



REPUBLIC OF KENYA



KENYA LAW
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**Yahya v Republic (Criminal Application 2 of 2022)
[2022] KECA 1057 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1057 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION 2 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 7, 2022**

BETWEEN

THABIT JAMALDIN YAHYA APPLICANT

AND

REPUBLIC RESPONDENT

*(An application for leave to appeal to the Supreme Court of Kenya
against the judgment of the Court of Appeal at Mombasa delivered on
4th March 2022 in Court of Appeal Criminal Appeal No. 36 of 2021)*

RULING

1. In his application dated 17th March 2022 invoking Article 163(4)(b) of the *Constitution*, Rule 24 of the *Supreme Court Rules*, 2011 and Rules 40 and 41 of the *Court of Appeal Rules*, 2010, the applicant, Thabit Jamaldin Yahya, seeks leave to appeal to the Supreme Court of Kenya against the judgement of this Court delivered on March 4, 2022 in Mombasa Criminal Appeal No 36 of 2021 which upheld the judgment of the High Court delivered on 1st December, 2015 in which the applicant was convicted of the offence of murder and sentenced to death.
2. The background to the application is that the applicant was charged before the High Court on July 16, 2012 with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 15th May 2012 at Bella Vista Hotel, Mombasa District within coast region, jointly with others not before court, the applicant murdered Mary Cheptirim. He was tried before the High Court (Muya, J.) and convicted in a judgment delivered December 1, 2015 and sentenced to death.
3. Aggrieved, the applicant preferred an appeal to this Court challenging the conviction and the sentence on grounds that evidence of identification was weak and unreliable; that there was discredited DNA



evidence; that the conviction was based on hearsay evidence; that his defence was improperly rejected and that death sentence was harsh and excessive.

4. In dismissing the appeal, this Court found that there was consistency in the evidence of the witnesses to the effect that the appellant was identified as the assailant on the material day; that the offence was proved to the required standard and that there was no reason to disturb the sentence. Dissatisfied, and intending to appeal to the Supreme Court, the applicant lodged a notice of appeal in this Court on March 18, 2022 following which the applicant brought the present application for certification that the intended appeal raises matters of general public importance.
5. The application is based on the grounds that a matter of general public importance is involved in that the applicant was convicted on the basis of a single identifying witness in challenging circumstances and in the absence of independent corroborative evidence; that suspicion should not be the basis of conviction regardless of whether the offence is terrorism related; that the Supreme Court needs to pronounce itself on the equal application and treatment of accused persons under the law; that the applicant is condemned to suffer death in the absence of aggravating circumstances and without exercise of discretion expressed in the Francis Muruatetu case; and that there is a clash of statutes in that this Court re-affirmed the death sentence imposed by the trial court despite the same having been commuted to life imprisonment in the year 2016 by the President of the Republic of Kenya.
6. Urging the application before us on behalf of the applicant, learned counsel Mr. Chacha Mwita referred to the applicant's supporting affidavit sworn on March 17, 2022 and submitted that this matter fulfils the criteria for determining whether a matter is one of general public importance as set out in the case of *Kenya Civil Aviation Authority v African Commuter Services Ltd & another* [2018] eKLR.
7. It was submitted, on the strength of the Supreme Court of Kenya decision in *R vs. Ahmad Abolfathi Mohammed & Another* (2018) eKLR, that matters of terrorism are matters of grave concern and of public importance; that the present matter is also of general public importance because unlike accused persons who are charged with less serious offences before the subordinate courts who have the opportunity to pursue a second appeal and also a third appeal to the Supreme Court, accused persons like the applicant are disadvantaged and discriminated upon as they can only appeal to this Court despite facing the more serious charge for the offence of murder with prospect of death sentence. It was urged that persons charged with the offence of murder should, as a matter of right be entitled to appeal to the Supreme Court so as to afford them equal treatment under the law in accordance with Articles 27 and 50 of the *Constitution*.
8. Counsel reiterated that leave to appeal should be granted in order for the Supreme Court to resolve the conflict between the judgment of this Court affirming the death sentence by the trial court and the fact that on October 24, 2016, the President of the Republic of Kenya commuted the death sentence imposed by the High Court under the *Power of Mercy Act*, No. 21 of 2021 enacted pursuant to Article 133 of the *Constitution*.
9. In opposition to the application, learned counsel Mr. Jami Yamina of the Office of Director of Public Prosecution for the respondent relied on Grounds of Opposition dated April 6, 2022 and respondent's written submissions of the same date which he orally highlighted in urging that the applicant failed to demonstrate that the intended appeal to the Supreme Court of Kenya raises matters of general public importance; that the issue of identification of the perpetrator of the offence arose before the trial court and before this Court and was addressed in accordance with settled legal principles and there is no uncertainty in the law regarding identification.
10. As regard the contention that this Court affirmed death sentence meted out by the trial court despite the same having been commuted to a life sentence, counsel submitted that this issue did not arise in



the appeal; that despite the fact that it was within the knowledge of the appellant that his sentence had been commuted, he did not raise the matter or bring it to the attention of this Court; that in the result the applicant would be inviting the Supreme Court to deal with the issue in its original jurisdiction.

11. Regarding the contention that the appellant, and persons charged with murder before the High Court are discriminated upon and not accorded equal treatment under the law relative to persons charged before the subordinate courts who have the opportunity to present a second and possibly a third appeal, counsel submitted that the matter is settled by the Supreme Court in *Muruatetu II* [2021] eKLR; that although the applicant would have benefited from that decision, he did not seek resentencing but opted to appeal to this Court whereupon this Court properly reviewed and reevaluated the evidence before rendering the impugned judgment.
12. Counsel concluded by urging that there is no clear point of law raised by the applicant requiring determination by the Supreme Court and that to allow the application would open a floodgate of applications to the Supreme Court and that the criteria for certification as set out in *Kenya Civil Aviation Authority v African Commuter Services Ltd & another* (above) has not been met.
13. In his brief reply, Mr. Mwita stated that the issue of identification is not the main issue the applicant intends to pursue before the Supreme Court but rather the issue of reinstatement of the death sentence. Referring to Section 332 of the *Criminal Procedure Code* relating to the requirement of a report to be sent to the President after the sentence of death is pronounced, counsel submitted that the respondent should have brought the information on commutation to the Court. Counsel also reiterated that as the matter touches on terrorism, it is a matter of general public importance.
14. We have considered the application and the rival submissions. The Supreme Court of Kenya set out the standard for certification of a matter as one of general public importance in the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi Ruscone* [2013] eKLR where that Court expressed that:

“...”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 impacts 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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”
15. Expounding further on the principles for determining whether a matter is one of general public importance, the Supreme Court went on to state in that case that:
 - 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;
 - ii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;



- iii. 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;
- iv. 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;
- v. 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;
- vi. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

16. See also a re-affirmation of those principles in *Town Council of Awendo v Nelson Oduor Onyango & 13 others* [2015] eKLR and also in *Kenya Civil Aviation Authority v African Commuter Services Ltd & another* (above) on which counsel for both parties relied.
17. With those principles in mind, does this matter meet the criterion? The first issue which the applicant contends merits consideration by the Supreme Court as one of general public importance is the question whether his identification as the assailant was free from error. The law on the duty of a court when addressing the question of identification and the need for the court to approach the question of identification with caution when there is a dispute in that regard is in our view settled. See for instance the long-standing case of *Abdallah Bin Wendo & another v Republic* [1953] 20 EACA 166; *Roria v Republic* [1967] E A 583; *Maitanyi v Republic* [1986] eKLR; *Republic v Turnbull & others* [1976] 3 All E R 549. All those cases consistently stress, without any contradiction, the need for courts to proceed with the greatest care when considering evidence of identification. We are not persuaded that it is a matter on which the Supreme Court should be troubled.
18. The next issue which the applicant states is one of general public importance is the question whether the appellant, and persons charged with murder before the High Court are discriminated upon and not accorded equal treatment under the law relative to persons charged with lesser offences before the subordinate courts who have the opportunity to present a second and possibly a third appeal. This matter was neither raised before the trial court nor was it raised before this Court. The applicant’s claim in that regard, that there is violation of Articles 27 of the *Constitution* which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and also Article 50 was not raised by the applicant in the High Court or in this Court. To the extent that that question did not arise in the High Court or in this Court and to the extent that it has not been the subject of judicial determination by either of the two courts, it is not, in our view, a matter in respect of which certification can be granted.
19. Lastly, there is the question that this Court affirmed and reinstated the death sentence despite the same having been commuted by the President of the Republic of Kenya. In that regard, it is instructive that in his appeal before this Court, the applicant, in addition to challenging the conviction also challenged the sentence and asserted that the death sentence that was meted out to him was severe and excessive and that his mitigation was not considered. At no time did the applicant state or mention that the death sentence had been commuted. It is somewhat intriguing that the applicant prosecuted his appeal



before this Court on the basis that the death sentence meted out was subsisting with full knowledge, and without any mention of the commutation, only to disclose, in the course of the hearing of this application, that it was commuted on 24th October 2016.

20. All in all, the application is devoid of merit and is accordingly dismissed with no orders as to costs.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER 2022.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

.....

J. LESIIT

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

