IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL (APPLICATION) NO. SUP.1 OF 2018

BETWEEN

REPUBLIC..APPLICANT

VERSUS

AHMAD ABOLFATHI MOHAMMED........1ST RESPONDENT

SAYED MANSOUR MOUSAVI...................2ND RESPONDENT

(An application for leave to appeal to the Supreme Court from a conviction, Judgment, decree, order of the Court of Appeal of Kenya at Nairobi (P. Kihara Kariuki, PCA, M'Inoti & Murgor, JJ.A.)

in

Criminal Application No. 136 of 2016)

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RULING OF THE COURT

1. On 26th January, 2018 this Court (**P. Kihara Kariuki, PCA, M'Inoti & Murgor, JJ.A)** delivered a judgment in **Criminal Appeal No. 136 of 2016, Ahamad O. Mohammed and Sayed M. Mousavi v Republic.**

2. The two appellants (now the respondents in this application), are citizens of the Islamic Republic of Iran. On 25th June, 2012 they were charged before the Chief Magistrate's Court, Nairobi, with committing an act intended to cause grievous harm contrary to **section 231** of the **Penal Code;** preparing to commit a felony contrary to **section 308(1)** of the **Penal Code;** and possession of explosives contrary to **section 29** of the **Explosives Act.**

3. On 2nd May, 2013 the respondents were convicted on all the counts and sentenced to life imprisonment for the first count, ten years' imprisonment for the second count and fifteen years' imprisonment for the third court, all the sentences to run concurrently.

4. Being aggrieved by the said conviction and sentence, the respondents preferred an appeal to the High Court. The High Court, (Kimaru, J.) dismissed their appeal against conviction but allowed the appeal against sentence, reducing it to fifteen years' imprisonment.

5. Still dissatisfied with the High Court's decision, the respondents preferred a second appeal to this Court. In a considered decision, the Court held that the circumstantial evidence upon which the charges were premised was insufficient to sustain a conviction on any of the charges. Consequently, this Court quashed the respondents' convictions, set aside the sentence and directed that **"they be set to liberty unless they are otherwise lawfully held. Upon being set to liberty, the appellants shall forthwith be repatriated back to their country."**

6. The State (now the applicant), was dissatisfied with the decision of this Court. Consequently, on 26th January, 2018 the Office of the Director of Public Prosecutions filed a notice of appeal, intending to appeal against the entire judgment to the Supreme Court of Kenya. On the same day, the applicant filed, under certificate of urgency, an application under **Article 163(4) (b)** of the **Constitution of Kenya 2010 (the Constitution)**, **rule 24** of the **Supreme Court Rules, 2011**; and **rules 40 and 41** of the **Court of Appeal Rules**.

7. The application seeks the following orders:

> ***"1. THAT leave be granted to the Applicant to appeal further to the Supreme Court of Kenya, against the Judgment and Order of the Court of Appeal delivered on the 26th January 2018.***
>
> ***2. THAT a certificate be issued certifying that the intended appeal involves matters of general public importance.***
>
> ***3. THAT an order of stay of the acquittal and release be granted pending hearing and determination of this application.***
>
> ***4. Any further orders this Honourable Court may deem fit."***

8. The application was supported by an affidavit sworn by Peter Mailanyi, Senior Assistant Director of Public Prosecutions. Mr. Mailanyi stated, *inter alia:*

> ***"5. THAT it is the contention of the applicant that this matter qualifies to be of general public importance because the Respondents herein were arrested in possession of explosives intended to be used to harm innocent Kenyans.***
>
> ***6. THAT the Respondents are Iranian Citizens and if they are allowed to leave the jurisdiction of the Court, the appeal shall be rendered nugatory as there is no extradition treaty between Kenya and the Republic of Iran.***
>
> ***7. THAT the Respondents (sic) are dissatisfied with the Judgment and order of the Court and has already filed a notice of appeal as the matter involves a matter of general importance, safety and peace of Kenya and affects the national security of the Country;***
>
> ***8. THAT this Honourable Court must take judicial notice of terror attacks which have previously occurred in the Country leading to the death of innocent persons both Kenyan and foreigners.***
>
> ***9. THAT terrorism affects National Security and public safety of all Kenyans and foreign nationals residing in Kenya.***
>
> ***10. THAT it is in the interest of justice that the orders sought be issued."***

9. When the application came up for hearing on 7th February, 2018, the respondents, through their advocates, **Ahmednasir Abdikadir & Company**, raised a preliminary objection based on five grounds as follows:

> ***"1. The Applicant, the Director of Public Prosecutions, having willfully disobeyed the judgment/order of this Honourable Court dated and delivered on 26th January, 2018 has no right of audience before this Honourable Court. It must first purge the contempt.***
>
> ***2. The Applicant having willfully disobeyed the judgment/order of this Court in filing the application before this Honourable Court acts contrary to Article 160 of the Constitution and is forcing the Court to hear an application that contravenes the provisions of the Constitution.***
>
> ***3. That once an accused person is acquitted by a trial or appellant court, a higher court has no power/jurisdiction to stay the acquittal of an accused person.***
>
> ***4. The Applicant fails miserably to bring the application within the confines of Article 163(4) (b) of the Constitution.***
>
> ***5. That this application is an abuse of the court process."***

10. The Court directed that the grounds raised in the preliminary objection be argued within the reply to the application. Arguing the application, **Mr. Wanyonyi, Senior Assistant Director of Public Prosecutions**, submitted that the intended appeal raises a matter of general public "interest" (sic), that is, security of the country. Counsel further submitted that unless the orders sought are granted, in the event that the intended appeal is successful it will not be possible to bring back the respondents to Kenya to serve any sentence that may be imposed upon them by the Supreme Court, in which event the appeal would have been rendered nugatory.

11. Responding to the issues raised by the respondents in their preliminary objection, Mr. Wanyonyi submitted that the State was not in contempt of the orders of this Court made on 26th January, 2018 directing that the respondents be set free and repatriated forthwith. He said that the State, having filed a notice of appeal and the application then under consideration, it cannot be said to have been in breach of the said orders. Besides, counsel added, repatriation is a process that takes quite some time to be undertaken.

12. Mr. Wanyonyi further submitted that the application was not an abuse of the court process; that under **Article 159(2) (d)** of the **Constitution** and **rules 1(2), 40 and 41** of this **Court's Rules,** the Court has jurisdiction to grant stay of acquittal and release of the respondents pending the intended appeal.

13. The respondents vehemently opposed the application**. Mr. Ahmednasir, Senior Counsel**, who appeared together with **Mr. Amanya Cohen** for the respondents, reiterated the grounds contained in the preliminary objection. Senior counsel submitted that the State should have

no audience before this Court since it had willfully disobeyed the orders issued by this Court on 26th January, 2018. In his view, the State should first purge the contempt then thereafter seek whatever orders it wishes to pursue.

14. That notwithstanding, Mr. Ahmednasir conceded that there is an exception to the general rule that ordinarily a court of law should not grant audience to a party who is in contempt unless and until he purges the contempt. He cited the ruling of Tunoi, J.A. in **ROSE DETHO v RATILAL AUTOMOBILES LTD & 6 OTHERS [2007] eKLR,** where the learned judge stated:

> ***"Has the contemnor a right to be heard? This is indeed an every day question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt. See EXITO NAVEGACION S.A. v SOUTHLAND ENTERPRISES CO. LTD. THE MESSIANIK TOLMI [1981] 2 LLOYD'S REP. 595 at page 602. In his speech Brandon LJ said:-***
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> ***"…………….that there may be cases where an appeal by a party in contempt against the very order disobedience of which has put him in contempt, can be shown to be, for one reason or another, an abuse of the process of the Court. In such a case the exception to the general rule discussed above would not apply."***

15. Senior Counsel further submitted that under **Article 160** of the **Constitution** which provides for the independence of the Judiciary, in the exercise of its judicial authority, the Judiciary is only subject to the Constitution and the law; and cannot be subject to the control or direction of any person or authority, the State included. The State should not therefore disobey this Court's order and then come before the same Court to seek approval to continue holding the respondents unlawfully, and thereby act as though it is directing the Court.

16. Mr. Ahmednasir further argued that there is no known provision of law under which a trial or appellate court can stay acquittal of an accused person. Liberty of the person is critical and once a person has been acquitted by this Court, there is no law that allows the State to hold him any further, Senior Counsel added.

17. Lastly, Mr. Ahmednasir submitted that the State had not demonstrated that there was any matter of general public importance that emanates from the impugned judgment of this Court to warrant certification to the Supreme Court. In support of that submission, he cited the Supreme Court decision in **JOHNSON GITHAIGA MWANIKI v DANIEL GITHAIGA MWANIKI [2015] eKLR**, where the Court held, *inter alia*, that

> **"for a matter to merit certification, it must relate to issues the determination of which will transcend the circumstances of the case."**

18. Senior Counsel urged the court to uphold the preliminary objection and dismiss the application.

19. We have anxiously considered this application and submissions by counsel. It is not in dispute that on 26th January, 2018 this Court allowed the respondents' appeal and directed that **"they be set to liberty forthwith unless they are otherwise lawfully held."** The court also directed that **"the appellants shall forthwith be repatriated back to their country."** Those orders have not been complied with.

20. Does this Court have jurisdiction to grant stay of acquittal pending an intended appeal? The question or issue of jurisdiction is fundamental in the discharge of any judicial functions by a court of law. This is a rare, if not unique, application seeking to have this Court stay its own orders acquitting the respondents and for their immediate repatriation. In common law jurisdictions an acquittal normally results in immediate release of an accused person from custody, unless there are other charges that are intended to be preferred against him or her and which therefore militate against such as accused person's release. In such a scenario the accused must be notified of the subsequent charges.

21. Under **section 379(5)** of the **Criminal Procedure Code**, where a person has been acquitted in a trial before the High Court in the exercise of its original jurisdiction and the Director of Public Prosecutions has, within one month from the date of acquittal or within such further period as this Court (the Court of Appeal) may permit, signed and filed with the Registrar of the Court a certificate that the determination of the trial involved a point of law of exceptional public importance, and that it is desirable in the public interest that the point should be determined by this Court, the Court is under an obligation to review the case or such part of it as may be necessary and thereafter deliver a declaratory judgment.

22. However, such declaratory judgment cannot operate to reverse an acquittal. It only has the effect of binding all courts that are subordinate to the Court of Appeal.

23. We are not aware of any law that grants this Court jurisdiction to stay an acquittal of an accused person so that he continues to be held in custody as a suspect awaiting a possible finding of guilt by the Supreme Court. When we asked Mr. Wanyonyi to point to us the enabling provisions of the law vide which the Court could grant such an order, counsel cited **Article 159(2)(d)** of the **Constitution** which stipulates that justice shall be administered without undue regard to procedural technicalities; and **rule 1(2)** of this **Court's Rules** which states that **"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice to prevent abuse of the process of the Court."**

24. We do not agree with Mr. Wanyonyi that this Court can invoke the provisions of **Article 159(2) (d)** of the **Constitution** to deny the respondents their right to liberty which the same court, differently constituted, has granted them**.**

In <u>LAW SOCIETY OF KENYA v THE CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 12 OTHERS</u>, Petition No. 14 of 2013, the Supreme Court of Kenya stated:

> ***"Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities."***

25. The same can be said of this Court's inherent jurisdiction; it cannot be the basis for granting orders that have otherwise no constitutional or statutory basis. The orders sought negate the constitutional principle of presumption of innocence until the contrary is proved. In the absence of any charges against the respondents, this Court has no jurisdiction to grant stay of a lawful order of acquittal of the respondents so that the State continues to hold them for an indefinite period of time in the hope that the Supreme Court may reverse this Court's judgment. Consequently, there is no basis for the Court to grant the request for stay of acquittal and the applicant's prayer in that regard is hereby rejected.

26. Turning to the prayer for leave to appeal to the Supreme Court, we are not persuaded that this application satisfies the well known principles laid down by this Court and the Supreme Court for certification of matters to the Supreme Court for purposes of appeal. When requested by the Court to do so, counsel for the applicant was unable to frame up the legal issue or issues that the applicant considers that the Supreme Court shall be required to pronounce itself on in the event that the leave sought were to be granted.

27. For a matter to merit such certification it must relate to issues the determination of which transcend the circumstances of the case. In allowing the appeal, this Court held that the circumstantial evidence that was relied upon to convict the respondents was so weak that it did not unerringly point to their guilt. The law relating to circumstantial evidence does not stand in a state of uncertainty so that it is for the common good of all that it be clarified by the Supreme Court. In **<u>PETER NGOGE v FRANCIS ole KAPARO & 5 OTHERS</u>, Supreme Court Petition No. 2 of 2012**, the Court held, *inter alia*:

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

28. We have said enough, we believe, to demonstrate that this application is for dismissal, firstly, for want of jurisdiction; and secondly, because the applicant has not met the threshold for certification.

In conclusion, we dismiss the applicant's application in its entirety.

Dated and delivered at Nairobi this 16th day of February, 2018.

R.N. NAMBUYE

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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.

<u>DEPUTY REGISTRAR</u>