

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.156 OF 2016

(An Appeal arising out of the Ruling by J.M. Omido (MR) – PM delivered on 25th November 2016 in Milimani CM. Private Prosecution Case No. No.1 of 2014)

STEPHEN JOSEPH VAZ.....1ST APPLICANT

QUEENIE PHILOMENA VAZ.....2ND APPLICANT

VERSUS

GLADY’S ROSE FERNANDES.....RESPONDENT

RULING

The Respondent raised a preliminary objection to the appeal that the Applicants intend to lodge before this court on two grounds; firstly, that the court lacks jurisdiction to entertain the application because the Applicants are improperly before this court as they lack the requisite jurisdiction to file such an appeal against the decision of the Honourable Magistrate to grant the Respondent leave to institute private prosecution. The other ground is that the Applicants lack *locus standi* to lodge an appeal against the decision of the Honourable Magistrate granting leave to the Respondent to institute private prosecution. In response the Applicants contend that under **Article 50(2)(q)** of the **Constitution**, they have a right to appeal to this court to challenge any decision of the Magistrate’s Court that may result in criminal prosecution being instituted against them.

A preliminary objection is raised on the understanding that the facts and the applicable law relating to the subject matter of the contest are not disputed. In the present application, it is clear that there is no agreement as between the Applicants and the Respondent in relation to the applicable law and what constitutes the agreed facts. Further, it is clear to this court that an issue that looms large in these proceedings is the question, whether the Director of Public Prosecutions, who has the constitutional mandate to prosecute all criminal cases under **Article 157(6)** of the **Constitution** should have been included as a party in the proceedings from the day the Respondent filed the application seeking the leave of the Magistrate’s Court to institute private prosecution. That issue can only be properly canvassed if the application is heard on its merits.

This court is therefore of the considered view that the Applicants cannot be denied audience at the High Court from ventilating what they consider infringement of their fundamental right not to be prosecuted. **Article 50(2)(q)** of the **Constitution** says so. The issues that the Respondent raised in the preliminary objection are issues which ought to be raised when the substantive application is heard. Since the promulgation of the 2010 Constitution, the courts are required to lean towards determining matters on merits rather than on mere procedural technicalities (See **Article 159(2)(d)** of the **Constitution**). The issue before this court is whether the grievance that the Applicants have is subject to be considered, and if successful, remedied by this court. The answer to that question is an emphatic yes. The Applicants cannot be shut of the seat of justice merely because the procedure they have used to approach the court is questioned. This is more so where the right of liberty of an individual is involved.

In the premises therefore, this court is of the view that the preliminary objection raised by the respondent lacks merit and is hereby dismissed. The application shall proceed to hearing on its merit. The order

staying proceedings by this court shall remain in force until the hearing and determination of the application. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JANUARY 2017

L. KIMARU

JUDGE