IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (GITHINJI, MURGOR & ODEK JJ.A)

CRIMINAL APPLICATION NO. SUP. 2 OF 2018

BETWEEN

PATRICK AYISI INGOI.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application to seek leave to the Supreme Court against the judgment and orders of the Court of Appeal, Nairobi (Waki, Nambuye & Kiage, JJA) delivered on 20th December 2018)

in

Civil Appeal No. Nai 131 of 2008

RULING OF THE COURT

This Notice of Motion dated 24th July 2018 is made under ***Article 163(4) (b)*** of ***the Constitution*** following a decision of this Court (Waki, Nambuye & Kiage, JJA), delivered on 20th December, 2018. In the application, the applicant seeks for certification to appeal against the decision of this Court to the Supreme Court, and an order of stay of execution of the orders of this Court pending the hearing and determination of the application.

The motion was filed on grounds that the intended appeal to the Supreme Court raised a matter of general public importance that pertained to the fundamental rights of a person to a fair trial, the right to fair administrative action and access to justice; that the appeal would be rendered nugatory if the appellant was removed from the jurisdiction of the Court; that the appellant had an arguable appeal with a high chance of success and that in the interest of justice the orders sought ought to be granted.

The application was supported by the affidavit of Karathe Wandugi, advocate, who had conduct of the appeal wherein it was deponed that the judgment in *Criminal Appeal No. 131 of 2008* was delivered on 20th December 2018, that the appellant was a citizen of Kenya, whose appeal would be rendered nugatory if he was removed from the jurisdiction of the Court, and extradited to a foreign jurisdiction; that the appellant was dissatisfied with the decision of this Court and intended to institute an appeal to the Supreme Court.

A brief background to the application as can be discerned from the Judgment of the Court delivered on 20th December, 2018 is that, about 14 years ago, on 21st May 2004 National Bank of Tanzania in Moshi

was robbed and Tanzania Shillings five billion was stolen at gunpoint from the Bank. Some Tanzania nationals were arrested and charged in the District Court at Moshi in Criminal Case No. RM 16/2004. Two Kenyans who were suspected to have participated in the robbery were also arrested, but in Kenya. These were Patrick Ayisi Ingoi, the applicant herein and Wilfred Onyango Nganyi. The Tanzanian Government requested for their extradition, and proceedings were commenced on 19th July, 2004 in the Nairobi Senior Resident Magistrate's Court in *Miscellaneous Criminal Case No 19 of 2004*.

Upon hearing the evidence of the Attorney General's 18 witnesses, the magistrate determined that the alleged offences were extraditable under Chapter 76 and not Chapter 77 of the Laws of Kenya, but that Chapter 76 was not applicable to the case as there was no rebuttal by the Attorney General that Legal Notice 95 of 1996 had been placed before the National Assembly. In addition, following interrogation of the evidence, the trial magistrate concluded that the witnesses were not truthful, and upon declaring that the suspects would not receive a fair trial before the Tanzanian court, ordered their discharge.

The Attorney General was aggrieved by the decision and filed an appeal to the High Court and at the same time requested for the certified proceedings. They were informed that the record was extensive and would take time to prepare. With the appeal due to lapse on 14th March 2005, they sought for and obtained orders allowing them to use hand written copies of the proceedings to file the appeal in the High Court pending the preparation of the certified typed proceedings. The proceedings were placed before the court Makhandia, J, (*as he then was*) but were not certified. When the Deputy Registrar was summoned to explain the delay, the court found the reasons provided to be reasonable and acceptable. Both parties also accepted the

explanation, and confirmed that the appeal could be set down for hearing, which the court subsequently ordered. The appeal was placed before Ojwang, J (as he then was) who for the reasons set out in the judgment allowed the appeal. One of the reasons pertained to the typed proceedings where the court concluded that want of form in using hand written proceedings to file an appeal cannot amount to sufficient reason to nullify the appeal.

The applicant was aggrieved by the decision of the High Court and filed an appeal to this Court. Once again the issue of the proceedings was raised, with the court asked to determine whether the appeal filed before the High Court was competent. The Court dismissed the appeal and, with respect to the question of the certified proceedings, the Court upon reviewing the record concluded that since both parties were satisfied with the certified proceedings and were agreeable to the appeal being set down for hearing, the High Court could not be faulted for having admitted them. The Court further found that no prejudice was occasioned to the parties on account of admission of the hand written proceedings.

Those in a nutshell are the facts as they pertain to this application.

In the submissions ***Mr. Wandugi***, learned counsel for the appellant begun by informing us that he would abandon the application for stay of execution of the orders of this Court, as the applicant had already been extradited and was no longer in the jurisdiction of the Court. Counsel went

on to submit that despite this, the issue concerned the preparation of the record of appeal and the evidence, and even though the orders were overtaken by events, rendering a decision on the question of admissible documents would not be an academic exercise as it would benefit future applications of this nature.

Counsel further submitted that the applicant who was the appellant in the High Court was dissatisfied with the decision of this Court, as the documents filed in this Court were dissimilar to those filed in the High Court; that ***section 349*** and ***350*** of the ***Criminal Procedure Act*** were not complied with as the provisions provide that the petition shall be accompanied by the proceedings and order or judgment appealed against; that instead, the petition was accompanied by hand written notes, which the court had admitted pending the filing of the certified proceedings. Counsel complained that this Court wrongly found this to be a matter of form and not substance, and further found that the typed proceedings were nonetheless included. Counsel argued that the procedure for including such documents was not followed,

and they were improperly slipped into the record; and that it was the inclusion of the impugned documents that had led to the applicant's extradition and denied him a fair trial. In view of the improper inclusion of the proceedings, counsel urged that the Supreme Court should be provided an opportunity to determine whether the inclusion of the impugned

documents should have been admitted, since the correct procedure was not followed.

On his part ***Mr. O'mirera*** learned counsel for the State opposed the application arguing that it was incompetent, as the applicant had already been extradited from the jurisdiction of the Court; that therefore the Court would be engaging in an academic exercise.

Counsel further argued that the motion did not identify the nature of the matter of general public importance to be determined by the Supreme Court, which precluded the respondent from ascertaining what the intended appeal encompassed. It was further submitted that to obtain certified proceedings, a party would of necessity have to apply to the Deputy Registrar; that due to the urgency of the matter, the Attorney General had applied to use the hand written proceedings whilst awaiting to be supplied with the typed certified proceedings; that the application was not at any time objected to by the applicant or its counsel, and consequently the court allowed the inclusion of the hand written proceedings. Counsel concluded that the record was therefore clear is clear that the controversy surrounding the certified proceedings was raised, and that both the High Court and this Court were satisfied that the record was properly prepared.

In his reply, Mr. Wandugi further submitted that the issue of the extraneous typed proceedings having been included in the record was

emphatically raised in both the High Court and in this Court, particularly the failure to comply with the provisions of the law; that, instead of disregarding the impugned proceedings, this Court had relied on them when it rendered its judgment. Counsel reiterated that the question for consideration by the Supreme Court and which was a matter of general public importance was whether the record could be amended without the proper procedures being followed.

We have considered the application, and the parties' submissions, and in our view, two issues arise for our consideration, namely:-

> *i) whether the applicant having been already extradited, rendered the intended appeal an academic exercise; and*
>
> ii) *whether the intended appeal sought to be determined by the Supreme Court was a matter of general public importance, and therefore eligible for certification as such.*

On the first issue, the respondent informed us, and the applicant's counsel confirmed that the issue pertains to the extradition of the applicant which had already taken place, and the applicant was no longer within the jurisdiction of this Court. It is for this reason that the respondent posited that determination of the application for certification was an academic exercise and in futility.

In the case of ***Muslims For Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, High Court Petition No. 7 of 2011*** Ibrahim, J (as he then was) rendered himself thus;

> ***"A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise".***

Though the instant application is for certification of an intended appeal to the Supreme Court instead of for conservatory orders, we nevertheless consider that the same rationale outlined therein would be applicable. For the applicant's rights to be protected and enforced, he would need to be within the

jurisdiction of the court. But since he is not, of what benefit would orders of the Supreme Court be to him at this point in time? He is not in a position to benefit from orders of protection or enforcement if any were to be issued. Certification of the application would be a 'futile academic discourse or exercise', and as we have said many times over, courts do not issue orders in vain.

But that said, the applicant's other contention is that notwithstanding that he will not be in a position to benefit from the outcome of the intended appeal, a decision on the issue would benefit future cases of a similar nature.

So does the application which is brought under ***Article 163 (4)*** of ***the Constitution*** and ***section 24*** of the ***Supreme Court Act*** qualify for certification? ***Article 163(4)*** of the ***Constitution*** stipulates the criterion to be satisfied by an intended appellant in order for leave to be granted to appeal to the Supreme Court. It states that;

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court--***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution; and***
>
> ***(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved...."*** (Emphasis supplied**)**

Whether or not a matter is considered to be of general public importance was set out in guidelines enumerated by the Supreme Court in the case of ***In the Matter of Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone, Civil Application No. Supreme Court 4 of 2012 (UR 3/2012)*** which specified that;

> ***i) "for a case to be certified as one involving a matter of general public importance, the intended appellant must satisfy the Court that the issue to be canvassed is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
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> ***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 significant bearing on the public interest;***
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> ***iii) such question or questions of law must have arisen in the court or courts below, and must been the subject of judicial determination;***
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> ***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***
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> ***(4) (b) of the Constitution;***
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> **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."***

In applying the above laid down guidelines to the instant case, we begin with the Attorney General's

complaint that neither the motion nor the affidavit in support have identified the issue of public importance that the Supreme Court would be required to address. Indeed, we have been through the motion and the averments, and besides a passing statement that the intended appeal involves a matter of general public importance as it pertains to *"…the fundamental rights of an accused person to a fair trial, the right to fair administrative action and access to justice",* no particulars were provided to demonstrate how the alleged shortcomings violated the applicant's rights. There was nothing to connect the broad statements proffered to the intended appeal to the Supreme Court. Hence the respondent's complaint that they were not aware of the issue to be propounded before the Supreme Court and to which they were required to respond.

Under conditionality (iv) set out above in the ***Hermanus Phillipus Steyn case (supra)*** the Supreme Court requires that;

> ***"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."***

Without identification of the issue in contention, like the respondent, we are unable to ascertain what are the issue or issues of general public importance for which certification is sought, and without which, we cannot determine *inter alia*, whether any or all of the elements set out in ***Hermanus Phillipus Steyn case (supra)*** have been satisfied. On account of this shortcoming, we are precluded from certifying an application, that has not properly identified and concisely particularised the *"…specific elements of 'general public importance'…"*.

Furthermore, in the submissions, the applicant's counsel sought to identify the question the Supreme Court was required to consider in the intended appeal. It was contended that the question was whether the record of appeal could be amended without the proper procedures being followed. From an analysis of the facts, our view is that the instant case turned on its own peculiar facts, and it is therefore difficult to see how the determination

of the question would either transcends the circumstances of the case or demonstrate a substantial point, or had given rise to a state of uncertainty in the law.

In view of the aforegoing, we find that the application having failed to satisfy the strictures set out by the Supreme Court, we decline to certify it. Accordingly, it lacks merit and is hereby dismissed. And since the applicant is no longer within the jurisdiction of this Court, we order each party to bear its own costs.

It is so ordered.

Dated and Delivered at Nairobi this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR