case started.
4. The respondent's Counsel stated that the lower court case was scheduled for hearing on 29<sup>th</sup> July, 2020 and PW1 was the only witness who would be referring the said inventory. It was submitted that this court only has power to make an order for stay of proceedings after hearing the application for revision filed on 15<sup>th</sup> July, 2020.
5. In responding to the submissions made by the respondent's Counsel, Mr. Muthomi stated that the defence Counsel could not dictate to the ODPP how they should proceed with their case. He stated that they have a theory of their case and a reason as to why they started off the lower court case with the particular 1<sup>st</sup> witness who intended to produce the inventory, which was objected to. The Prosecution Counsel indicated that they needed to have proceedings that flow.
6. The Prosecution Counsel submitted that the respondent had the obligation to raise the bond required, which would enable him to go for treatment. It was stated that in their 1<sup>st</sup> application to this court, the ODPP had made reference to a press statement made by the Inspector General of Police in regard to the respondent.
7. Mr. Muthomi further submitted that it was a misconception for the respondent's Counsel to state that this court cannot issue orders for stay of proceedings, at an interim stage. He stated that no prejudice would be occasioned to the respondent if the said orders were issued.
8. Mr. Aboubakar responded by submitting that jurisdiction is conferred by the Constitution and/or by statute and it would be unprocedural for this court to grant orders for stay of proceedings at an interim stage as Section 364 of the Criminal Procedure Code makes no provision for such an eventuality. He was of the view that the ODPP's intention was to sneak in the inventory.

**Determination**

**The issue for determination is if an interim order for stay proceedings of the lower court case should be granted.**

9. In this matter the applicant's Counsel prayed for stay of the lower court proceedings due to the fact that when PW1 was adducing evidence in the lower court, he ought to rely on an inventory and produce the same, but it turned out that it had not been supplied to the respondent's Counsel during the pretrial stage.

10. This court notes that the Criminal Procedure Code does not contain provisions for each and every scenario that is likely to arise during a criminal trial and what a court is supposed to do when faced with certain predicaments. As such, Section 364 of the Criminal Procedure Code does not address the issue of stay of proceedings. It must however not be forgotten that each court has inherent powers to deal with matters that come before it so that the ends of justice are not defeated. In such circumstances, a court is required to exercise its discretion judiciously and if such a matter has been addressed through judicial precedents, a court can fall back to the same, when making a decision on a matter before it.

11. This court's finding on the nature of the application made to stay proceedings of the lower court pending the hearing and determination of the revision application herein is nothing new, but has been dealt with, time without number, by both the High Court and the Court of Appeal.

12. In **Republic v The Kenya Anti-Corruption Commission & 2 Others** Civil Application No. Nairobi 51 of 2008 (unreported), the Court of Appeal (in the lead judgment of Tunoi JA) (as he then was) expressed himself thus on the issue of stay of criminal proceedings –

***“It would appear logical to say that it seems that the court can [grant an order of stay] if petitioned on time to stay the order and/or decree of the superior court which in turn have the effect of staying the criminal proceedings in the superior court. Further, as to whether it can do so or not depend on the particular circumstances of each case and especially so, what exactly the applicant is asking the court to do and how the court is approached.”***

13. Similarly, in **Berkeley North Market & Others v Attorney General & others**, Civil Application No. Nairobi 74 of 2005 (unreported) the court rendered itself on the factors to be considered in an application for stay of criminal proceedings in the following manner:-

***“At this stage, on an application for stay of criminal proceedings, it is not for this court to make a final determination, we only need to be satisfied that a sole bona fide contention is not unarguable or frivolous.”***

14. This court has supervisory jurisdiction conferred on it under Article 165(6) and (7) of the Constitution of Kenya. The said Article provides as follows:-

***“(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 in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*** (emphasis added).

15. This court has considered the brief submissions made by each Counsel and the applicable law. Contrary to Mr. Aboubakar's submissions that this court has no jurisdiction to grant the prosecution interim orders for stay of the lower court proceedings, it is my finding that although the provisions of Sections 362-364 of the Criminal Procedure Code do not expressly provide for the same, the said provisions do not prohibit the grant of orders for stay of proceedings in a matter that is pending hearing before the subordinate court. Article 165(6) of the Constitution confers jurisdiction to the High Court to make any order or give any direction it considers appropriate. It cannot therefore be said that appellate courts lack jurisdiction to grant interim orders. The two decisions referred to by this court indicate that in appropriate cases, courts have at an interim stage granted orders for stay of proceedings in criminal cases.

16. This court has considered Mr. Aboubakar's submission that the lower court case can still proceed to hearing pending the determination of the application for revision as there are other witnesses available to testify, save for PW1 who is required to produce the inventory, which was objected to in the lower court. Since the lower court case is at its infancy, it is only reasonable that this court determines the application for revision first before the lower court case can proceed for further hearing. This court does not have the benefit of witness statements and the inventory in issue so as to confirm that only PW1 will be making reference to it as stated by Counsel for the respondent.

17. This court is of the considered view that failure to grant the prayer for stay of the lower court proceedings may render the application dated 15<sup>th</sup> July, 2020 nugatory. Justice has been equated to a sword that cuts both ways, in favour of an accused person and the complainant. It is no different in this case.

18. My finding therefore is that it is reasonable and just to grant an order for stay of the lower court proceedings in **Mombasa Chief Magistrate's Court Criminal Case No. 1815 of 2019, Republic v Salim Aboud Ali alias Salim Aboud Sultri Salim Abuda Khalid alias Khalid alias Survivor.**

19. Mr. Aboubakar pointed out that his client is nursing gunshot wounds and needs treatment. Since this court has stayed the proceedings in the lower court, I hereby order that the applicant shall be escorted to Coast Province General Hospital for treatment after proper security has been put in place. The arrangements for his treatment and his return to prison must be in line with the applicable Ministry of Health Covid-19 guidelines.

It is soordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28thday of July, 2020. Ruling delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Muthomi, Prosecution Counsel,for the DPP - applicant

Mr. Aboubakar for the respondent

Mr. Oliver Musundi- Court Assistant.