Kamande v Republic (Criminal Appeal (Application) 102 of 2018)
[2023] KECA 1239 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1239 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL (APPLICATION) 102 OF 2018

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

OCTOBER 6, 2023

BETWEEN

RUTH WANJIKU KAMANDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court against the judgment of this Court at Nairobi (Okwengu, Warsame & J. Mohammed, JJ.A.) dated 6th November, 2020 in Nairobi Criminal Appeal No. 102 of 2018)

Principles to determine whether a matter was of general public importance

The application sought the certification and leave to appeal to the Supreme Court against the judgment of the instant court. The court held that to succeed in an application for certification under article 163(4)(b) of the Constitution, an applicant had to demonstrate that the issue to be raised in the intended appeal involved a matter of general public importance the determination of which transcended the circumstances of the particular case, and had a bearing on the public interest. The court further highlighted the principles to determine whether a matter was of general public importance. The court finally stated that the issue surrounding battered women syndrome was ideally raw in Kenya and that the same should be given a window for interrogation by the Supreme Court.

Reported by Kakai Toili

Civil Practice and Procedure *– appeals – appeals to the Supreme Court – appeals in matters certified as involving matters of general public importance - principles to determine whether a matter was of general public importance - what were the factors to consider in an application for certification of a matter as of general public importance warranting an appeal to the Supreme Court - of Kenya, 2010, article 163(4)(b).*

Brief facts

The application sought the certification and leave to appeal to the Supreme Court against the judgment of the instant court. The applicant was charged, tried and convicted for the offence of murder. The applicant was sentenced to death by the trial court after rejecting her defence of self-defence. The instant court dismissed the appeal. It was upon dismissal of the appeal that the applicant filed the instant application. The applicant

claimed that her intended appeal to the Supreme Court would raise questions of general public importance and as such she should be granted leave to appeal to the Supreme Court.

The application was based on the grounds on the face of the motion which *inter alia*, included that: the intended appeal involved a matter of general public importance being the doctrine of battered women syndrome, and the standard and burden of proof applicable when an accused pleaded self-defence. The applicant argued that the two issues transcended the circumstances of the particular case and would ideally have a significant bearing on the public interest to protect and advance the rights of domestic violence victims in line with the provisions of the .

Issues

i. What were the principles necessary to determine whether a matter was of general public importance?

ii. What were the factors to consider in an application for certification of a matter as of general public importance warranting an appeal to the Supreme Court?

Held

1. To succeed in an application for certification under article 163(4)(b) of the of Kenya, 2010 (the Constitution), an applicant had to demonstrate that the issue to be raised in the intended appeal involved a matter of general public importance the determination of which transcended the circumstances of the particular case, and had a bearing on the public interest. Where the matter in respect of which certification was sought raised a point of law, the intending appellant must demonstrate that such a point was a substantial one, the determination of which would have a significant bearing on the public interest.
2. A matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences were substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest were not closed, the burden fell on the intending appellant to demonstrate that the matter in question carried specific elements of real public interest and concern.
3. The principles to determine whether a matter was of general public importance included:
    1. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal was one the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest;
    2. where the matter in respect of which certification was sought raised a point of law, the intending appellant must demonstrate that such a point was a substantial one, the determination of which would have a significant bearing on the public interest;
    3. such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
    4. where the application for certification had been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
    5. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, was not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163(4)(b) of the ;
    6. the intending applicant had an obligation to identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for which certification was sought;
    7. determination of facts in contests between parties were not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

4. From a look at the issues that had been raised by the applicant, the issue surrounding battered women syndrome was ideally raw in Kenya and there were not so many decisions on the same. The same should be given a window for interrogation by the Supreme Court.

Application allowed.

Citations

Cases

1. Hermanus, Phillipus Steyn v Giovanni Gnecchi-Ruscone (Application 4 of 2012; [2013] KESC 11 (KLR)) — Mentioned
2. Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and allied Workers' Union (Kefhau) Represented By Its Promoters David Benedict Omulama, Andrew Makwaga, Benard Amuchizi Mukaisi,Adriano Mukalo, Wycliffe Sore,Severio Masika, Lilian Indutia, Efeli A. Nandi, James Amatonye, Registrar of Trade Unions (Civil Application Sup 5 of 2017; [2018] KECA 760 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 163(4) — Interpreted
2. Penal Code (cap 63) — section 203, 204 — Interpreted
3. Protection Against Domestic Violence Act, 2015 (Act No 2 of 2015) — Cited

Advocates

None mentioned

RULING

1. By way of notice of motion dated February 17, 2021, Ruth Wanjiku Kamande, "the applicant", has moved this court for certification and leave to appeal to the Supreme Court against the judgment of this court delivered on November 6, 2020.

2. A brief background of the matter will place the instant application in the proper context. The applicant was charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the information were that on the 20th day of September, 2015 at Buruburu Estate within Nairobi County murdered Farid Mohamed Halim.

3. According to the evidence tendered at the trial, the applicant was having an affair with the deceased, and at the time of the incident, they were living together. On September 20, 2015 at 9.00 am or thereabouts, screams and calls for help were heard from the house of the deceased which he had rented from PW7 and PW8, husband and wife respectively. PW8 went to the deceased's house to find out what the matter was. As she walked towards the house, she heard the deceased saying "nisaidie, nisaidie, amenidunga", "Help me, help me, she has stabbed me." PW8 knocked on the door and asked loudly what was going on inside that house. Then she heard the deceased say, "It is this one who has stabbed me." Followed immediately by the words "I have been stabbed again". At that point, PW7 arrived at the scene. The house was locked from the inside. PW7 looked inside and saw the deceased standing facing the applicant. The deceased was holding his abdomen and appeared to be in great pain. Being unable to access the house, police officers from Buruburu Police Station were called in. When they came, they discovered that the victim was already dead. The post-mortem was carried out on the body of the deceased on the same day by Dr Oduor Johansen. The doctor formed the opinion that the deceased died of multiple injuries and blood loss due to penetrating force trauma. The doctor found a total of 25 stab wounds on the chest, hands, legs, head, abdomen, back and shoulders of the deceased, with intestines sticking out.

4. The applicant was thereafter arrested, tried and convicted for the offence of murder and sentenced to death by the trial court after rejecting her defence of self-defence.

5. On appeal to this court, it was found that the trial court properly considered the law and evidence and rightly rejected the appellant's plea of self-defence and thus dismissed the appeal.

6. It is upon dismissing the said appeal that the applicant is again before us for the consideration of the current application so that we can allow her to appeal to the Supreme Court. The application is predicated upon article 164(4)(b) of the *Constitution*, rules 4, 38, 40, 41, and 43 of this Court's Rules, and all enabling provisions of the law. The applicant claims that her intended appeal to the Supreme Court will raise questions of general public importance and as such she should be granted leave to appeal to the Supreme Court against the judgment of this court.

7. The application based on the grounds on the face of the motion which *inter alia*, include that: the applicant is aggrieved by the judgment of this court which upheld the finding of the High Court's decision against her and intends to appeal to the Supreme Court on the main ground that the intended appeal involves a matter of general public importance being the doctrine of battered women syndrome, and secondly, the standard and burden of proof applicable when an accused pleads self-defence. That the two issues transcend the circumstances of the particular case and will ideally have a significant bearing on the public interest to protect and advance the rights of domestic violence victims in line with the provisions of the *Protection Against Domestic Violence Act*.

8. The said motion is further supported by the affidavit of the applicant dated February 16, 2021. She depones that the appeal raises questions of general public importance to the extent that when a defence of self- defence is raised and especially when in situations where the parties were in a relationship, like the instant case, it follows then that the appellant was to be accorded a defence under the doctrine of battered women syndrome and the test of loss of control. The two courts did not address themselves to the doctrine whose plea should be a prima facie conclusive defence that shifts the burden of proof to the prosecution to rebut the elements of the offence. Further, it was her deposition that when the prosecution fails to rebut all the elements of self defence, entitles the accused person to a conviction on the lesser charge of manslaughter. The application was not opposed by the respondent as it did not file any response to the application.

9. When the application came up for hearing Muigai Githu, SC appeared for the applicant while Mr Murithi, learned counsel was present for the respondent. It was the respondent's submission that it did not oppose the application. If anything, it was supporting the application as it was merited.

10. In his written submissions, Githu Muigai, SC stated that the defence of provocation, self-control as conceptualized and enacted in law ideally proceeds from the old traditional stereotypical understanding of the human psychology that anger is instantaneous from a significant event that precipitates loss of self-control for the person and as such the offence of murder is placed distinctly from past abuse. The applicant submitted that there had been increased cases of domestic violence. Thus, the appeal will address the rights of victims of domestic violence, the proper and applicable legal principles in a self-defence plea, and the appropriate test for provocation raised in a battered women syndrome defence. Further, that the question of law raised by the applicant on the applicability of the battered women syndrome and the extent of its applicability in Kenya in light of the *Protection Against Domestic Violence Act*, *2015* are issues that are destined to continually engage the courts. That being a question of law have direct and immediate bearing on the proper conduct of the administration of justice as accused persons whose defence indicates domestic violence ought to be entitled to a lower or reduced charge.

11. The applicant while relying on the celebrated case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR, submitted that the application had met the threshold as a matter of general public importance.

12. We have duly considered the application, the supporting affidavit, the applicant's submissions, the authorities cited and the law. The motion before us seeks leave and certification to appeal to the Supreme Court. Article 163(4) of the *Constitution* stipulates that appeals lie from this court to the Supreme Court:

> "(a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved."

13. It is trite law as stated in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, [*supra*] that to succeed in an application for certification under article 163(4) (b) of the *Constitution*, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance:

> "the determination of which transcends the circumstances of the particular case, and has a bearing on the public interest;...where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest..."[Emphasis supplied].

14. The Supreme Court in the same case pronounced itself on the meaning of 'matter of general public importance' thus:

> "...a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

15. This court in *Kenya Plantation and Agricultural Workers' Union v Kenya Export Floriculture, Horticulture and Allied Workers' Union (Kefhau); Represented by Its Promoters; David Benedict Omulama & 9 Others* [2018] eKLR stated as follows:

> "The principles set out in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, (*supra*) to determine whether a matter is of general public importance included:
>
> i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
>
> ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial

one, the determination of which will have a significant bearing on the public interest;

iii. such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163(4)(b) of the *Constitution*;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;

vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

16. In the instant application, though not opposed, it is our duty still to consider and appraise if the foregoing principles enunciated for certification have been satisfied. The question that we must determine is whether the applicant has set out specific elements of general public importance which she attributes to the questions to be urged before the Supreme Court in the intended appeal?

17. The applicant identified the issues for determination in its intended appeal as follows:

i. They transcend the circumstances of the appellant by speaking to all cases where an accused person and the victim are in a close personal (or domestic) relationship and the accused raises the plea that their actions were precipitated by domestic violence suffered in the relationship. The Supreme Court would therefore be obliged to speak to the applicable test and the burden; and

ii. Standard of proof, and the applicable sentencing guidelines in such cases; The question of law arose in the preceding courts as the intended appellant had consistently admitted to the actus reus of the offence of murder but had consistently contested the mens rea by indicating they were suffering from continuous domestic violence, apprehension of HIV/AIDS infection and other psychological trauma directly traceable to their close personal relationship with the victim.

The applicant further states that the intended appeal involves two fundamental questions of law, which are:

a. The applicability, standard of proof, burden of proof, and guiding principles of the doctrine of battered woman syndrome as a defence; and

b. The applicable standard and burden of proof in a self-defense plea and the consequences thereon once the accused provides prima facie circumstantial evidence of their defence.

18. The applicant has submitted that the instant matter pertains to a novel issue of law that requires the Supreme Court to pronounce itself on the standard and burden of proof to guide other courts. Furthermore, that it is trite that in criminal proceedings, the standard of proof is beyond reasonable doubt and the burden of proof rests with the prosecution. In her appeal to the Supreme Court, the applicant seeks to canvass the proposition that once a defence of self-defence is adduced and circumstantial evidence is led to that effect, the accused ought to enjoy the benefit of the law and the charge automatically reduced to manslaughter.

19. While we are alive to the requirements under the *Hermanus* case *supra*], we also are aware of the finding of the Supreme Court that the Hermanus principles are not exclusive or exhaustive.

20. We have looked at the issues that have been raised by the applicant and note that the issue surrounding buttered women syndrome is ideally raw in the country and has had not so many decisions on the same. We feel the same be given a window for interrogation by the Supreme Court.

21. The upshot is that the notice of motion dated February 17, 2021 is merited and is hereby allowed.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR