



REPUBLIC OF KENYA



**Tumbo v Republic (Miscellaneous Criminal Application E139 of 2023)
[2023] KEHC 18694 (KLR) (Crim) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E139 OF 2023
K KIMONDO, J
JUNE 19, 2023**

BETWEEN

PETER NDERE TUMBO APPLICANT

AND

REPUBLIC RESPONDENT

(Hon. Wandia Nyamu, SRM, dated April 14, 2023 in Milimani Criminal Case 992 of 2014.)

RULING

1. The applicant is aggrieved by the order of the learned trial magistrate, Hon. Wandia Nyamu, SRM, dated April 14, 2023 in Milimani Criminal Case 992 of 2014.
2. The lower court disallowed the applicant's prayer to expunge his evidence which was taken in the absence of his counsel and ordered that the defence case proceeds.
3. Being aggrieved, he lodged a petition of appeal dated April 25, 2023 pleading inter alia, that the learned trial magistrate acted in excess of jurisdiction; and, that the order was a violation of the accused's rights enshrined in article 50 of *the Constitution*. Contemporaneously with the petition, he brought a Notice of Motion for stay of the trial pending the hearing and determination of the appeal.
4. The motion is supported by a deposition of even date. I should add that there is also a further affidavit sworn on 13th June 2023; and, a list of authorities of even date.
5. The application is opposed by the respondent through grounds of opposition dated June 9, 2023.
6. On June 19, 2023, I heard further arguments from both the learned counsel for the applicant and the respondent.



7. I note that the interlocutory appeal is pending for hearing. In view of the orders that I propose to make, I refuse the invitation to comment on the propriety or correctness of the impugned order. But I can safely state the following. The trial in the lower court has been pending since the year 2014. The applicant and his co-accused have now been placed on their defence. The trial court will finally find them either guilty or not guilty. To stay the proceedings at this late stage will only occasion further and unnecessary delays.
8. I am alive that article 165 (6) of *the Constitution* confers the High Court with supervisory jurisdiction over all subordinate courts. I am equally cognizant that the applicant contends that his rights to a fair trial were prejudiced by the impugned order. But those issues fall squarely for determination in the pending interlocutory appeal; or, may even become the subject of a final appeal.
9. An application for stay of proceedings should be entertained by superior courts only in the clearest of cases. I am not persuaded that this is such one case. I am well guided by the Supreme Court in *Joseph Lendrix Waswa v Republic*, Supreme Court Petition No. 23 of 2019 [2020] eKLR. The learned judges were emphatic that except in the clearest of cases, interlocutory appeals should not be entertained by the superior courts. The rationale is self-explanatory: Beyond causing delays, the accused person may eventually be acquitted and the grievances will be all water under the bridge. See also *Thomas Patrick Gilbert Cholmondeley v Republic*, Court of Appeal, Nairobi, Criminal Appeal 116 of 2007 [2008] eKLR.
10. For all those reasons, I find that the applicant's Notice of Motion dated 25th April 2023 is not merited. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of June 2023.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

Mr. Muchiri for the applicant instructed by MB Muchiri & Company Advocates.

Ms. Oduor for the respondent instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

