



**Simiyu v Republic & another (Criminal Application 72 of 2020)
[2021] KECA 5 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 5 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION 72 OF 2020
W KARANJA, DK MUSINGA & SG KAIRU, JJA
SEPTEMBER 23, 2021**

BETWEEN

PETER JUMA SIMIYU APPLICANT

AND

REPUBLIC 1ST RESPONDENT

JOHN OMOLLO NYAKONGO 2ND RESPONDENT

(Being an application for stay of proceedings and Orders of the Ruling of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 1st November 2019 and on 5th December 2019 in H.C. Criminal Revision No. 5 of 2019.)

RULING

1. Peter Juma Simiyu, the applicant herein, has filed before this Court an application seeking stay of further proceedings in Mombasa Criminal Case No. 1338 of 2016 (as consolidated with Criminal Case No. 685 of 2015) and Mombasa Criminal Case No. 1115 of 2020. The application was brought under sections 3A & 3B of the Appellate Jurisdiction Act and rules 5(2)(a), 42 and 43 of this Court's Rules.
2. The factual background to the application is that John Omollo Nyakongo, the 2nd respondent, was the complainant in Mombasa Chief Magistrate Criminal Case No. 1338 of 2016, which was consolidated with Mombasa Chief Magistrate Criminal Case No. 685 of 2015. The applicant was acquitted of all the charges on 23rd October 2017 under the provisions of section 202 of the *Criminal Procedure Code*.
3. The 2nd respondent was dissatisfied with the acquittal and on 5th February 2019 he lodged before the High Court Criminal Revision No. 5 of 2019. The High Court (Mwangi, J.) rescinded the acquittal order and ordered the reinstatement of the criminal charges.



4. Being aggrieved by the learned judge's ruling, the applicant filed Criminal Appeal No. 34 of 2020 before this Court. The applicant also lodged in the High Court an application for stay of execution of the ruling pending determination of the application and the intended appeal. The application is yet to be heard.
5. Meanwhile, the criminal proceedings before the Magistrate's Court were ongoing. After several mentions, on 24th July 2020 the 1st respondent applied to close the matter, and the application was allowed and the applicant was set free again. But that was not the end of the applicant's tribulations. On 3rd August 2020 the appellant was again arraigned in Court and charged in Chief Magistrate Criminal Case No. 1115 of 2020 on the same facts emanating from the earlier criminal cases.
6. In his application before this Court, the applicant, through M/s Kadima & Company Advocates, submits that he has an arguable appeal, and referred us to his memorandum of appeal. Some of the grounds of appeal that have been raised are that the learned judge erred in law by: failing to hold that the 2nd respondent lacked legal capacity to bring an application for revision; treating the application for revision as if it were an appeal from the acquittal order; failing to disclose any illegality or impropriety attributable to the trial court to warrant the exercise of the High Court's power of revision; and failing to appreciate the provisions of section 364 (1) of the Criminal Procedure Code which stipulates that revision cannot be exercised to alter or reverse an acquittal order.
7. Lastly, it was submitted that if the orders sought are not granted, the applicant will be greatly prejudiced and the appeal risks being rendered nugatory.
8. This application came up for virtual hearing on 9th March 2021. Parties had been advised that the application would be canvassed by way of written submissions only, and were therefore directed to file and exchange the same. However, only the applicant put in submissions and a bundle of authorities. Although the respondents were served with the applicant's submissions and list of authorities on 4th December 2020, none of them filed submissions.
9. We have considered the applicant's submissions and the cited case law. It is doubtful whether rule 5(2) (a) of this Court's Rules can be invoked to grant the orders sought.
10. The rule provides as follows: -

“(a) In any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.

The marginal note to rule 5 is headed “Suspension of sentence, injunction and stay of execution and stay of proceedings.”

The applicant has neither been convicted and sentenced nor is he seeking to be released on bail.

11. In *Goddy Mwakio & Another v Republic*, where the applicants sought stay of criminal proceeding pending appeal in almost similar circumstances as the applicant herein, this Court stated: -

“In our view, the present application is beset by several hurdles. We refer to only two. The first is that of jurisdiction. The application is brought under Rule 5(2)(b) which expressly applies to civil proceedings. The proceedings in the subordinate court which are the subject matter of the application are criminal proceedings and therefore governed by Rule 5(2)(a) which gives this Court power specifically to do two things, firstly, to order an appellant to be released on bail, and, secondly, to suspend the execution of any warrant of distress. The applicants' advocate made no effort whatsoever to show that the Court has,



in addition, jurisdiction under Rule 5(2)(a) to order stay of criminal proceedings pending in a subordinate court. The applicants have not invoked the courts inherent jurisdiction. Secondly, assuming but without deciding that, the court has jurisdiction to entertain an appeal from dismissal of an application for revision, the applicants have not shown that there are valid grounds of appeal..”

12. In this application the applicant has invoked the Court’s inherent jurisdiction. The applicant has also advanced several arguable grounds of his intended appeal. The respondents did not oppose the application. In *Mary Ngechi Ngethe v The A.G. & Another*, , this Court had jurisdiction to consider the issue of jurisdiction to stay criminal proceedings in the Magistrate’s Courts under rule 5(2)(a) and (b) of this Court’s Rules. The Court held: -

”There cannot be any doubt that this Court cannot stay criminal proceedings in the Magistrate’s Courts in the manner sought in this application because there is no jurisdiction to do so. This Court will issue and has issued as demonstrated by decisions we have referred to orders prohibiting magistrates’ courts from proceeding with criminal trials where it found evidence that the trial was actuated by malice and abuse of process, where such prosecution was in derogation of the appellant’s constitutional rights and instituted with the pre-dominant and improper intent to harass and exert pressure on the appellant.”

13. In *Eng. Michael Sistu Mwaura Kamau v The Ethics and Anti-Corruption Commission & 3 Others*, the Court followed the earlier decision of *Mary Ngechi* (supra) and held: -

”We are in agreement with the above findings that each case is considered on its own merits. It is in instances where there are trumped-up charges, or the prosecution is not undertaken according to law, or it is activated by malice and meant to harass the applicant that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice are met and to prevent the abuse of the process of court, as indeed this is a Country that is governed under the rule of law and not the whims of the D.P.P. or any other person or authority.”

14. Having looked at the draft memorandum of appeal, we are satisfied that the appeal is arguable. Unless we grant the orders sought, the applicant’s constitutional right to a fair trial may be trampled upon and will suffer prejudice. Consequently, we hereby grant stay of further proceedings in Mombasa Criminal Case No. 1338 of 2016 as consolidated with Criminal Case No. 685 of 2015 and Mombasa Criminal Case No. 1115 of 2020 pending hearing and determination of Criminal Appeal No. 34 of 2020 and that the Criminal Appeal be heard on basis of priority.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

