Mutune v Republic (Criminal Application E290 & E292 of 2024 & Criminal Appeal (Application) E124 of 2024 (Consolidated)) [2025] KECA 496 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 496 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPLICATION E290 & E292 OF 2024 & CRIMINAL APPEAL (APPLICATION) E124 OF 2024 (CONSOLIDATED)

PO KIAGE, WK KORIR & JM NGUGI, JJA

MARCH 21, 2025

BETWEEN

TITUS MUTUNE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being applications to be joined as an interested party and an application for stay of execution and proceedings pending the hearing and determination of an appeal from the ruling and/or decree of the High Court of Kenya at Nairobi (Kimondo, J.) dated 25th July 2024 in HCCRC No. E074 of 2022)

RULING

1. Titus Mutune, who is the applicant in Criminal Application No. E290 of 2024, Volker Edambo, Josphat Boke Sensera and James Rono, who are the respective 1st to 3rd applicants in Criminal Application No. E292 of 2024, and Benjamin Kipkosgey Koima and Titus Yoma, who are among the named respondents in the applications, have been charged before the High Court at Nairobi in Criminal Case No. E074 of 2022. They are yet to take plea. Owing to the inelegant titling of the applications, we will, for lack of a better word, refer to the four applicants and these two respondents as "suspects". The National Police Service ("NPS") is the applicant in Criminal Appeal (Application) No. E124 of 2024. In addition to the application by the NPS to join the appeal, all the applicants seek to stay the proceedings in the aforesaid criminal case. The three applications were consolidated with the consent of the parties.

2. Before going into the details of the applications, it is important to highlight what has brought the applicants and the NPS before this Court. Following the declaration of the presidential results in the 2017 general elections, violence erupted in, among other places, the informal settlement of Nyalenda in Kisumu. Police were called to quell the violence. As a result, a baby called Samantha Pendo ("Baby

Pendo") lost her life in the skirmishes. Other civilians were also killed; maimed; raped and tortured. An inquest was conducted into the cause of her death, and upon conclusion of the inquest, it was determined that police officers, who included the suspects, were criminally liable for the death of Baby Pendo. The findings were forwarded to the Director of Public Prosecutions ("DPP") for appropriate legal action. On 26th October 2022, the DPP filed an information in the High Court, indicting 12 police officers, among them being the suspects, with multiple counts of murder, rape and torture being crimes against humanity under sections 6(3)(a) & (b) and 7(1)(f) of the *International Crimes Act*, as well as Article 28(b) of the Rome Statute of the International Criminal Court. One of the named victims in the information was Baby Pendo.

3. The suspects previously sought conservatory orders from the High Court to restrain the Republic from arresting or charging them. However, on 21st November 2022 this request was dismissed on the ground of mootness. Another application by the suspects aimed at certifying the matter as raising significant legal questions to be heard by an uneven number of Judges, as stipulated in Article 165 (4) of *the Constitution*, was also dismissed in a ruling delivered on 18th January 2024. However, the question as to whether the suspects should stand trial, which was one of the prayers in the application, was reserved and later dispensed with through a ruling delivered by Kimondo, J. on 25th July 2024. That is the ruling the suspects have appealed against in Nairobi COA Criminal Appeal No. E124 of 2024.

4. In the impugned ruling, Kimondo J. determined that the suspects had failed to prove that their rights under Articles 27, 28, 29, 47, 48, 50, and 73 of *the Constitution* had been violated merely by the decision to charge them or by the nature of the charges preferred against them. The learned Judge dismissed the suspects' petition dated 9th December 2022 and a notice of motion dated 20th December 2022 and proceeded to order the suspects to plead to the charges. The learned Judge recused himself from presiding over the criminal trial and ordered that the trial be conducted by the next senior Judge in the Criminal Division, except Muteti, J., who previously prosecuted the criminal matter.

5. Titus Mutune, filed a motion dated 24th September 2024 in Misc. CR App. No. E290 of 2024 seeking to stay the execution of the ruling and decree by Kimondo, J., and also stay the proceedings in Nairobi High Court Criminal Case No. E074 of 2022. The application, which is supported by an affidavit sworn by the applicant, is premised on the grounds that the applicant, together with others, were set to take plea in the criminal case on 3rd October 2024 following the impugned ruling. He averred that there are no rules or regulations to guide proceedings in a trial of international crimes under the *International Crimes Act*.

6. The applicant deposed that there is glaring conflict between the municipal laws and the Rome Statute and its rules of procedure, and this being the first case of its kind in Kenya, his constitutional rights to a fair hearing will be infringed for being tried under a law that is in conflict with *the Constitution*. According to the applicant, if he takes plea before the appeal is determined, he will be prejudiced, and the appeal will be rendered nugatory as he will be interdicted immediately as per the provisions of the National Police Standing Orders. Further, that this will affect his income, and even if his appeal succeeds, his reinstatement is not assured as another person will have taken over his position. According to the applicant, stay orders will not prejudice the respondents, and it is, therefore, in the interest of justice that the orders sought be granted.

7. Similarly, Volker Edambo, Josphat Boke Sensera, and James Rono filed a notice of motion dated 27th September 2024 in Misc. Cr. App. No. E292 of 2024 through which they seek an order staying the proceedings in Nairobi High Court Criminal Case No. E074 of 2022 and any consequential orders arising from the impugned ruling by Kimondo, J. They averred that they are dissatisfied with the impugned ruling and disclosed that they have filed an arguable appeal, which raises important and

unprecedented issues of law concerning the violation of their rights as protected under Articles 25 and 50 of *the Constitution*. Further, that their appeal questions whether the charges disclosed in the information dated 26th October 2022 and presented in Court on 27th October 2022 meets the legal threshold for crimes against humanity as enshrined under sections 6 (3) (a) & (b) and 7 (1) (f) of the *International Crimes Act*, 2008 and Article 28 (b) of the Rome Statute.

8. It is the applicants' case that there is real risk and imminent danger of violation of their constitutional rights, and unless orders of stay are issued, their appeal will be rendered nugatory. Specifically, it is their averment that being public servants, they will be interdicted upon taking plea and if the criminal case against them is not halted, they stand a risk of facing proceedings that are null and void ab initio. This, they assert, will render the appeal nugatory while also continuing the infringement of their fundamental rights and freedoms as guaranteed in Articles 25 and 50 of *the Constitution*. They posit that since, according to them, no prejudice shall be occasioned to the respondents if the orders sought are granted, it is only fair, just, equitable, and in the interest of justice that their application be allowed.

9. The third application is the notice of motion dated 19th December 2024 filed by the NPS in Criminal Appeal No. E124 of 2024, firstly, seeking to join the appeal as "an interested party", and secondly, seeking stay of proceedings in Nairobi High Court Criminal Case No. E074 of 2022 - Republic vs. Titus Yoma & 11 Others pending the hearing and determination of the appeal.

10. In support of the application for joinder, the applicant avers that as per the provisions of *the Constitution* and the *National Police Service Act*, the doctrine of command responsibility upon which the charges in Nairobi High Court Criminal Case No. E074 of 2022 are premised, does not apply to police officers. According to the applicant, it is uniquely placed to demonstrate the doctrine's implications on the National Police Service structure, national security, and international obligations, which transcend the interests of the suspects. It is deposed that the involvement of the NPS will provide a fresh perspective on how the command structure functions in relation to the command responsibility doctrine, given that the current disciplinary procedures for senior police officers do not consider them criminally responsible for the actions of their juniors during operations. The NPS' position is that it will be prejudiced if not included in the matter, as the Court's decision will affect its command structure. Additionally, it is contended that the outcome of the appeal may alter the NPS's disciplinary guidelines, command structure, and operations. The applicant avers that it will be prejudiced if a decision affecting its internal policies and disciplinary procedures will be made in its absence.

11. Benjamin Kipkosgey Koima swore a replying affidavit on 9th December 2024 expressing his support for the issuance of an order staying execution of the impugned ruling and the criminal trial.

12. In opposition to the application, the Republic relied on a replying affidavit sworn on 5th February 2025 by Victor Juma Owiti, a Principal Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP). In response to the application for stay of the criminal trial, Mr. Owiti avers that the same is incurably incompetent because it does not fall within the ambit of rule 5 (2) (a) of the Court of Appeal Rules and also for the reason that the supporting affidavit is undated. In respect to the substance of the application, he deposes that the application does not meet the threshold for the grant of the orders of stay of execution of the impugned ruling or the criminal proceedings. He contends that the applicants have not established that their appeal is arguable or that it will be rendered nugatory if the orders sought are declined. Mr. Owiti further avers that since the applicants face a joint information before the trial court with other persons who have not appealed, granting an order of stay would lead to an unreasonable delay in the institution and continuation of the prosecution of the criminal case.

13. Concerning the application for joinder by the NPS, the Republic opposes it on the grounds that the applicant has not met the threshold for joinder because it is not subject to the criminal charges before

the trial court; is not directly affected by the criminal trial; and has no identifiable stake or legal interest in the proceedings. It is also averred that the NPS is not a necessary party for the complete settlement of the questions in issue with the appeal, and it stands to suffer no prejudice should it not be allowed to join the proceedings. Mr. Owiti concludes that all the applications are for dismissal as they are bereft of merit and are an abuse of the Court process.

14. On behalf of the Independent Policing Oversight Authority (IPOA), Benedict Otieno, the investigating officer in respect of Nairobi High Court Criminal Case No. E074 of 2022, swore a replying affidavit on 7th February 2025 in opposition to the applications. Concerning the application for joinder, he averred that the NPS had not met the threshold for admission to the appeal since it has no identifiable interests in the proceedings. Further, that the Inspector General of the NPS was the 4th respondent in Nairobi Misc. Criminal Application No. E033 of 2023 and, therefore, had the opportunity to present the NPS's case before the Superior Court. It was the IPOA's case that the issues the NPS intends to raise have already been agitated by the suspects before the High Court and that the applicant will not suffer any prejudice if its prayer to join the proceedings is declined. As for the application for stay of proceedings, the IPOA restated the views of the Republic, which we need not rehash.

15. In the affidavit sworn on 20th February 2025 by Victor Kamau, the Deputy Director/Head of the Legal Services Directorate, the Kenya National Commission for Human Rights (KNCHR) made similar averments to those of the Republic and IPOA, adding that the application for stay of proceedings is incompetent because the criminal proceedings against the suspects are yet to take off, and there are therefore no proceedings to be stayed.

16. On its part, Utu Wetu opposed the applications through the affidavit sworn on 25th February 2025 by Christine Alai, the Chairperson of the Board of Trustees of Utu Wetu Trust. This party also filed a Notice of Preliminary Objection dated 24th February 2025. Utu Wetu's position is that the applications are incompetent as there is no proper notice of appeal or appeal on record, and therefore, the Court lacks jurisdiction to entertain them. As regards the substance of the application, Utu Wetu put forward arguments similar to those of the Republic.

17. The International Justice Mission (IJM), the Law Society of Kenya (LSK) and Titus Yoma did not file any response to the applications at hand.

18. When the consolidated applications came up for hearing on 26th February 2025, learned counsel, Mr. Nelson Havi and learned counsel, Mr. Moses Munoko appeared for Titus Mutune. Volker Edambo, Josphat Boke Sensera, and James Rono were represented by learned counsel, Mr. Cliff Oduk, learned counsel Mr. Innocent Muganda, and learned counsel, Ms. Jane Wanjiru, while learned counsel Mr. Erick Gumbo, learned counsel Mr. Moses Kipkogei, and learned counsel Mr. E. Ouma appeared for the NPS. Principal Prosecution Counsel, Mr. Victor Owiti appeared for the Republic, with learned counsel, Mr. Kinoti appearing for IPOA. Learned counsel, Abdikadir Osman, appeared for the KNCHR, while learned counsel, Mr. Willis Otieno represented Utu Wetu. The IJM, Benjamin Kipkosgey Koima, the LSK, and Titus Yoma were respectively represented by Ms. Betty Wambua, Ms. Kiget holding brief for Mr. Arusei, Mr. Abner Mango, and Mr. Makundi, all learned counsel. The applications were canvased by way of written submissions as well as oral arguments.

19. Relying on the submissions dated 8th November 2024, learned counsel Mr. Nelson Havi cited Michael Sistu Mwaura Kamau vs. Director of Public Prosecutions [2018] KECA 487 (KLR) and Wainaina & Another vs. Republic [2023] KECA 727 (KLR) in appreciation of the scope and principles undergirding the issuance of an order of stay under rule 5 (2) (b) of the Court of Appeal Rules with respect to criminal cases. Counsel proceeded to submit that the applicants had established several

grounds of appeal, thereby surmounting the arguability test. Still addressing this limb, counsel referred to the case of Cosmas Stephen Nabungolo vs. African Banking Corporation Ltd [2018] eKLR to urge that an arguable appeal is one that is not frivolous and has at least one ground of appeal that meets the required threshold. Counsel further referred to the grounds enumerated in the motion to highlight the arguable aspects of the appeal.

20. Turning to his arguments on the nugatory aspect of the application, counsel referred to Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227 for what it means for an appeal to be rendered nugatory and how an appeal would be rendered as such. Counsel proceeded to submit that if the orders sought are not granted, then upon taking plea, the applicants will be interdicted, leading to loss of their income and promotion and, in the process, subjecting them to emotional and financial distress and stigma. According to counsel, these prejudicial outcomes will be irreversible. Counsel relied on Re Estate of Harish Chandra (Deceased) [2021] eKLR to submit that the damage to reputation and loss of promotion and opportunities due to interdiction qualify as reasons for the Court to intervene with an order staying the proceedings. Urging for the issuance of the orders sought, counsel referred to the holding in Stanley Munga Githunguri vs. Republic [1986] eKLR for the proposition that a person facing a criminal trial and possible conviction need not wait for the perilous outcome if he can countermand the same by an order of prohibition.

21. Finally, Mr. Havi indicated his client's support for the application by the NPS to join the appeal.

22. Learned counsel Mr. Muganda for Volker Edambo, Josphat Boke Sensera, and James Rono relied on written submissions dated 6th November 2024. Counsel commenced the submissions by stating that his clients were in support of the application for joinder by the NPS.

23. While addressing the preliminary objection, Mr. Muganda urged that this is a matter arising from criminal proceedings, hence, rule 84 of the Court of Appeal Rules was inapplicable.

24. Turning to the substance of the application, Mr. Muganda reiterated the grounds in support of the same and the grounds of appeal as enumerated in the application and urged that we find the appeal to be arguable. Referring to Samuel Otieno Obudo vs. DPP & 6 Others [2017] eKLR, counsel submitted that an order of stay is issued to preserve the status quo or to prevent interim harm and to ensure that an appeal is not rendered an empty ritual. Counsel cited the Supreme Court holding in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR to urge that an order of stay of proceedings is available in appropriate cases.

25. Addressing the issue as to whether the appeal is likely to be rendered nugatory should the proceedings not be stayed, counsel submitted that being public servants, the applicants risked being interdicted, resulting in the infringement of their constitutional rights, and the prejudice suffered cannot be reversed.

26. Learned counsel Erick Gumbo for the NPS did not file written submissions but filed a case digest. Submitting orally regarding the preliminary objection raised by the respondents, Mr. Gumbo urged that this being a criminal-related matter and rule 60, and not rule 84 of the Court of Appeal Rules, is the applicable provision.

27. In support of the application by the NPS to join the appeal, counsel urged that the appeal concerned the applicability of the command responsibility doctrine and that no party was better placed to address the issue other than the NPS. According to counsel, the NPS was the only party that was better placed to address the Court on the import and impact of the command responsibility doctrine on its administrative structure and operations. Counsel further submitted that the charges preferred against the suspects will adversely affect the operations of the NPS because senior officers will shy away from

issuing orders and directives to their juniors for fear of being reprimanded. Still urging the need to allow the NPS to join the appeal, counsel submitted that his client will bring forth new arguments on the link between the operation orders and the command responsibility doctrine. Further, that at the centre of the criminal trial are occurrence books in the custody of the NPS; hence, its presence in the trial is necessary.

28. We did allow Mr. Gumbo to address us on the NPS' application for stay orders with a view to considering the arguments should we allow the application for joinder. Counsel straightaway delved into the question as to whether the appeal is likely to be rendered nugatory should the proceedings not be stayed. He urged that if plea-taking is allowed to proceed, it will alter how the NPS operates as senior officers will shy away from issuing orders. Pointing to sections 50, 55, and 88 of the *National Police Service Act*, counsel submitted that allowing the criminal trial to proceed will erode those provisions that hold all officers liable for their actions. Counsel additionally submitted that allowing plea to be taken would stifle the operations of the NPS, which is against public interest and may result in lawlessness. Counsel urged that no prejudice would be suffered by anyone should plea be deferred to allow the court system to settle the salient issues surrounding the command responsibility doctrine in Kenya.

29. Benjamin Kipkosgey Koima and Titus Yoma made submissions similar to those of the applicants.

30. Principal Prosecution Counsel Mr. Owiti relied on submissions dated 4th February 2024 to urge the Republic's opposition to the applications. On a preliminary point, counsel submitted that the applications as framed are fatally defective, denying the Court the requisite jurisdiction. Counsel holds the view that the jurisdiction of the Court under rule 5 (2) (a) of the Court of Appeal Rules is limited to applications for release on bail or suspension of the execution of warrants of distress and that the error of invoking Court's power under the provision cannot be cured by Article 159 (2) of *the Constitution* or sections 3A and 3B of the *Appellate Jurisdiction Act*.

31. Turning to the application by the NPS to join the appeal, counsel submitted that the application did not meet the threshold set by the Supreme Court in Communications Commission of Kenya and 4 Others vs. Royal Media Services Limited & 7 Others [2014] eKLR and Francis Karioko Muruatetu and Another vs. Republic & 5 Others [2016] eKLR. Mr. Owiti argued that the NPS's interest in the matter was neither direct nor identifiable but was merely cursory and had not been demonstrated before the Court. Counsel asserted that the perceived interest of the NPS aligns with the interests of the suspects, each and all of whom were represented by counsel. Counsel maintained that the NPS was not a necessary party to the appeal and that the issues identified by the applicant could as well be ably canvassed by the suspects.

32. Regarding the applications for orders of stay of the impugned ruling and the criminal proceedings, it was Mr. Owiti's submission that the application had not met the threshold for granting such orders. Counsel submitted that the intended appeal was not arguable and would not be rendered nugatory. Counsel urged that staying the proceedings would lead to further delay in the matter, which is of tremendous public interest, and would be against the constitutional edict in Article 50 (2)(e) of *the Constitution*, which grants every accused person the right to have the trial begin and conclude without unreasonable delay. Counsel consequently urged that the applications be dismissed.

33. In the submissions dated 7th February 2025, counsel for the IPOA argued that the Court lacks jurisdiction to hear the applications. According to counsel, rule 5 (2) (a) of the Court of Appeal Rules is limited to stay of proceedings in criminal matters where the applicant has already been convicted and is seeking release on bail or suspension of warrants of distress pending the determination of the appeal. It is counsel's position that the suspect officers have neither been convicted nor are they seeking bail or

suspension of warrants of distress. Counsel buttressed this argument by referring to the decisions in Manilal Jamnadas Ramji Gohil vs. Director of Public Prosecution [2014] eKLR and Goddy Mwakio & Another vs. Republic [2011] eKLR. Relying on Kithinji vs. Director of Public Prosecutions & Another [2022] KECA 1087 (KLR), counsel submits that the applicants have, in any event, not demonstrated how the criminal trial before the Superior Court is an abuse of the court process or is not in conformity with the ends of justice.

34. In oral arguments made during the hearing, counsel opposed the NPS' application to join the appeal, asserting that the NPS is not a party to the criminal proceedings. Counsel further contends that the NPS has not established any identifiable interests in the proceedings, and neither is its presence necessary for the determination of the criminal proceedings. According to counsel, the NPS will not suffer any prejudice if their request for joinder is denied. We were, therefore, urged to dismiss this request.

35. Addressing the question of stay of proceedings, counsel cited Manilal Jamnadas Ramji Gohil vs. Director of Public Prosecution (supra) and Kithinji vs. Director of Public Prosecutions & Another (supra) to contend that the order sought by the applicants can only issue where an arguable appeal is disclosed. Counsel submits that none of the grounds indicated in the applications has any substance to indicate that the appeal is arguable. Still relying on Kithinji vs. Director of Public Prosecutions & Another (supra), counsel contends that the applicants have not demonstrated to the required standards that their appeal will be rendered nugatory should the orders sought not be granted. Finally, counsel adverted to Goddy Mwakio & Another vs. Republic (supra) and Michael Sistu Mwaura Kamau vs. Ethics and Anti-Corruption Commission & 3 Others [2015] eKLR for the proposition that criminal proceedings can only be stayed where exceptional circumstances have been established. According to IPOA, no exceptional circumstances have been disclosed by the applicants to warrant the suspension of the criminal trial. Counsel consequently urges for the dismissal of the application for stay of proceedings. We have read through the submissions of the KNCHR, the IJM and the LSK and we find that they associated themselves with and supported the arguments advanced by the Republic and IPOA. It is, therefore, not necessary to reproduce their submissions.

36. For Utu Wetu, learned counsel, Mr. Otieno, relying on the submissions dated 25th February 2025, urged that there was no competent appeal before the Court upon which the applications could be anchored. Counsel submitted that the filing of the notice of appeal and the record of appeal did not comply with rules 84(1) and (2) of the Court of Appeal Rules. According to counsel, the notice of appeal stood withdrawn pursuant to rule 85 (1), and therefore, the Court lacked jurisdiction to entertain the applications. In buttressing this point, counsel relied on Dishon Ochieng vs. SDA Church, Kodiaga [2012] KECA 169 (KLR) and Efureith Irima Mugo vs. Republic & 5 Others; Moffat Muriithi Kangi & Another (Proposed Interested Parties) [2021] KECA 674 (KLR).

37. Turning to the substance of the applications, counsel submitted that the intended appeal was not arguable and would not be rendered nugatory because the issues raised therein were yet to be subjected to trial before the High Court and that the apprehensions relating to the alleged violation of the right to fair hearing had not been tested. Counsel urged that the applications should be disallowed and all the parties be granted a hearing before the trial court and access to justice.

38. Counsel for Utu Wetu also opposed the application by the NPS to join the appeal.

39. We have reviewed and given due consideration to the applications before us, the submissions, and the authorities cited by counsel. It is our considered view that addressing the following issues determines the applications:

i. Whether the applications are incompetent for being brought under rule 5(2)(a) of the Court of Appeal Rules;

ii. Whether there is a competent notice of appeal before the Court;

iii. Whether the National Police Service should be joined as a party in Nairobi COA Criminal Appeal No. E124 of 2024;

iv. Whether the victims are properly before the Court; and v.Whether an order of stay should be granted.

40. We begin with the determination of the question as to whether the applications are incompetent for being brought pursuant to rule 5 (2)(a) of the Court of Appeal Rules. The Republic, the IPOA, and the KNCHR took issue with the propriety of the applications being brought under rule 5 (2) (a). It was their case that the scope of rule 5 (2) (a) was limited to release of an applicant on bail and the suspension of execution of warrants of distress. We appreciate the varying views emanating from the Court concerning the scope of rule 5 of the Court of Appeal Rules in criminal proceedings. However, the holding in Republic vs. Kenya Anti-Corruption Commission & 2 Others [2009] KECA 387 (KLR), which we agree with, correctly determined the issue thus:

> " From my consideration of the above somewhat conflicting decisions I would hold therefore that whether rule 5 (2) (b) of the Rules does apply to criminal proceedings and as to whether this Court can issue an order for prohibition in a criminal case against the magistrate's court pending appeal depends on what prayers an applicant is seeking under the rule and the particular circumstances of each case."

41. The above decision was also cited with approval in Diana Kethi Kilonzo vs. Republic [2016] KECA 19 (KLR), where the Court pointed out that:

> " In R vs. Kenya Anti-Corruption Commission & 2 Others [2009] eKLR, the applicant, an employee of the Public Service Commission, sought a stay of proceedings in a criminal case against him pending an appeal against a decision of the High Court dismissing his judicial review application for orders of certiorari and prohibition. He invoked rule 5 (2) (b) of this Court's Rules. Although the application was allowed by a majority, the Court was unanimous that criminal proceedings before a magistrate's court would not be stayed pending an appeal from a decision of the High Court under rule 5 (2) (b). The majority of the members of the Court, however, determined that such criminal proceedings would be stayed as there existed precedent for doing so."

42. In as much as we would agree with the respondents that the scope of rule 5 (2) (a) is limited, we are reluctant to bar the prosecution of these applications on that ground alone when the Court itself has held divergent views as to whether a similar application can be brought under rule 5 (2) (b). However, there is no doubt that this Court has, on previous occasions, granted orders of stay in criminal proceedings. Those are the nature of the orders sought by the applicants before us. Further, acceding to the objection by the respondents would amount to burying substantive issues under a heap of technicalities. In the circumstances of this case, where serious issues have been raised by the applicants, we do not wish to determine the applications on technicalities, and we, therefore, decline the respondents' invitation to take that road. This objection is therefore disallowed.

43. Turning to the second issue, we observe that Utu Wetu contested the competency of the notice of appeal upon which the applications are premised. Counsel complained that the letter be- speaking the

typed proceedings was not served upon his client or him, as required by rule 84(1) and (2) of the Court of Appeal, and that failure to effect service resulted in the withdrawal of the notice of appeal under rule 85(1). In response, Volker Edambo, Josphat Boke Sensera, James Rono, and the NPS contend that by virtue of the provisions of rule 60, their applications do not fall within the scope of rules 84 and 85 because the applications relate to criminal and not civil proceedings.

44. The arguments advanced by counsel on this issue do indeed further reveal the amorphous nature of the applications. In answer to Utu Wetu's submission, we observe that although it participated in the proceedings before the trial court, it did not file any document. Even before this Court, they are yet to file a notice of address as required by the rules. On the contrary, it was also established that the other parties were served with the notice of appeal. Be that as it may, we wish to point out that in addressing an application for stay, rule 5(2) refers to the filing of a "notice of appeal" and not a "valid notice of appeal". Much as an obviously invalid or defective notice of appeal may not pass muster, our view is that contested facts about a notice of appeal, as is the case in the applications before us, does not give room to the Court to venture into the validity or otherwise of the notice of appeal. Thus, in National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] KECA 333 (KLR), it was held that:

> " The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered."

45. Moving to the third issue, a question as to whether the KNCHR, Utu Wetu, IJM, and LSK were properly before the Court arose during the hearing of the applications. Our short answer to this issue is that they are properly before this Court. This is because this set of respondents, pejoratively referred to as NGOs, were parties and participated in the proceedings before the High Court and are thus entitled to have their day before this Court. In any event, the issue not having been raised in the pleadings, these respondents were denied an opportunity to substantively respond to the objection to their participation in the applications before us. We say no more except to point out that these parties were before us representing victims of the crimes which are being tried in Nairobi High Court Criminal Case No. E074 of 2022. As the Supreme Court has bindingly interpreted the Victims Protection Act in Joseph Hendrix Waswa v R (2019) eKLR, victims of crimes have a right to participate actively in criminal and auxillary proceedings concerning the crimes they suffered.

46. We now turn to the fourth issue being the move by the NPS to join Nairobi COA Criminal Appeal No. E124 of 2024. Learned counsel Mr Gumbo submitted that the NPS has met the threshold for joinder set by the Supreme Court in Communications Commission of Kenya and 4 others vs. Royal Media Services Limited & 7 Others [2014] eKLR and Francis K. Muruatetu and another vs. Republic & 5 Others [2016] eKLR. However, the Republic, IPOA, KNCHR, Utu Wetu, IJM and LSK hold the contrary view that the threshold has not been met and that the Inspector General of Police who was a party to the proceedings before the trial court was accorded an opportunity to address the issues that the NPS seeks to raise on appeal.

47. Before we address the question of joinder on merit, there is the preliminary issue of the NPS' juridical capacity to be a party in court proceedings which we have identified suo moto and has the possibility of putting this issue to bed. In dealing with the issue at hand, it is imperative to point out and differentiate the two entities established under Articles 243 and 246 (1) of *the Constitution*. Article 243 establishes the NPS, which is actualized through the enactment of the *National Police Service Act* (NPS Act). On

the other hand, Article 246 (1) establishes the National Police Service Commission (NPSC), which is brought to life through the *National Police Service Commission Act* (NPSC Act).

48. Whereas the NPSC, pursuant to section 3 (1) (b) of the NPSC Act, wields powers of a body corporate, the NPS is not clothed with such authority by its mother Act. This leads us to the conclusion that the NPS does not have statutory or constitutional authority to sue or be sued and cannot, therefore, be made a party to the appeal. The constitutional and statutory expectation is that it is the Inspector General who sues, or is sued, on behalf of the NPS in appropriate cases. Additionally, the Inspector General who commands the NPS, having been a party to the proceedings before the trial court and who should be a party to the appeal as of right, is well equipped to advance the position of the NPS. Consequently, we need not interrogate the merits of the application for joinder by the NPS but even if we were to delve into the merits of the application for joinder there would be no possibility of admitting the NPS to the appeal considering that its commander (the Inspector-General) was a party to the proceedings in the trial court and elected not join the appeal or present proceedings. Consequently, the NPS' motion dated 19th December 2024 lodged in Nairobi COA Criminal Appeal No. E124 of 2024 is dismissed in its entirety.

49. We finally address the question as to whether the remaining applicants have satisfied the conditions for the issuance of orders staying the impugned ruling and suspending the criminal proceedings. In addressing this issue, we are guided by the parameters set by the Court in Diana Kethi Kilonzo vs. Republic (supra) as follows:

> "22. The upshot on the issue of jurisdiction is, therefore, that under the inherent jurisdiction of this court and pending disposal of appeals from the High Court, an order of stay of proceedings can issue where it is demonstrated that the prosecution is actuated by malice and there is abuse of the court process and/or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the applicant. The subordinate court criminal proceedings will also be stayed if it is demonstrated that the prosecution is instituted in derogation of the applicant's constitutional rights. The jurisdiction is sparingly used and only where the justice of the matter so demands.
>
> ...
>
> 23. The applicant is still bound to demonstrate first that the appeal is not frivolous or that it is arguable and secondly, that if it were to succeed, the success would not be rendered nugatory unless a stay is granted. See this Court's decisions in Reliance Bank Ltd. vs. Norlake Investments Ltd. [2002] 1EA 227 and Githunguri vs. Jimba Credit Corporation Ltd. & Others (No.2) [1988] KLR 838."

50. Regarding whether the intended appeal is arguable, we note that the invocation of command responsibility, also referred to as superior responsibility, under the *International Crimes Act* and the Rome Statute in the prosecution of accused persons is a novel occurrence within our jurisdiction. The intended appeal raises arguable issues on the application of the doctrine and the respondents cannot deny the strength of the applicants' submission that the issues deserve their day in an appeal before this Court. Therefore, we readily accede that the intended appeal is arguable.

51. Regarding the nugatory aspect, the applicants contend that upon being charged, they risk being interdicted and, as a result, they will lose their pay and promotional opportunities and be subjected to ridicule and emotional distress. The scenario painted by the applicants befalls every other public servant when faced with a criminal trial. In our view, such an eventuality cannot be a ground that renders an appeal nugatory. If the Court were to halt every other criminal trial on such grounds, then the objectives of criminal trials will be lost. On this, we wish to recall the Court's pronouncement

in Erdemann Property Limited & 2 others vs. Ethics and Anti-Corruption Commission & 5 Others [2022] KECA 860 (KLR) thus:

> "... It cannot be said that the criminal prosecution will be an irreversible event as the Court can set aside the findings of the trial court if the appeal is successful.
>
> 17. We also take note of the fact that the proceedings being of a criminal nature, there must be demonstration of exceptional circumstances to justify interference with the prosecution. The applicants are apprehensive that if the criminal proceedings against them proceed, they may be severely prejudiced. However, it is common ground that the court hearing the criminal proceedings has the obligation of ensuring that the applicants get a fair trial. The applicants also could appeal, should they not be satisfied with the decision of the Chief Magistrates' Court or the High Court. We find that the applicants are simply jumping the gun, as other than mere speculation, they have not demonstrated any exceptional circumstances to justify interference with the criminal prosecution."

52. Still on the nugatory aspect of the applications, we are bound to consider whether the applicants have demonstrated that the prosecution is actuated by malice or there is abuse of the court process or that the prosecution is instituted for an improper motive. In persuading us to halt their trial, the applicants heavily relied on the decision of this Court in Samuel Otieno Obudo vs. Director of Public Prosecutions & 6 Others [2017] KECA 440 (KLR). Our view is that the circumstances of this case are distinguishable from those of the cited case. In the cited case, the imminent injustice was real as the applicant had sought to have the additional evidence availed in vain hence his constitutional rights were imminently in danger of violation. The same can be said of the Stanley Munga Githunguri vs. Republic [1986] KLR 1, where the prosecution of the appellant was halted after the appellant had established to the satisfaction of the Court that his constitutional rights would be violated by continuing with the trial. In the present case, the applicants have not pinpointed a specific act that has given rise to their fear of an injustice or even an infringement of their rights. We wish to reiterate the obvious fact that the trial court will be under an obligation to protect the suspects' rights as guaranteed under Articles 49 and 50 of the Constitution, and should they be dissatisfied, they will have an opportunity to challenge any aspect of the trial in a substantive appeal to be filed after the trial. Their fear that they are being used as guinea pigs in respect of the application of the provisions of the *International Crimes Act*, 2008 and the Rome Statute to members of the National Police Service is also not sufficient reason for holding that their appeal will be rendered nugatory if stay is not granted. All issues surrounding the implementation of the command responsibility doctrine in our jurisdiction can always be addressed through a substantive appeal after the trial, should it ever come to that. There is also the unstated but important effect of delayed trial on the quality of justice. The crimes for which the applicants are charged stem from omissions and commissions that took place in 2017, which is over seven years ago. Any further delay of the trial will negatively impact the rights of the victims to access justice. It is possible that the memories of the witnesses are fading and the quality of the exhibits, if any, is deteriorating. The Court is called upon to strike a balance between the alleged violation of the rights of the applicants and the right to access justice by the victims of the alleged crimes.

53. The position we have taken accords with the binding decision of the Supreme Court in Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission, Public Prosecutions, Attorney

General & Inspector General of the National Police Service [2015] KECA 331 (KLR) where it said the following:

> "Proceedings before a court of law should not be stopped on the basis of speculation or apprehension. At this interlocutory stage, the applicant must be able to point out an outright illegality or breach, or violation which does not require protracted arguments; the violation based on the illegality must be plain and obvious. What is not plain and obvious is a matter for a full trial."

54. Our duty as articulated in David Kipruto Chingi & Another vs. Director of Public Prosecutions & 2 Others [2016] eKLR is to protect not only the functional, administrative and operational independence of the ODPP but also to protect the applicants and ensure that in exercise of his functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. It is also important to appreciate that the *International Crimes Act* has not been repealed or declared unconstitutional and therefore enjoys the presumption of constitutionality. Having satisfied ourselves that the applicants are not faced with imminent injustice, we find no good reason to warrant further deferral of their taking of plea and the commencement of their trial.

55. We have said enough to show that despite being premised on an arguable appeal, the applications for stay of execution of the ruling delivered by Kimondo, J. on 25th July 2024 and the trial in Nairobi High Court Criminal Case No. E074 of 2022 cannot succeed. The applications are bound for dismissal, which we hereby do. We also reaffirm our dismissal of the application by the National Police Service to be made a party to Nairobi COA Criminal Appeal No. E124 of 2024.

56. Before we exit this matter, we are of the view that although we have found that the suspects' appeal will not be rendered nugatory, the novel issues raised in the appeal need to be determined without undue delay. In that regard, we certify Nairobi COA Criminal Appeal No. E124 of 2024 urgent, and direct that the same be listed before the Registrar of the Court within 14 days from the date hereof for issuance of directions on the hearing of the appeal. This should be done with a view to having the appeal listed for hearing in the coming term of the Court.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025.

P. O. KIAGE

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR