



**Republic v Wandaka (Criminal Appeal E102 of 2024)
[2024] KEHC 14546 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E102 OF 2024
TA ODERA, J
NOVEMBER 12, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

JOHN WAWERU WANDAKA RESPONDENT

(Being an Appeal against the Judgment of Hon. C.N SINDANI (PM) delivered in Ogembo Magistrate's Court CRIMINAL CASE NO. 976 of 2023 on 11th September, 2023)

RULING

Introduction

1. The Appellant being dissatisfied with the decision of the learned trial Magistrate acquitting the Respondent under section 210 of the criminal procedure code and ordering for the release of the motor vehicles registrations number KCU 893C and KBJ 338W and disposal of the exhibits under the supervision of NEMA and KRA Officials, filed this Appeal vide a Petition dated Appeal on 25th September, 2024 which was based on the following grounds;
 - a. The learned trial magistrate erred denying the appellant an adjournment on 12th August, 2024 without carefully balancing the competing rights of the parties causing the Appellant to prematurely close its case in violation of its constitutional rights as provided under Article 27 and article 50.
 - b. The learned Magistrate in declining the Application for adjournment misapplied the law to the facts by failing to exercise his discretion judiciously in considering all facts of the case and the fact that the Appellant's witnesses were and have always been available and ready to testify throughout the proceedings with one witness who still on oath and yet to be discharged and cross-examined.



- c. The Learned Trial Magistrate erred in law and fact by finding that the Appellant did not establish a prima facie case against the accused person hence prematurely dismissing the Appellant's case under Section 210 of the Criminal Procedure Code yet he was aware that the Appellant had instituted Kisii High Court Misc. Rev. Appl. No E046 challenging its orders of 12th August 2024.
 - d. The Learned Trial magistrate erred in law and fact by contemporaneously issuing orders for release of motor vehicles registration number KCU 893C and KBJ 338W to the Respondent yet they were used in the conveyance of unaccustomed goods hence befitting forfeiture under Section 210 of the East Africa Community Customs Management Act. 2004.
 - e. The Learned Magistrate erred in law and fact by further ordering for the disposal of items held by the Appellant to with 74 drums of ethanol and hides and skins under the supervision of KRA and NEMA yet the items had not been formally produced as exhibits.
 - f. The Learned Trial Magistrate erred in law and fact when he overlooked the High Court's directions issued on the 6th September 2024, directing that the Trial Court's file be placed before the Presiding Judge on the 11th September 2024.
 - g. The Learned Magistrate's conduct of the matter was manifestly unjust and unfair to the Appellant, unreasonably relied on procedural technicalities and the attendant ruling not only undermines public confidence in the justice system but is also unreasonable.
2. The Appellant filed a Notice of Motion Application on 25th September, 2024 which is the subject of this ruling seeking stay of execution of the order dated 11th September, 2024, ordering for the release of the motor vehicles registration numbers KCU 893C and KBJ 338W and disposal of the exhibits. The Application was supported by the Affidavit sworn by Mr. Job Lomechu, a customs officer with KRA.
 3. Mr. Lomechu averred that on 11th September 2024, the trial court rendered the impugned ruling acquitting the respondent under section 210 and ordered for release of the motor vehicles. Prior to the Ruling, on 5th September, 2024 the learned counsel for KRA had filed an Application for review of the trial court ruling delivered on 12th August, 2024 under vacation rule, denying to grant the accused person adjournment. On 6th September, 2024 Justice Ongijo sitting in Migori certified the Application urgent and directed the same together with trial court's file be placed before the High Court sitting in Kisii for purposes of the determination. The learned counsel for the Appellant on 11th September, 2024 tried to seek stay of delivery of the ruling and informed the trial court of the pending proceeding in the High Court but the lower court declined and proceeded to deliver the ruling anyway and acquitted the Respondent consequently rendering the Appellant's Applicant's review Application a nugatory.
 4. Mr. Lomechu, lamented that the complainant immensely aggrieved by the decision rendered on 11th September, 2024 instructed the ODPP to file an Appeal against ruling. In order to preserve the Appeal he decided to seek stay of execution of the order directing the complainant to release the motor vehicle and disposal of the exhibits.
 5. In Response the respondent John Wandaka Waweru filed a replying Affidavit dated 14th October, 2024, wherein he averred that the application was unfounded and an abuse of the court process. He contended that is the beneficial of the two motor vehicle detained at KRA offices in Kisumu under the instruction of Job Lomechu. He averred that he did make an application seeking the release of the motor vehicle which were granted but Mr. Lomechu declined to obey the court order and release the motor vehicle to him.



6. He contended too that the ODPP were granted sufficient time to prosecute their case and therefore the Application and the Appeal lack merit. He decried that the motor vehicles have been in custody since 17th May, 2023 to date and that this application was one of the many ways the applicant has been employing to punish him. He argued that the Applicant has not demonstrated why the motor vehicles should continue being detained for that long until the Appeal is heard. He decried that he acquired the two motor vehicles through a loan facility and there is a risk of him defaulting if the vehicles continue to be detained. He decried too that he had incurred a loss of 1, 440,000/= for the 16 months the motor vehicles have been in detention. He argued that there was no likelihood that the Appeal the Appellant has lodged would succeed given that they did shoddy investigations leading to the trial court acquitting him and ordering for the release of the motor vehicle. He also undertook to have the motor vehicle produced before the court so that he can get it from there since the respondents have disobeyed court order.
7. In order to dispose of the Application this court directed the parties to file their written submissions. The parties did file their submissions which I have considered in my determination below.

Analysis And Determination

8. Having considered the Application herein, the response thereto, the record of the trial court especially the ruling of the trial court, the petition of Appeal and the submissions of the parties with respect to this Application I find that the sole issue of determination is whether the Appellant is entitled to grant an order of stay of execution of the order of the trial court directing it to release the Respondents trucks pending the hearing and determination of the appeal.
9. Grant of stay of execution is a discretionary and the court in exercising that discretion needs to be satisfied that the appeal or intended appeal is not frivolous and that unless stay is granted, the same may turn out to be an academic exercise if successful. The exercise of that discretion has been subject to many decisions and as a result principles have been developed to guide courts in the exercise of the discretion to grant a stay of execution. In the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji* [2014] eKLR the Supreme Court settled the principles for grant of stay of execution when it stated inter alia;

“The principles to be considered before a Court of law may grant stay of execution has been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) The appeal or intended appeal is arguable and not frivolous; and that
- (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) That it is in the public interest that the order of stay be granted.”

10. Before making a determination as to whether the Appeal is arguable and not frivolous and whether it is in the Public interest that the same be granted it is important to note that section 348A of the *Criminal*



Procedure Code under which the DPP is granted a right of appeal in criminal trials, only applies to acquittal, order for refusal or dismissal of charge. It stipulates as follows:

“348A. Right of appeal against acquittal, order of refusal or order of dismissal

- (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.
- (2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.”

11. I have perused the petition of Appeal annexed to this Application and I have confirmed the Appellant contests the acquittal of respondent under section 210 of the CPC. It is therefore outright that Appeal is rightly before this court as stipulated under section 348A of the CPC.
12. Having concluded that the Appeal by the ODPP is properly before this court under section 348A it is now important to go into an in depth analysis as to whether the Appeal is arguable, whether it will be rendered a nugatory if stay is not granted and whether it is in public interest that stay be granted.
13. The Appellant contends in his Petition of Appeal that the learned trial magistrate erred denying it an adjournment on 12th August, 2024 without carefully balancing the competing rights of the parties causing the Appellant to prematurely close its case in violation of its constitutional rights as provided under Article 27 and Article 50 of the Constitution. The Appellant also equally decried that by declining grant the adjournment the learned trial magistrate failed to exercise his discretion judiciously by considering all facts of the case and the fact that the Appellant’s witnesses were and had always been available and ready to testify throughout the proceedings with one witness who still was on oath and was yet to be discharged and cross-examined. The respondent in his response contend that the applicant squandered their chance to call witness.
14. Without going into the merits and demerits of the appeal, it suffices to say here these are arguable grounds of appeal as the right to be heard is fundamental. Having so held the appellant has an arguable Appeal.
15. On whether the appeal will be rendered nugatory if the stay is not granted. Section 214 (3) (a) of the East African Community Customs Management Act, 2004 provides that where anything liable to forfeiture under this Act has been seized, then if any person is being prosecuted for the offence by reason of which the thing was seized, the thing shall be detained until the determination of such prosecution, and dealt with in accordance with Section 215. In this case, it was alleged that the Respondent’s lorries were used in conveying the allegedly uncustomed goods. Therefore, apart from the goods which were being conveyed, the vehicle which was being used for that purpose would be liable to forfeiture and thus should remain in custody. If this court were to allow for the release of the motor vehicles to be released and later find the Appeal is merited then it would be acting contrary to the dictates and provisions of 214 (3) (a) a move that will occasion great injustice and the appeal will be rendered nugatory.
16. On whether it is in the public interest that the stay be granted, The Director of public prosecutions(DPP) is the chief Government prosecutor and thus acts on behalf of the State. In this matter the DPP is the appellant on behalf of Kenya Revenue Authority a public body who is the



complainant herein. The respondent was charged with being in possession of restricted goods contrary to Excise and Duty Act 2015

17. From the forgoing therefore I find that the Application is merited and thus proceed to allow it.
18. The matter be expedited in the interest of justice.
19. Record of appeal be filed and served within 30 days from today,
20. Mention on 10.12.24 before Deputy Registrar for compliance.
21. It is so ordered.

T.A ODERA

JUDGE

12.11.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Bwondika for the Respondent

N/A for the Appellant.

Oigo – Court Assistant

