



**Attorney General & 3 others v PAK & another (Civil Application  
E016 of 2022) [2022] KECA 1311 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1311 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E016 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> APPLICANT  
THE DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> APPLICANT  
THE INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> APPLICANT  
THE SENIOR PRINCIPAL MAGISTRATE KILIFI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**PAK ..... 1<sup>ST</sup> RESPONDENT  
SALIM MOHAMMED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of the orders of the High Court pending the lodging, hearing and determination of an intended appeal from the judgement and decree of the High Court of Kenya at Malindi (Mr Justice Reuben Nyakundi) given on 24th March 2022 in Malindi High Court Constitutional Petition No. E009 of 2020)*

**RULING**

1. The 1<sup>st</sup> Respondent was charged with the offence of procuring abortion contrary to section 159 of the [Penal Code](#) whereas the 2<sup>nd</sup> Respondent was charged with procuring abortion contrary to section 158 of the [Penal Code](#) in the Kilifi Principal Magistrates Court. The 2<sup>nd</sup> Respondent also faced the alternative charge of supplying drugs to procure abortion contrary to section 160 of the [Penal Code](#). The Respondents thereupon filed Malindi High Court Constitutional Petition No E009 of 2020 in the High Court at Malindi seeking among other orders, to quash the criminal cases commenced against them and a declaration that the sections 154, 159 and 160 of the [Penal Code](#) that criminalised abortion were unconstitutional.



2. The High Court (R. Nyakundi J.), after hearing the parties, granted the following orders in its judgment delivered on March 24, 2022:
- a. That Sections 158, 159 & 160 of the Penal Code are not inconsistent with Articles 1, 2, 4, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 73, 75, 157 (11), 159, 165 (3,6 & 7), 232, 258, 259 and section 7 of the Sixth Schedule of the Constitution.
  - b. That the right to abortion is a fundamental right but it cannot be said to be absolute in light of Article 26(4) of the Constitution. That the language in the impugned sections looked at from the legal lens of the Constitution there is a lacuna on information regarding the termination of pregnancies as strongly provided for in those provisions.
  - c. That a declaration be and is hereby made founded on the right to life for Parliament to enact an abortion law and public policy framework in terms of Article 26(4) of the Constitution to provide for the exceptions as stipulated in the Supreme Law.
  - d. That the declaration be and is hereby made by reviewing of the decision making process in a wider context by the respondents to initiate an investigation, arrest and commencement of criminal proceedings in Criminal Case No 395, 396 of 2019 and Children's Case No 72 of 2018 at Kilifi Law Courts against the petitioners in terms of sections 158, 159 and 160 of the Penal Code. That the proceedings having been marked with irregularities from the outset a writ of certiorari clearly merit based do issue against the text of the charges involved in prosecuting the petitioners under the authority of Article 157(6) and (7) of the Constitution.
  - e. That the forced medical examination in which the 1st petitioner was subjected to by the police violated her rights prescribed under Article 25 of the Constitution on freedom from torture and cruel, inhuman and degrading treatment, right to life within the bounds of Article 26(4), Article 28 on human dignity, Article 29 on freedom and security of the person, Article 31 on rights to privacy all of the Constitution.
  - f. That the right to private communication between a patient and his or her personal doctor is guaranteed and protected under Article 31 of the Constitution and other enabling statutes safe for the disclosure is consented to by the patient or as in the public interest or the limitations provided for in the Constitution. To that extent the police and the Director of Public Prosecutions were prohibited from criminalizing such communication unless compelled by the due process of the court.
  - g. That the medical doctor/trained health professional licensed to practice medicine in Kenya by the relevant authorities exercising his/her skill, expertise with due care and attention, good faith inferred from the diagnostic carried out on examination of a patient was not to be guilty of an offence in the expansive provisions of the Penal Code on procuring abortion.
  - h. The declaration be and is hereby issued that a prerogative writ of mandamus prayed for by the petitioners against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to fulfil the public duty on a wide range of duties stated in the petition lacks merit and is therefore denied.
  - i. That a declaration be and is hereby made to the effect that there is no primary justification for a grant of perpetual injunction against the respondents.
  - j. That a declaration be and is hereby made that section 158, 159 and 160 of the Penal Code on purely procedural and substantive defects failed to capture the letter and spirit to the exceptions in article 26(4) of the Constitution.



- k. That the truism on assessment and award of damages against the State was hereby denied.
  - l. What constitutes cost be borne by each party.
3. The Applicants, being aggrieved with the said decision, filed a Notice of Appeal dated March 29, 2022 and lodged with the High Court registry on March 31, 2022, and subsequently filed a Notice of Motion application dated July 27, 2022 in this Court brought pursuant to Rule 5(2)(b) of the [Court of Appeal Rules](#), seeking orders that there be stay of the judgement and decree in Malindi High Court Constitutional Petition No E009 of 2020 pending the hearing and determination of the intended appeal. The application was supported by an affidavit sworn on July 27, 2022 by PC Omari Albert Odero, from the Directorate of Criminal Investigations at Ganze Sub-County, who detailed the facts giving rise to the prosecution of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in Kilifi Senior Principal Magistrate’s Court Criminal Cases no 395 and 396 respectively, and deponed to the effects of the impugned judgment and in particular that the judgement has curtailed the powers of police officers to investigate, arrest and present offenders to court for charging, and the right and duty of the office of the Director of Public Prosecution from prosecuting offences of procuring illegal abortion.
  4. The Respondents opposed the application by way of a replying affidavit sworn on August 16, 2022 by the 1<sup>st</sup> Respondent, deponing to the implications of staying the impugned judgment, and in particular on the continuation of the subject criminal trials, and the continued use sections 158, 159 and 160 of the [Penal Code](#) without regard to the provisions of the Constitution on the rights to health and access to abortion care within the law, and the rights of women, girls and healthcare professionals. The 1<sup>st</sup> Respondent stated that the 2<sup>nd</sup> Applicant herein made an application on June 14, 2022, before the 4th Applicant withdrawing criminal cases No 395 and 396 of 2019 and Children’s Case No 72 of 2019 against the Respondents, which application was allowed, all cases withdrawn, and files closed.
  5. We heard the application through the virtual court platform on August 7, 2022, and learned counsel Ms. Lutta, Mr. Mwangi Kamanu, Mr. Jami Yamina and Mr. Jacob Mkala, appeared for the 1<sup>st</sup> to 4<sup>th</sup> Applicants, while learned counsel Mr. Martin Onyango and Ms. Prudence Mutiso, appeared for the Respondents. The learned counsel highlighted their respective submissions that they lodged with this Court’s registry dated August 10, 2022 and August 16, 2022 respectively.
  6. The principles applicable in the exercise of the Court’s unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR. In addition, this court exercises original jurisdiction under Rule 5(2)(b) as held in [Ruben & 9 Others v Nderitu & Another](#) (1989) KLR 459.
  7. On the first limb of arguability, the Applicant’s counsel highlighted the arguable issues in their intended appeal as being whether the right to abortion is a fundamental right; and the powers of the police to investigate and arrest as well as that of the Office of the Director of Public Prosecutions (ODPP) to charge offenders of illegal abortions. It was also argued that the nugatory test had been met because the judgement will open a floodgate of litigation from persons previously charged and convicted under the subject provisions of the Penal Code and will cripple the constitutional functions of the police and the ODPP. On the public interest angle, it was urged that the judgement issued orders in rem and this would affect proceedings hinged on the impugned provisions of the [Penal Code](#).
  8. The Respondents’ counsel, while not contesting the arguability of the appeal, submitted that the intended appeal will not be rendered nugatory if stay is not granted, as the Applicants will suffer no



loss. Further, that the ODPP and the Senior Principal Magistrates Court, having taken steps to bring the criminal cases against the Respondents to a close in compliance with the High Court’s decision, and are therefore estopped from seeking stay orders. Lastly, on the public interest, that the stay will sanction a continuation of the violation of the rights of the respondents.

9. It is indeed not disputed that the issues of whether abortion is illegal or whether it is a fundamental right is at the core of the appeal, and the appeal is to this extent arguable. It must be emphasised that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. As to whether the appeal will be rendered nugatory if the stay is not granted, the Applicants have invoked the public interest in performance of the duties of the police and ODPP and the prosecution of illegally procured abortions. Similarly, the Respondents urge that there is public interest in upholding women and girls’ reproductive health rights. They also urge that a stay will be personally prejudicial to them as it will result in their prosecution for criminal cases which have already been withdrawn.
10. It was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR added the public interest as an element to be considered in stay applications. It is our view that the orders sought to be stayed extensively affect the law and policy on the regulation of abortion, and the execution of the duties of the police and DPP in this regard, and that it is in the public interest that the said orders are put on hold pending a determination of the issues raised in the appeal. In addition, actions taken pursuant to the impugned judgment in this regard may be irreparably irreversible. The only demonstrated prejudice that is likely to occur is the continued prosecution of the Respondents, and it is our view that the order quashing the criminal charges against the Respondents is the only one which needs to be preserved pending the hearing of the appeal for this reason.
11. The required threshold for the orders of stay of execution sought by the Applicants has therefore been met with regard to majority of the orders given by the High Court in the impugned judgment, save for that on the Respondents criminal prosecution, and the Notice of Motion application dated July 27, 2022 is accordingly partially allowed, to the extent that the orders in the judgment delivered by the High Court on March 24, 2022 in Malindi High Court Constitutional Petition No E009 of 2020 are stayed pending the hearing and determination of the appeal filed herein, save for order (d) of the said judgment which reads as follows:

“That the declaration be and is hereby made by reviewing of the decision making process in a wider context by the respondents to initiate an investigation, arrest and commencement of criminal proceedings in Criminal Case No 395, 396 of 2019 and Children’s Case No 72 of 2018 at Kilifi Law Courts against the petitioners in terms of sections 158, 159 and 160 of the Penal Code. That the proceedings having been marked with irregularities from the outset a writ of certiorari clearly merit based do issue against the text of the charges involved in prosecuting the petitioners under the authority of Article 157(6) and (7) of the *Constitution*.”

12. There shall be no order as regards the costs of the application.
13. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF DECEMBER 2022.**

**S. GATEMBU KAIRU (FCI Arb)**



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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

