



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 6 OF 2020

ALFRED KIPTOO KETER.....1ST APPELLANT

SURJEEV KAUR BIRDI ALKAS SONIA.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Ruling of Hon. K. Bidali CM in

Naivasha CMCR No 742'B' of 2015 delivered on 13th February, 2020)

RULING

Background and parties, representations

1. This application, which was filed under urgency, seeks the following orders:

“b) THAT pending the hearing and the determination of this application, this Honourable Court be pleased to issue an interim order of stay and/or injunction staying proceedings of Naivasha Criminal Case No. 742 ‘B’ of 2015 in Naivasha Chief Magistrate’s Court and/or restraining the 1st Respondent from undertaking, and/or proceeding with Naivasha Criminal Case No. 742 ‘B’ of 2015.

c) THAT pending the hearing and the determination of the Appeal herein, this Honourable Court be pleased to issue an interim order of stay and/or injunction staying proceedings of Naivasha Criminal Case No. 742 ‘B’ of 2015 in Naivasha Chief Magistrate’s Court and/or restraining the 1st Respondent from undertaking, and/or proceeding with Naivasha Criminal Case No. 742 ‘B’ of 2015.”

2. The application was triggered by the lower court’s ruling on 13th February, 2020 in CMCR No. 742B of 2015 admitting certain electronic evidence tendered by the prosecution. Dissatisfied with the ruling, the Applicant has filed an appeal in this court against the said ruling. Pending this ruling and the said appeal on the ruling, the applicant seeks that an order of stay of the lower court’s proceedings be granted. The lower court is scheduled to continue with the hearing on 2nd and 3rd November, 2020.

3. The Applicant’s submissions are summarized as hereunder.

4. First that to allow the proceedings in the lower court to continue with the contested evidence on record would cause him hardship and prejudice. See **Reliance Bank Ltd v Norlake Investment Ltd [2002] EA 277**.

5. Secondly, the Applicant submits that their situation contesting the admissibility of the said evidence is an exceptional circumstance whereby an appeal on an interlocutory decision may be allowed. They cite the recent Supreme Court decision in **Joseph Lendrix Waswa v Republic [2020] eKLR** where the Court gave guidance on the previously rare practice of permitting a right to appeal against interlocutory decisions of a court in criminal trials. The Supreme Court stated in **Lendrix**:

“However exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

a) Where the decision concerns the admissibility of evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case.

b) When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal.

c) Where the decision entails the recusal of the trial court to hear the cause.” (Emphasis added)

6. In submissions, the Applicant places himself within the rubric of paragraph (a) above in respect of admissibility of evidence. He argues that the evidence which was admitted in the lower court was adduced by the prosecution’s star witness. He states that the electronic evidence consisted of a video, produced pursuant to a certificate of evidence made under improper circumstances.

7. He argues that if the trial court continues with the proceedings it may pronounce itself upon that evidence to the prejudice of the applicant and the appeal herein which would be rendered nugatory. Further, he submits that there is no requirement for him to show that the appeal would definitely succeed, but only that it has very high chances of succeeding. On these points he cites **Retreat Villas Limited v Equatorial Commercial Bank Limited & 2 Others [2007] eKLR** and **Dennis Mogambi Mong’are v Attorney General & 3 Others [2014] eKLR**

8. The 2nd Respondent is a co-accused of the Applicant in the criminal trial in the subordinate court. He partly supports and partly opposes the application. He made oral submissions through counsel.

9. He supports the application in that he considers that the subject video constitutes extremely important evidence and that being so crucial it is potentially catastrophic to the prosecution’s case if expunged. He concedes that it is not in all matters where admissibility is in issue that a stay of proceedings should be granted.

10. In this case, the 1st Respondent asserts that the subject video was adduced without proper compliance with **Section 106B of the Evidence Act**, and when the issue was raised, the state hurriedly and improperly made an attempt to comply with the said provision. Thus the appeal lodged by the Applicant has great chances of success.

11. Where the 1st Respondent opposes the application is in the fact that the trial in the lower court has been running for the last five (5) years. Thus the 1st Respondent has, as it were, the albatross of the charges against him hanging around his neck, and wants that the trial should be expedited and concluded. He feels that his right to expeditious administration of justice hangs in the balance.

12. The DPP opposes the application. His contentions are as follows: that the witness who introduced the subject video is not the State’s star witness and that the State’s case does not hang upon that evidence; that the State has other critical witnesses who need not rely on the video evidence sought to be excluded; that the said remaining witnesses are due to give evidence on 2nd and 3rd November, 2020; that the criminal case has been pending for five years and the state does not wish to delay it further in light of **Article 50 (2) (e) of the Constitution** on expeditious trials. In any event, he argues, the subject evidence is not essential to prove the charges and is not mentioned in them.

13. Further in written submissions, the DPP submits that there are no exceptional circumstances pursuant to which the stay should be granted. Counsel argues that where the delay in expectation can be unjustifiable the imposition of stay should be the exception rather than the rule; that stay of criminal proceedings is generally made very sparingly. He cited **Goddy Mwakio & Another v Republic [2011] eKLR**; **Wycliffe Oparanya Ambetsa v the Director of Public Prosecutions & Anor. Petition No. 14 of 2016 CA**; **Evans Odhiambo Kidero v Director of Public Prosecutions [2020] eKLR Criminal Revision No. 1 of 2020**.

14. With regard to the alleged violation of the Applicant’s fundamental rights, the DPP argued that no such rights have been specifically pleaded (**Anarita Karimi Njeru v Republic (1976-1980) KLR**); that it is for the Applicant to prove any such violation (**Leonard Otieno v Airtel Kenya Limited [2018] eKLR**). He also cited a number of authorities in which the courts have held that it is not for the court to stop the prosecution by the DPP or using the DPP’s constitutional mandate to investigate and undertake prosecutions within his discretion (**Attorney General v Attorney General & 3 Others Ex parte Thomas Nganga Munene (2014) Petition 166 of 2013**; **Hon James Ondicho Gesami v Attorney General & 2 Others, Petition No. 376 of 2011**, Nairobi. He concluded by conceding that although the High Court may stop proceedings where they are oppressive, vexatious and an abuse of the court’s process and a fundamental breach of fundamental freedoms, such power must be exercised sparingly and in the interest of the public.

Analysis and determination

15. Having carefully considered the parties’ submissions and the documents placed before me, I note that it is imperative that I avoid going down the slippery slope of analysis that may lead me to discuss the subject matter of the pending appeal. The only question is whether the stay sought should be granted.

16. There is no doubt that following the **Lendrix Case**, there is a clear power vested in the High Court to stay proceedings where exceptional circumstances are evident. As I understood it, the video evidence which is disputed is the subject of contestation because of the manner in which the certificate for its production was brought to court leading to the Video/CD being admitted.

17. I also note that the video evidence constitutes material contained in the CD and not yet disclosed to parties unless and until it is played out to them. So that the admission of the video is the gateway for it to be played out in court for consideration by the trial magistrate. There is no suggestion that the content of the video has yet been played out and disclosed to the court.

18. In this type of situation, this court must always balance the rights and interests of parties and the public interest in the administration of justice. In **Lendrix** the Supreme Court citing **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** restated the importance of expeditious dispensation of justice as a critical component that must always be at the

forefront of the court's determinations. The court in fact stated that a party to proceedings has a "legitimate expectation that when they seek justice or are the subject of criminal proceedings, the same will be dispensed timeously."

19. The ultimate conclusion of the Supreme Court on the right of appeal against interlocutory decisions in the **Lendrix Case** is at paragraph 94 which reads as follows:

"Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred and await the final determination by the court." (Emphasis included by the Supreme Court).

20. The question then is whether the present admissibility contest is so exceptional to the point where the court must necessarily stay the lower court's proceedings.

21. I have already indicated the nature of the evidence admitted. It is a video. In the ruling of Hon. P. Gesora dated 30th March 2017 which was attached to the application herein, he stated that there was evidence that the footage which was captured was sought to be adduced without a certificate to authenticate it. Thus he stated:

"This fulfilment has to be met notwithstanding that another analyst had it burned into CD form.

I also hold that an attempt to play it without the certificate even at this stage where it is stated that the witness wishes to mark it for identification is not proper."

22. Following the challenged production of the certificate of authentication, the trial court on 13th February, 2020 in the Ruling of Hon. Bidali, stated:

"I have also perused the ruling delivered on 30th March, 2017 and the proceedings that followed. It is my understanding that the Court found that the playing of the subject without a certificate as prescribed under Section 106 (b) would not be proper. As the said certificate is now available, I hold that the circumstances have since changed. It appears to me that the prosecution has since complied with the court's directions; case to proceed."

23. This being the impugned ruling in the appeal, I refer to it here only to provide the background for the contest to show that the footage or evidence in the said video/CD has not been played. The importance of making this observation is to elucidate that the trial court has not yet seen the video and therefore though the CD may have been admitted, its footage has not yet been played. That CD/video can therefore be readily excised or expunged or otherwise dealt with without prejudicing the court's mind or the Applicant's case.

24. In my view, and taking into consideration the importance of expeditious disposal of the proceedings, I think the appropriate orders to make in this application include an order to isolate the CD whilst allowing the proceedings to be expedited without leading to any prejudice to the Applicant or the other parties.

25. This means that I am inclined and hereby make the following orders:

- 1) The contested evidence, namely the CD and the footage therein, are hereby stayed from use in the trial court pending the determination of the appeal.
- 2) The proceedings in the trial court may proceed with prosecution witnesses up to conclusion of the prosecution case, provided that the trial court shall not rule on whether there is a case to answer until the appeal is determined.
- 3) For clarity, it is directed that until determination of the appeal, no prosecution witness may refer to or be referred to the CD or the contested evidence in it.
- 4) The appeal shall be fast tracked within the next 90 days.
- 5) Orders accordingly.

Administrative directions

26. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

27. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

28. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 2nd Day of November, 2020.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Karuri for the DPP
2. Mr. Obae holding brief for Mr. Dingi 1st Appellant
3. No representation for 2nd Appellant
4. Court Clerk - Quinter Ogutu