IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPLICATION NO. SUP 2 OF 2016

BETWEEN

WANYIRI KIHORO …….……. APPLICANT

AND

ATTORNEY GENERAL ……...…… RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the Judgment and Decree of the Court of Appeal at Nairobi (Gachuhi, Masime & Kwach, JJ.A) dated 17th March, 1993

in

Civil Appeal No. 151 of 1988)

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RULING OF THE COURT

1. The applicant, **Wanyiri Kihoro,** is a gallant fighter, literally, and a patient man. He is also a London-trained Advocate of the High Court of Kenya and therefore an officer of this Court. By his motion dated 19th May, 2016, he seeks a certificate under ***Article 163 (4) (b)*** of the **Constitution** that a matter of general public importance is involved in his intended appeal to the Supreme Court. The remarkable part about the application is that the decision of the appeal he wishes to challenge was made 24 years ago on 17th March, 1993 in **Civil Appeal No. 151 of 1988**!

2. The background to the application has its roots in the dark days of political intolerance in this country that led to detentions without trial. On the night of 29/30th July, 1986, the applicant was arrested in Mombasa by agents of the State and transported to Nairobi where he was held in the Nyayo torture chambers for three months until 10th October, 1986 when he was detained without trial until 1st June, 1989. He filed suit in the High Court (**1793/1987)** against the State whilst in detention questioning his arrest, detention, torture and inhuman treatment, but the suit was dismissed. The State contended that he was connected with anti-government activities as an active member of "Mwakenya", an organization the State had banned, and possessed seditious literature.

3. On appeal to this Court, **(C. A. 151 of 1988),** the appeal was allowed and factual findings made that the applicant was kept in prolonged detention during which he was intensely and continuously interrogated. He was held virtually incommunicado for 74 days with no access to either an advocate or members of his

family and he suffered mental torture in the hands of his captors. The court found that the holding of the applicant by the police for 74 days was illegal as it was contrary to ***section 72*** and ***74*** of the retired Constitution. For those reasons, compensatory damages assessed at Shs.400,000 were awarded, the court declining the plea for punitive or aggravated damages for the reason that allegations of inhuman and degrading treatment were made but not proved. The decision was made on 17th March, 1993.

4. The State did not comply with the order for payment of those damages immediately and the applicant was forced to return to the High Court **(Misc. Appl. No. 52 of 2009)** for enforcement procedures which lasted another 18 years until payment was made on 25th November, 2011. For some reason, the applicant did nothing for the next five years or so until he went to the Supreme Court in May 2016 to seek leave to appeal against this Court's decision made 23 years earlier. The Supreme Court rejected that application on 5th May, 2016 on the basis that the matter lay within the framework of ***Article 163 (4) (b)*** of the **Constitution**. That is when the applicant filed the motion now before us on 19th May, 2016.

5. Two issues fall for our consideration in this application. Firstly, whether the application is tenable in view of the delay in filing it; and secondly, whether the application would succeed on merits.

6. In dealing with the glaring issue of delay and the competence of the application on that account, the applicant contended that the application could validly go to the Supreme Court because the execution process was not completed until the year 2011 and therefore the appeal would not be caught up by the decision of the Supreme Court in the cases of ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others*** ***[2012] eKLR*** and ***Tom Martins Kibisu vs Republic*** ***[2014] eKLR***. In those cases, he pointed out, the Supreme Court held that matters which had been finalized before the promulgation of the Constitution 2010 would not be entertained by that court. In his submission however, this matter was distinguishable because it was not finalised before the year 2011 when the decretal amount ordered by the court was recovered from the State. There was thus continuity of the dispute between the parties up to November 2011 and time would not begin to run until then. In his view, the Supreme Court would have no problem admitting the appeal if it was certified under ***Article 163 (4) (b).***

7. He further explained that he had filed a notice of appeal to the Supreme Court on 10th November, 2011 but copies of the Court of Appeal proceedings were not supplied to him until 3rd November, 2015 when he prepared the record of appeal to await the decision of the Supreme Court on his application for leave which was determined on 5th May, 2016. There was no other reason given for the delay.

8. On the second issue, the applicant referred us to a draft memorandum of appeal in which he listed some 15 grounds which he relied on to satisfy the requirement that the intended appeal was of general public importance and was deserving of the attention of the highest court in the land. In the grounds of appeal, affidavit in support and in oral submissions, the applicant emphasized that the intended appeal concerns the **Preservation of Public Security Act**, the **Criminal Procedure Code**, the law on sedition and treason, the **Evidence Act** and the constitutional right of an arrested person to a fair and public trial. It will call to question the whole issue of detention without trial which is a juridical and constitutional challenge to democracy. A number of International human rights instruments and Treaties ratified by Kenya will also need to be considered *vis a vis* the use of emergency powers by the Executive.

9. As regards the specific errors made by the Court of Appeal which will need revisiting, the applicant listed, among others: the erroneous evaluation of the evidence relating to the length of his unlawful detention; ignoring the circumstances under which he was detained which amounted to inhuman, torturous, degrading treatment and punishment; the finding that the trial which unlawfully took place *in camera* was lawful; the erroneous finding that the applicant's evidence was exaggerated; unjustified rejection of the claim for aggravated damages; and the unlawful assessment of damages after allowing the appeal instead of remitting the case back to the High Court for assessment. He would be seeking exemplary damages for failure by the State to justify his incarceration and torture, and for refusing to settle the judgment debt for 18 years thus aggravating and perpetuating the initial violation of human rights.

10. In support of the application he cited the cases of ***Malcolm Bell vs Daniel*** ***Toroitich Arap Moi & Another*** ***[2013] eKLR*** and ***Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone*** ***[2013] eKLR.***

11. In response to the application and submissions, the Attorney General through learned State Counsel, **Mr. Onyiso,** filed written submissions and made oral highlighting. On the issue of delay, he submitted that the application was filed outside the time limits permitted under ***Rule 40*** of the Court of Appeal Rules **(the Rules),** which is 14 days, and there was no plausible explanation for the delay extending to 24 years.

12. On the second issue, he submitted that the applicant had not satisfied the definition of *"matter of general public importance'* set by the Supreme Court in various cases including the ***Hermanus Phillipus Steyn case (supra),*** and ***Omega Chemical Industries Ltd vs Barclays Bank of Kenya Ltd [2014] eKLR***. He cited ***Black's Law Dictionary*** defining *'general public importance'* as:

> ***"..the general welfare of the public that warrants recognition and protection, something which the public as a whole has stakes, especially that justifies Government regulation".***

12. Mr. Onyiso referred us to the facts of the matter and observed that it only affected the applicant and the public has no stake. There is no explanation as to how the violation of his rights affected the rights of members of the public or what transcends the circumstances of the case to give it general significance. Even beyond the facts, submitted counsel, there was no substantial issue of law or uncertainty calling for clarification by the highest court. In his view, the applicant merely pleads apprehension of miscarriage of justice which is a matter capable of resolution by the superior courts, and was resolved by the Court of Appeal. The applicant was fully compensated by the State thereafter in accordance with the decision of the Court of Appeal and therefore, the public policy principle of finality of litigation must apply, he concluded.

13. We have anxiously considered this application and the two issues stated above. We are not without sympathy for the applicant who, in his own account of events and the findings of this Court, suffered immensely through unlawful actions of the State. As stated earlier it was a dark and regrettable period of the history of this country. But legal matters cannot be decided on the basis of sympathy or whim. We have examined the facts and the applicable principles of law and have come to the conclusion that the applicant is on fairly thin ice on the issue of delay, which is the first issue.

14. The intended appeal is against the decision of this Court made on 17th March, 1993. The application itself and the notice of appeal to the Supreme Court expressly so state. In that event, the rules are clear that an application for certification that a point of law of general public importance is involved, should be made within 14 days of the decision. That is ***Rule 40 (b)*** of the Rules which was in existence even before the Supreme Court came into existence. At a more fundamental level, the decision intended to be challenged was made long before the promulgation of the Constitution in August 2010. We do not, with respect, buy the argument advanced by the applicant that there was continuity of the litigation up to the year 2011 and that therefore the intended appeal ought to be considered as post-promulgation. In our view, the right of appeal, which is now sought to be exercised, arose in 1993 when the final judgment was delivered. There is no law or procedure stating that a party must await the completion of the execution process before challenging a decision of a court of law. Even assuming, without deciding, that the delay in the execution process can explain the delay of 18 years, we find no acceptable explanation for the delay between the time the execution was completed in 2011 and the filing of the application before us in May 2016. It was an afterthought and we so find.

15. In those circumstances, it is our view that the caveat imposed by the Supreme Court, that is, keeping at bay all pre-promulgation decisions, fully applies in this matter. In the case of ***Samuel Kamau Macharia & Another*** ***(supra),*** the Supreme Court stated thus:-

> ***"Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution."***

It continued -

> ***"The sole issue to consider is whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest Court in the land) before the commencement of the Constitution of 2010. Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that Court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens..... a final judgment by the highest court in the land at the time vested certain property rights in, and imposed certain obligations upon the parties to the dispute. We hold that Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution."***

16. We are bound by that decision and our finding on the first issue would be enough to dispose of the application. But the second issue seems to be a non starter too. The onus was on the applicant to satisfy us on the parameters set by the Supreme Court in determining what amounts to a matter of general public importance. In the ***Hermanus Phillipus Steyn case (supra),*** the Supreme Court carried out extensive comparative survey on the matter before concluding thus:

> ***"Before this Court, '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."*** [Emphasis added]

17. In the end, the Court outlined the governing principles in determining whether a matter is of general public importance, which principles have been applied in numerous subsequent decisions, thus:-

> **"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 [other] 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."

See also ***Malcolm Bell vs Daniel Toroitich Arap Moi & Another [2013] eKLR.***

18. We have examined those principles against the facts and law in the matter before us and, in our view, it does not pass muster. As correctly submitted by the Attorney-General, most of the complaints are centered on the findings of fact made by this Court which the applicant contends amounted to a miscarriage of justice in his case. Viewed with the hindsight of 24 years in an era of constitutionalism, rule of law and open society, it is easy to understand those complaints. However, the Court expressed itself with finality in its findings of fact and the errors made, if any, cannot form the basis of declaring the matter of general public importance. Such were the findings relating to the period of the appellant's unlawful detention; extent of inhuman, torturous, degrading treatment and punishment inflicted on him; the place and manner of his trial; credibility of the evidence on record; the claim for aggravated or punitive damages; and the decision to assess damages after allowing the appeal instead of remitting the case back to the High Court for assessment.

19. So, too, the issues of law touted as matters of general public importance. Most of those that are raised in the draft memorandum of appeal and in the affidavit in support of the application, do not appear to have been directly in issue before the Court or to have been adjudicated on. The intention is to raise them for the first time before the Supreme Court for it to express advisory views thereon. Such are the issues relating to the execution process which took the shape of other court proceedings before the High Court; the aggravation and perpetuation of torture by the State through delaying settlement of a court judgment for 18 years; philosophical discourse on the preservation of public security, sedition and treason laws; detention without trial in a democratic society, and executive use and abuse of emergency powers. As stated in the ***Hermanus Stein case (supra)*** the question or questions of law must have arisen in the court below, and must have been the subject of judicial determination for them to become a *"matter of general public importance"* meriting the Supreme Court's appellate jurisdiction.

The issues referred to above are tangential and were not the subject of judicial adjudication by this Court. Furthermore, there is no claim of a state of uncertainty in the law, arising from contradictory precedents of this Court. This ground fails.

20. Having so found on both issues, it only remains for us to dismiss the application which we now do. Considering the antecedents of the matter and the respective positions of the litigants, we make no order as to costs.

Dated and delivered at Nairobi this 29th day of September, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR