



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HC CRIMINAL APPEAL NO. 38 OF 2017

MUTHANGYA MUSUNZA.....1ST APPLICANT

KALUNDE MUTHANGYA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants, **Muthangya Musunza** and **Kalunde Muthangya** by way of Notice of Motion seek orders as follows:

(i) That there be stay of the proceedings and execution orders dated 15th day of June 2017 in Mwingi Senior Principal Magistrate Criminal Case NO. 262 of 2016 pending hearing and determination of this application.

(ii) That there be stay of the proceedings and execution of orders dated 15th day of June 2017 in Mwingi Senior Principal Magistrates Criminal Case no. 262 of 2016 pending hearing and determination of the appeal herein.

(iii) Any other and/or further relief this Honorable court deem fit to grant in the interest of justice.

2. The application is premised on grounds that; The Applicants were charged with the offence of infringing a child's right to Health care Contrary to **Section 9** as read with **Section 20** of the children Act; pending the hearing of the case the subject child, TM's remains were disposed off. That the prosecution has filed an application to exhume the remains of the child for further investigations as to the cause of death; the court granted the order ex-parte without granting the applicants the right of audience; that the exparte order may be executed and if done the appeal shall be rendered nugatory.

3. The Application is supported by an affidavit sworn by the applicants where he deponed that pending hearing of the case in the lower court, the prosecution made an application to force him to take the child to hospital which application was meant to intimidate them. That the application had constitutional issues but the court overlooked the issue and instead proceeded to make the orders that affected his constitutional rights.

4. Further,they stated that the child faced embarrassment by being taken to hospital by force and after she was treated and discharged she died; and they were condemned unheard when exparte orders were granted.

5. The State through **Learned Counsel, Mamba Vincent** opposed the application. In a replying affidavit he deposed that the Applicants right to fair hearing as envisaged under Article 50 of the Constitution is yet to accrue since charges preferred against them following the exhumation and examination of the child are yet to commence and as such the appellant will be afforded an opportunity to defend themselves. That individual rights guaranteed by **Article 32 (1) of the Constitution** are not absolute but limited to the fundamental freedom envisaged in **Article 24 (1)**, as such the subject child had a personal right as envisaged under **Article 53 (1) (c) of the Constitution**.

6. That the child having died after the applicants failed to take her to hospital the root cause of her demise must be established and after the child died while the case against the applicants was pending the state had to open fresh investigations in the matter hence the application before the Senior Principal Magistrate.

7. The Application was disposed off by way of written submissions. It was submitted that the Applicants were before the lower court having been charged on the **19th day of August 2016**. On the **16th day of June 2017** the DPP prosecuted an application without involving the Applicants. An application by the applicant to set aside the order was dismissed which prompted him to appeal. That Exparte orders that granted the prosecution's agent power to exhume the remains of the deceased were in contention.

8. Further, that orders sought, if not granted will render the appeal nugatory. That there are constitutional issues regarding this matter that

need to be addressed.

9. The Respondent/State on the other hand submitted that following the death of the child after the Applicants were charged with the offence of infringing her rights, the prosecution had to investigate the matter further by ascertaining the cause of her death and decide on whether to prefer other charges. That the Applicants hostility and faith could not make him co-operate with the prosecution. He concluded by stating that the Applicants' rights under **Article 50** of the Constitution are yet to accrue as charges preferred against them are yet to commence.

10. I have carefully considered the application and rival submissions filed by respective counsels.

11. The basis of this application is that the Applicants/Appellants are aggrieved by the order of the learned trial Magistrate who heard an application brought by the Directorate of Public Prosecutions affecting them but they were not given audience. They argue that having filed an appeal against the order of the trial Magistrate, if a stay order is not granted the appeal shall be rendered nugatory. In the case of ***Manilal Jamnadas Ramji V. DPP Crim APPL (Application) NO. 57 of 2013 UR*** the court stated that for a matter to be rendered nugatory, it must be demonstrated inter alia that the prosecution is not undertaken according to the law.

12. The gist of the matter herein is that the Applicants' fundamental rights were not taken into consideration when a decision that affected them was made in their absence and without being given the opportunity to participate in the proceedings, where they were the Accused persons.

13. A Magistrate has the right to order the exhumation of a body for remains of anybody for purposes of investigations (***See the proviso to Section 146 of the Public Health Act***).

The question that the court will be addressing is whether the learned Magistrate was justified in conducting the matter in the absence of the applicant and what procedure should have been adopted.

14. To address the issues, the appeal should be heard and determined. Failure to grant the orders sought would therefore be detrimental to the applicants/appellants as the appeal shall be rendered nugatory.

15. In the result I make orders as follows;

There be stay of proceedings and execution of Orders dated 15th June, 2017 in Mwingi Senior Principal Magistrate Criminal Case NO. 262 of 2016 pending hearing and determination of the Appeal.

16. It is so ordered.

Dated, signed and delivered at Kitui this 21st day of March, 2018.

L. N. MUTENDE

JUDGE