



**Wanyama & another v Republic (Criminal Application  
E002 of 2020) [2023] KECA 397 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 397 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION E002 OF 2020  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
MARCH 31, 2023**

**BETWEEN**

**LAWRENCE FRANK WANYAMA ..... 1<sup>ST</sup> APPELLANT**

**ALEX MAHAGA OLABA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an application for stay of proceedings pending an intended appeal  
from the Judgment of the High Court of Kenya at Nairobi (G.W. Ngenye-  
Macharia, J.) dated 30th June, 2020 in HC. CR.A. No. 184 of 2019))*

**RULING**

- 1 The applicant, Frank Lawrence Wanyama (with another) was tried and convicted for the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve 15 years imprisonment. He appealed to the High Court of Kenya at Nairobi and in a Judgment delivered on June 30, 2020 (GW Ngenye-Macharia, J – as she then was) the appeal partially succeeded where the conviction was quashed and sentence set aside, the High Court ordering that a retrial be conducted. It was ordered that the appellant and his colleague be escorted to Kilimani Police Station for preparations to take a fresh plea.
- 2 The Motion before us is brought under rules 1 (2), 5(2) (a) and 42(1) of the Court of Appeal Rules and all enabling provisions of law where the applicant prays in the main that pending the *inter partes* hearing and determination of the application, we order a stay of proceedings in Nairobi Chief Magistrate’s Court Sexual Offences Case No 27 of 2020 Republic v Frank Lawrence Wanyama & Alex Mahaga Olaba and that we restrain the Magistrate’s court from further hearing and determination of their case. In grounds in support of the application and in a supporting affidavit of the applicant it is said *inter alia*: that the applicant was tried, convicted and sentenced; that in an appeal to the High



Court it was found that proceedings before the Magistrate were a mistrial; conviction was quashed and sentence set aside it being ordered that a new trial be conducted; that the applicant and his co-accused appeared before a different Magistrate on July 7, 2020 and took plea and were granted bail; and that the applicant had informed the Magistrate that he intended to appeal the High Court Judgment and thus requested the Magistrates court to stay proceedings, a request that was granted. Further, that in the Judgment intended to be appealed the High Court had pre-empted the decision of the trial court conducting the retrial by ruling on the substance of the evidence by making definitive findings. It is said that whereas the High Court held that PW1 was not sworn and that the proceedings before the Magistrate amounted to a mistrial, the High Court relied on the unsworn evidence of PW1 to arrive at an erroneous finding that the applicant had sexual intercourse with PW1 and that the said intercourse was not consensual as if the unsworn evidence of PW1 was admissible; that the intended appeal raises important constitutional points of law touching on criminal procedure and rules of evidence; that the intended appeal shall be rendered nugatory and the retrial will result in injustice to the applicant who is not likely to get a fair trial.

- 4 In a replying affidavit, Solomon Kimathi Njeru, a prosecution counsel in the office of the respondent, says that the High Court did not make any error of fact or law in ordering a retrial; that the High Court took all factors into consideration when ordering a retrial; that the offence the applicant is charged is a serious one and he should stand trial; that witnesses are ready to testify; and that the application lacks merit.
- 5 The Motion came up for hearing before us on March 6, 2023 on a virtual platform when Senior Counsel Mr. Pravin Bowry with Mr. Naeku appeared for the applicant while learned state counsel Mr. Muriithi appeared for the respondent. Both sides had filed written submissions which we have read and considered. The applicant submits that it has raised substantial issues in the draft Memorandum of Appeal which touch on constitutional issues, issues of criminal procedure and the law of evidence and he cites the case of *Dennis Mogambi Mongare v Attorney General & 3 Others* [2012] eKLR for the proposition that an arguable point on appeal is not one that must succeed, it is simply one that is deserving the Court's consideration. The applicant faults the learned Judge of the High Court for making definitive findings in the judgment and submits that his constitutional rights will be violated if stay of proceedings is not granted.
- 5 We have considered the motion, submissions made and the law and this is how we determine this matter.
- 6 The principles that apply in an application of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – these principles were discussed in detail in the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & Others* [2013] eKLR.
- 7 We have perused draft Memorandum of Appeal. It is proposed to be argued on appeal, *inter alia*, whether the Judge erred in law by proceeding to adjudicate in a matter she ordered to be retried; that the High Court proceeded to try the applicant unlawfully when it was *functus officio* thereby usurping the jurisdiction of the subordinate court.
- 8 The High Court found at paragraphs 48-50 (inclusive) of the impugned Judgment:
  48. While I must limit my deliberations, it is apparent in the evidence of the prosecution and defence that there were sexual relations between the Complainant and the Appellants on the night in question. What I have no doubt in my mind with, is the fact that the evidence discloses that the intercourse was not consensual.



49. I cement this finding by the fact that the conduct of PW1 in the morning immediately after the ordeal, was a clear testimony that she did not consent to the relation. There is clear evidence that the Appellants, more so the 1<sup>st</sup> Appellant, upon arrival at his house at High Rise Estate deliberately gave her more alcohol that made her lose control of her mental faculties after which they raped her in turns. Further, PW1 did immediately report to her friends whom she was with through the night including one Jeff (PW4) about what had transpired to her. In categorical terms, she informed him that she had been raped. These words were echoed by PW2, the doctor who first treated her at the South B Hospital. All the prosecution witnesses did not deviate from this line of evidence and no contradiction was cited. PW1 was clear in her mind that the Appellants raped her by taking advantage of her intoxication.
50. It matters not that she did not report the ordeal to the police immediately after the incident. It also matters not that she was not physically examined or that she showed no sign of pregnancy at the time she testified. What is vivid is that by her own evidence, corroborated by other key prosecution witnesses, the Appellants in turn had sex with her without her consent. I add that the lack of consent established by the commission of intentional or unlawful acts of the Appellants as defined under Section 43(1), (2) and (4) of the *Sexual Offences Act* was demonstrated by the prosecution. As to further evaluation of the elements constituting the offence of gang rape, I leave it to the trial court least I preempt the outcome of the trial.”
- 9 The applicant is saying that the Judge made definitive findings that may be binding on the trial Magistrate when the matter goes for re-trial as ordered in the Judgment. We think that this is an arguable point which merits consideration of this Court and as was held in the *Dennis Mongare* (supra) case an arguable point is not one that must succeed. It is one deserving of consideration by the Court.
- 10 On the nugatory aspect we find that there are constitutional questions to be taken on appeal and it would not be proper to have the applicant undergo a retrial where penal consequences may follow when those questions have not been resolved. It was held by this Court in *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another* [2006] eKLR:
- In cases which are purely civil, this Court hardly grants a stay of proceedings on the basis that even if the proceedings to be stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – see for example *Silverstein v Chesoni*, [2002] KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.”
- 11 The applicant has satisfied both limbs of the principles that apply in an application of this nature. We allow the Motion dated August 11, 2020. There will be no order on costs.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

