



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), KARANJA & KOOME, JJ.A.)**

**NAKURU CRIMINAL APPEAL (APPLICATION) NO. 2 OF 2020**

**[Consolidated with Nakuru CoA Criminal Applications No. 3 & 4 of 2020]**

**BETWEEN**

**PERRY MANSUKH KANSAGARA .....1ST APPLICANT**

**VINOJ JAYA KUMAR.....2ND APPLICANT**

**LUKA KIPYEGON.....3RD APPLICANT**

**JOHNSON KAMAU NJUGUNA.....4TH APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

*(An Application for Stay of Proceedings and/or any Further Proceedings in Naivasha Chief Magistrate Court MCR No. 977 of 2018 pending the Hearing and Determination of an Appeal or Intended Appeal from the Judgment and Decree of the High Court of Kenya at Naivasha (Mwongo, J) delivered on the 9th April, 2020*

*in*

***H.C.CR. Revision No. 4 of 2020)***

**RULING OF THE COURT**

1. The applicants initially separately filed three applications - Criminal Appeal (Application) Nos. 2, 3 and 4 of 2020 but they were later consolidated and they yielded Criminal Application No. 2 of 2020. The applicants are all aggrieved by the Ruling delivered on 9th April, 2020 in Criminal Revision No. 4 of 2020 by the High Court sitting in Naivasha (**Mwongo, J**). This Ruling therefore applies to the three applications as consolidated. The applicants in the three applications seek from this Court orders as follows:-

**(i) That the Honourable court be pleased to grant stay of the orders issued on 9th April, 2020 and specifically the order directing commencement of proceedings and in essence issue an order of stay of proceedings against the appellant/applicant in Naivasha MCR No. 977 of 2018 pending hearing and determination of this application.**

They also seek the same order of stay pending the hearing and determination of the intended appeal before this Court.

2. A brief account of the circumstances leading to the filing of this application is necessary in order to place the application in context. The four applicants were among nine persons charged before the Chief Magistrate Court at Nakuru with several criminal charges arising from a very unfortunate incident which came to be known as the “Solai Dam tragedy”. In the said incident the Solai dam broke its walls and an avalanche of water swept across the nearby farms leaving in its wake unfathomable destruction to the people, property which included livestock and the flora and fauna in the area; not to mention that several lives were lost in the process and several other families were rendered homeless. We cannot delve into the details of the incident but suffice to say that several persons including the applicants herein found themselves before the magistrate’s court where they were charged with several criminal charges which included manslaughter contrary to **section 202** as read with **sections 205** of the Penal Code.

3. The applicants pleaded not guilty of the charges and the matter was fixed for hearing. The case came up for hearing on several occasions but for some reason or other, the Office of the Director of Public Prosecutions (ODPP) (the respondent herein) and on occasion the defence counsel were not ready to proceed and the trial never took off. It would also appear that as the matter was pending hearing, negotiations on prospects of plea bargaining were going on but nothing tangible appears to have come of the negotiations.

4. The matter was eventually fixed for hearing on 3rd December, 2019 by consent of all parties who were present in court. On the scheduled date however, there was no State Counsel in court to prosecute the matter or anybody to hold their brief and apply for adjournment or explain their unavailability or absence from court. Learned counsel for the defence strongly opposed any adjournment being granted terming the conduct of the ODPP deplorable and contemptuous of the court bearing in mind that the officers from that office were party to that hearing date being given.

5. The defence applied for dismissal of the suit proffering reasons, *inter alia*, that the prosecution had lost interest in the matter; and that the accused persons were entitled to a speedy trial. In a reserved ruling, the learned Magistrate (Hon. Bidali) made a finding as follows:-

“ ... **No evidence was tendered by the prosecution.**

**Constructively the prosecution case closes and in the absence of any evidence on record, and applying the principles emanating from the authorities referred to earlier in this ruling, I hereby acquit the accused persons under Section 210 of the Criminal Procedure Code.”**

6. That Ruling shook the ODPP into action and they moved the High Court by way of revision pursuant to **Section 362, 364** and **365** of the Criminal Procedure Code; asking the court to set aside the said ruling on grounds, *inter alia*, that the ruling was improper as the prosecution had not adduced any evidence yet the learned Magistrate acquitted the accused persons under **Section 210** of the Criminal Procedure Code; and that the matter was of public interest.

7. After considering the application before him, the learned Judge found in favour of the ODPP and declared the applicant’s acquittal void and set it aside. The learned Judge ordered a retrial of the case before a Magistrate other than Hon. Bidali.

8. The applicants have filed an appeal against that Judgment before this Court and in the meantime filed the three separate applications, the subject of this ruling; seeking the orders we referred to earlier. The applications are predicated on the grounds on their faces and on the affidavits in support sworn by the applicants on various dates. We note that the memoranda of appeal are also part of the record of the applications before us.

9. In their grounds of opposition, the (ODPP) opposes the applications on grounds that the applicants have failed to establish that their intended appeal is arguable, and further that the nugatory aspect has not

been established and the applications therefore fail to meet the threshold set for applications under **Rule 5(2)b** of the Rules of this Court; that the applicants are guilty of non-disclosure as they have failed to disclose that counsel for the victims have pending applications which are to be determined by the trial court by dint of the orders of the Judge, thus granting a stay at this stage would be prejudicial to the victims as they would have no *locus* to appeal.

10. Counsel on both sides filed written submissions and lists of authorities. We have considered all the material before us, and the applicable law. In considering the application we must eschew delving into the substantive matters that are for decision by the Bench that will hear the main appeal. All we need to do now is to consider whether based on the material placed before us and applying the guidelines and the law which is already settled in this area, the applicants have demonstrated that their appeal/intended appeal is arguable and secondly whether if the order of stay sought is not granted, their appeal/intended appeal will be rendered nugatory were the appeals/intended appeals to succeed. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.**

11. On the first limb on arguability, we have considered the draft memorandum of appeal and in our view the appeal is not frivolous. For instance, the draft memorandum of appeal raises the question whether the learned Judge erred in invoking his constitutional supervisory powers conferred on the court by the constitution when in fact he had been moved pursuant to the court's revisionary jurisdiction under **Sections 364 and 365** of the Criminal Procedure Code. There is also the germane issue as to whether the learned Judge had jurisdiction to overturn an acquittal while sitting on revision. In view of the fact that the applicants only need to establish one arguable point, (See **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai 345 of 2004, we are satisfied that arguability has been demonstrated.

12. On the second limb on the nugatory aspect, the law enjoins the applicants to demonstrate both arguability and the nugatory aspect as demonstrating only one limb will not suffice. Have the applicants demonstrated the nugatory aspect? The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. See **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227** at page 232.

13. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. Having considered the circumstances surrounding this matter, we do not see what will be rendered nugatory if the stay orders are not granted. We say so because if the appeal is allowed, the hearing before the trial court will just be stopped and the acquittal of the applicants restored. We do not think that they will be prejudiced in any way if the criminal trial proceeds. As stated earlier, there were attempts to plea bargain and attempts to settle the matter out of court. Orders of stay of proceedings if granted will scuttle any attempts to finalize the negotiations that were on going prior to the impugned Ruling.

14. Additionally, as held in this Court's decision in **David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001**, each case must be considered within its own peculiar circumstances. In this case other than the three applicants, there are six other co-accused persons who did not appeal against the impugned judgment. If their trial is stayed pending hearing of the applicants' appeal, their right to a speedy trial will be compromised. On the converse, if the case against them proceeds and that of the applicants is stayed, then in the event the appeal fails, it would mean recalling all the witnesses who will have testified. That would be untidy and also be an uneconomical use of valuable judicial time and other resources. We are also persuaded that the matter is in the realm of Public Interest and the stay orders sought are not merited.

15. For the foregoing reasons, we find that this application fails to meet the threshold set for applications under **Rule 5(2) b** of the Court of Appeal Rules. The application is therefore dismissed with costs in the intended appeal.

**Dated and delivered at Nairobi this 19th day of February, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**