



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Republic (Criminal Application SUP. E004 of 2021)
[2022] KECA 1351 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1351 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION SUP. E004 OF 2021
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
DECEMBER 2, 2022**

BETWEEN

NAHASHON MUTUA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for leave to appeal to the Supreme Court against the judgment of the Court of Appeal made on 18th December 2020) in HC. CR. A. No. 55 of 2019)

RULING

1. The application before the court is dated February 8, 2021 and is brought under articles 159(2)(d), 163(4)(b) of the *Constitution* of Kenya, 2010 and rule 33 (3) (a) of the *Supreme Court Rules*, 2020. The applicant seeks leave to appeal to the Supreme Court of Kenya against the judgment of the Court of Appeal dated December 18, 2020.
2. A brief background to the matter is that the applicant was the Officer Commanding Station (OCS) Ruaraka Police Station at the material time, when one Martin Manyara was arrested on December 9, 2013. According to evidence adduced at trial, the said Martin Manyara caused a commotion at his home when he arrived home drunk past 9 p.m. and threatened to jump over his 1st floor balcony with his child, aged 6 weeks old, in his arms. This incident drew the attention of neighbours, who called in the assistance of police from the nearby Ruaraka Police Station. The police went to the scene and managed to take away the baby from Martin and then booked him at the police station. Martin was never to return home alive as he was taken to Kenyatta National Hospital on the morning of the following day 20th December 2013, where he succumbed to injuries sustained from a beating he suffered while in custody. Initially, one Kelvin Odhiambo, a cellmate to the deceased, was charged with Martin's murder. However, after investigations by the Independent Police Oversight Authority (IPOA), the charges against Kelvin Odhiambo were dropped and the applicant herein was charged with the murder in Nairobi R. No. 84 of 2015. The prosecution brought forward 3 protected witnesses who had been



custody at the police station on the material night, and they told the court that Martin Manyara was one of two prisoners brutally beaten by the applicant on the fateful night. The prisoners (witnesses) also told the court that they had been forced to sign statements falsely implicating Kelvin Odhiambo. In defence, the court was told that the prosecution witnesses were untruthful and that the deceased was indeed beaten by Kelvin Odhiambo. The High Court delivered its Judgment on February 14, 2019, where it held that the applicant was guilty of killing Martin Manyara, and sentenced him to death. The applicant filed Criminal Appeal 55 of 2019 which was dismissed in its entirety by this Court on 18th December, 2020.

3. The present application states that there are issues of general public importance in the intended appeal touching on rights and freedoms protected by the *Constitution*. The applicant states that there are cardinal issues of law touching on immunity of police officers in discharge of their duties, especially for those officers in charge of police stations. In his submissions dated December 4, 2021, the applicant submits that the Supreme Court dictated that right to life cannot be taken away without clear reasons. He also submits that the mandatory death sentences facing many convicts qualifies the issues raised as those of general public importance.
4. The Supreme Court of Kenya in *Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone* [2013] eKLR gave guiding principles for consideration of applications for leave to apply that court. The court stated:

“In summary, we would state the governing principles as follows:

- 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. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”



5. While referring to the case of *Hermanus Phillipus Steyn (supra)*, this Court in *Johnson Gitthaiga Njoroge v Daniel Gitthaiga Mwaniki* [2014] eKLR noted:

“The court stated (at paragraph 58):

“...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 closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern”.

6. We have considered the application in issue, as well as the background to this matter and the law, and are of the view that the applicant has not met the threshold to warrant grant of leave to appeal to the Supreme Court.

7. With regard to the particular circumstances in this matter, the evidence by the prosecution witnesses directly implicated the applicant in the assault that led to the death of the deceased. This situation does not create an issue of general public importance merely because the applicant is a police officer or a former OCS. Additionally, the matter was investigated by IPOA, an independent body, which was not shown to have any malice against the applicant, and the resulting report by IPOA cannot be said to have implication upon all police officers. The applicant therefore has not demonstrated that there are any issues of general public importance which transcend the particulars of this case. Furthermore, there is no substantial question of law tabled for potential consideration by the Supreme Court nor is there any demonstrated conflict of jurisprudence arising from other courts in similar circumstances.

Consequently, the application dated February 8, 2021 is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

