



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC MISC. APPLICATION 42 OF 2018

REPUBLIC.....APPLICANT

VS

YABESH AMORO.....RESPONDENT

RULING

1 The Applicant has filed this application under section 357(1) Criminal Procedure Code seeking stay of proceedings in Nairobi Chief Magistrate's ACC No 28 of 2011 set for hearing on 29/10/18. The said hearing involved the **State vs Francis Emmanuel Oyugi** and the **Yobesh Amoro** (now Respondent).

2 The main ground is that the trial magistrate in a Ruling delivered on 4th July 2018 discharged **Francis Emmanuel Oyugi** under section 163(3) Criminal Procedure Code (CPC).

3 The Applicant being dissatisfied with the said Ruling has filed an appeal (ACEC criminal Appeal No 16 of 2018). Counsel M/s Nyauncho has argued that the State has an arguable Appeal. Should the appeal succeed it will be prejudiced if the proceedings are not stayed. She referred to the case of **R VS J.W.K. Criminal case no 57 of 2009.**

4 The application was opposed by the Respondent. Mr. Oduor submitted that the case was old and 15 witnesses have testified. He said the State had not demonstrated that they would not trace the witnesses in the event of a successful appeal.

5 He argued that there was delay in filing this application since the appeal had been filed on 16th July 2018. Further that the applicant was well protected under section 163(3) CPC as the discharge is not absolute.

6 The procedure in case of lunacy or other incapacity of an accused is dealt with under sections 162-167 CPC depending on the condition. A ruling was made under section 163(3) CPC in respect to one of the accused persons in ACC No 28 of 2011. The State is aggrieved because it wants the case to proceed against both the accused persons.

7 I believe the court hearing the appeal will have to grapple with the issue of the fairness of proceeding with a hearing where a person (not out of choice) is unable to follow or comprehend proceedings. That is exactly what section 167(1) Criminal Procedure Code is all about. The said section provides:

(1) If the accused, though not insane, cannot be made to understand the proceedings—

(a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;

In view of the above, a challenge would come about in the event of a successful appeal how the case would proceed in respect to **Francis Emmanuel Oyugi**, when the case against the Respondent has been finalized.

10 It would be in the interest of justice and best practice to allow the appeal to be heard and determined before the matter in the lower court proceeds.

11 I therefore allow the application and stay the proceedings in ACC No 28/11 for 90 days. The Appeal must be fast tracked.

Signed, dated and delivered this 25th day of October 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE