Mugoh v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 2525 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2525 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E025 OF 2022

LM NJUGUNA, J

MARCH 22, 2023

BETWEEN

TISIANO COSMAS MUGOH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The application for determination before the court is dated November 18, 2022 wherein the applicant sought for orders as enumerated on the face of the application.

2. The application is premised on the grounds on its face and it's supported by the affidavit of the applicant.

3. The applicant herein was charged with two Counts to wit Count I being the offence of giving false information to a person employed in Public Service contrary to section 129(a) of the *Penal Code* with the particulars of the offence being that :

   On June 8, 2020 at Embu Police Station in Embu West Sub County within Embu County informed No.xxxx Cpl. JO, a person employed in the public service as police officer that on the diverse dates between March 9, 2015 and April 7, 2015one Faith Njeri Migwi defrauded him money totaling to 5.6 Million by falsely pretending that she was in a position to supply him with 100x60Kgs bags of Mwea pishori rice, an information he knew or believed to be false, intending thereby to cause the said police officer to arrest and charge the said Faith Njeri Migwi with the offence of obtaining money by false pretence which he ought not to have done if the true state of facts respecting which such information was given had been known to him.

4. On count II: He was charged with the offence of uttering a false document contrary to section 353 of the *Penal Code* and the particulars of the same being that:

On the June 10, 2020 at the Directorate of Criminal Investigations Embu West Offices in Embu West Sub County within Embu County knowingly and fraudulently uttered a forged document namely a copy of Cheque No. 00xxx drawn from Account No. 010xxxxxxxxxx to a Police Officer No. 73331 Cpl. James Opiyo purporting it to be a genuine document issued by Faith Njeri Migwi.

5. On March 15, 2022, the matter came up for hearing when the applicant made an oral application that he was not ready to proceed for the reason that the prosecution had allegedly not served him with committal bundle. It was his case that when he signed the committal bundle previously served upon him by the prosecution, he did so on an assumption that all the documents were in order but the same was not the position as he later discovered. The prosecution in rejoinder argued that all the documents that it was planning to rely on in prosecuting the matter were all served upon the applicant and the same was proved by the applicant appending his signature, a fact that has not been controverted.

6. The trial court after considering both parties' submissions, dismissed the applicant's application. It is that ruling that provoked the appeal before this court. The applicant filed the application dated 18/11/2022 seeking several orders as enumerated therein.

7. The court directed that the application be canvassed by way of written submissions and only the applicant complied.

8. The respondent did not participate in the application herein despite being served.

9. The applicant raised 12 issues for determination which I have summarized as follows: whether prosecution disclosed the documents and /or evidence that it was going to rely on in prosecuting the matter, the appellant submitted that the evidence of PW2 who allegedly was his spouse ought not to have been admitted by the court for the reason that they were still married. Further that, no consent was sought from him to determine whether he had forgone the right to allow PW2 testify against him. The applicant relied inter alia on section 127(2) of the *Evidence Act* and on the cases of *Republic v Maxwell Mwaingolo* [2021] eKLR and *Julius Mwita Range v Republic* [2003] eKLR. In the same breadth, he argued that the evidence by PW1 was fabricated and further, the same was never authored by her and as result therefore, the court ought not to have admitted the same. That the purported document was undated, unsigned and further, did not meet the provisions as stipulated under section 231 (3) (b) of the *CPC*. The applicant contended that for the reason that the evidence by PW2 did not meet the stipulated standards in the quoted provision of law, the same ought not to have been considered by the court.

10. Further, the applicant contested that the court ought not to have considered the evidence by PW1 for the reason that the alleged agreement was not part of the committal bundles supplied to him. That the said agreement having not been part of the documents supplied to him, the best that the learned magistrate ought to have done was to decline its admittance. Reliance in support of the proposition was placed on section 231 of the *CPC.* In reference to item no. 5 of the inventory, the appellant submitted that the court ought to have addressed itself to the specific language that was used in drafting the alleged document. It was his argument that the only language/s that the court ought to use and/or admit documents must either be in English, Kiswahili or a language that the accused person understands. Further, apart from the fact that the said inventory was not written in the language of the court, the same was a forgery in that the cancellations and /or alterations were not countersigned against, and this negated the validity of the said document. He reiterated the fact that the prosecution did not supply him with the full committal bundle and this was contrary to the tenets of a fair hearing.

11. I have considered the application herein, the evidence, the submissions and authorities relied upon by the applicant herein.

12. The applicant has sought before this court orders to stay the proceedings before the trial court and for the reasons inter alia, that PW2 is his wife and she ought not to have been called to testify as she is not a competent witness. Further that, the court should strike out the evidence of PW1 for the reason that the same was given to her by PW2.

13. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, Gikonyo J held that:

> " Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent".

14. Further, in the persuasive authority in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -

> " As I understand the law, whether or not to grant a 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 .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously".

15. In the *Kenya Wildlife Case* (supra), Gikonyo J quoted *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, that:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
>
> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

16. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of

each case. As stated by the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR: -

> " The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay".

17. I have perused the application by the applicant and some of the prayers sought include an order to strike out the evidence of PW2 for the reason that the witness is his wife and as such, an incompetent witness in the matter herein. Further that, the court strikes out the evidence of PW1 for the reason that the same was given to her by PW2.

18. Section 127 (2) (ii) of the *Evidence Act*, which applies to this case provides that " save as provided in subsection 3 of this section [which does not apply here] the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged." As noted in *Evidence for Magistrates*, [1969] by Philip P. Durand (KIA) at page 105, the husband –wife exception is founded on the marriage relationship:

> " Owing to the nature of the marriage relationship, a group of special rule of evidence have endured where one spouse is accused of an offence and the other is a potential witness, either for the prosecution or the defence. These rules involve both competency and compellability as well as the privilege relatively to the non-disclosure of communication during marriage. The relevant section issection 127 Kenya *Evidence Act*".

19. The principles of the husband- wife exception therefore depend on the existence of the marriage relationship between the duo. In the case of *Julius Mwita Range v R*, supra, the Court of Appeal held that:

> " However section 127 (4) defines "husband" and "wife" and it states:
>
> "(4) in this section "husband" and "wife" mean respectively the husband and wife of a marriage, whether or not monogamous, which is binding during the lifetime of both parties unless disclosed according to law, and includes a marriage under native or tribal custom".
>
> We are certain in our minds that the marriage between the appellant.... was a marriage covered under section 127 (4) and thus she was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness. The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available".

20. However, each case is dependant on its own facts and since this court is not dealing with the merits of the appeal at this juncture, it would not be prudent for it to address the merits of the appeal by determining whether the applicant was married to PW2 or not. This is a matter to be canvassed during the hearing of the appeal. Suffice it to state that the applicant has an arguable appeal.

21. It should be remembered that on whether an appeal is arguable, it is sufficient if a singe bonafide arguable ground is raised – see the case of *Stanley Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.

Additionally an arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous – see *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR.

22. On whether the rights of the applicant were breached by the failure on the part of the prosecution to supply it with some documents, again this is a matter that will be determined during the hearing of the appeal.

23. For those reasons, I find that the applicant has satisfied this court that he deserves an order for stay of proceedings pending the hearing and determination of the appeal and I hereby grant the same.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent