IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & J. MOHAMMED, JJ.A.)

CRIMINAL APPLICATION NO. NAI. 4 OF 2016 (UR 4/2016)

BETWEEN

REPUBLIC.....APPLICANT

AND

NUSEIBA MOHAMMED HAJI OSMAN alias UMM FIDAA,

alias UMMU FIDAA, alias UMMULXARB.....……..RESPONDENT

(An application for stay of the ruling of the High Court of Kenya at Nairobi (Ngenye - Macharia, J.) dated 11th May, 2016

in

H.C. Cr. Revision No. 232 of 2016

Pending hearing and determination of an intended appeal)

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RULING OF THE COURT

[1] By his Notice of Motion dated 15th July, 2016 and filed on 19th July, 2016, the ***Director of Public Prosecution (DPP or Applicant)*** seeks two principal reliefs expressed thus:

> ***"2. That the decision by the High Court, Criminal Division - Milimani in Criminal Revision No. 232 of 2016 delivered on the 11th day of July, 2016, in which the court declined to revise Chief Magistrate's Court order granting the respondent bail be set aside and or stayed;***
>
> ***3. that an order of stay be granted pending hearing and determination of this application and the Appeal".***

[2] The applicant has invoked ***Articles 1 (1), 159*** and ***164 (3)*** of the ***Constitution***, ***section 3*** of the ***Appellate Jurisdiction Act, Rule 1(2)*** of the ***Court of Appeal Rules*** and all enabling provisions of the law as the source of the law for this application.

[3] The matter arose this way. The respondent ***Nuseiba Mohammed Haji Osman*** *alias* ***Umm Fidaa alias***

Ummu Fidaa *alias* ***Ummulxarb*** *("hereinafter the respondent")* is charged, jointly with another, in ***Criminal Case No. 836 of 2016 of the Chief Magistrate's Court, Nairobi (Milimani),*** with one count of being a member of a terrorist group, contrary to ***section 211*** of the ***Prevention of Terrorism Act, 2012*** *(the Act);* one count of soliciting for the commission of a terrorist act, contrary to ***Section 9(1)*** of the same ***Act*** and one count of being in possession of articles connected with the commission of a terrorist act, contrary to ***section 30*** of the same ***Act***.

[4] The respondent pleaded not guilty and despite opposition from the prosecution, she was released on a cash bond of Kshs. 5 Million with two Kenyan sureties. She was also required to deposit her passport in court and report to the ***Anti-Terrorism Police Unit (ATPU)*** fortnightly.

[5] The DPP being dissatisfied with the order releasing the respondent on bail made by the subordinate court, applied for revision of that order by a Notice of Motion filed before the High Court on 17th June, 2016. The DPP invoked ***Articles 49(h)*** and ***24*** of the ***Constitution*** and ***Section 362*** of the ***Criminal Procedure Code***. The DPP sought, not variation of bond terms, but denial of bail to the respondent altogether. The DPP contended that he had furnished compelling reasons to the subordinate court which were not considered; that the respondent faced serious charges; that she was a flight risk; that she was likely to interfere with witnesses; that investigations were incomplete; that the prosecution had a strong case, and that there were serious security concerns.

[6] The learned Judge of the High Court, ***(G. W. Ngenye Macharia, J.),*** on 11th July, 2016, declined the application for revision of the order of the subordinate court. She however, stiffened the terms of bond by adding that the respondent could not leave *"the country except with express permission of the trial court"*, and that she was to report to ATPU investigations officer "*twice a week, that is on Mondays and Fridays as per the investigating officer's directions*".

[7] The DPP again being dissatisfied with the refusal to revise the order granting the respondent bail, promptly lodged a notice of appeal and thereafter filed the present application. He states, in the application and the supporting affidavits, that the conduct of the respondent at about the time she was arrested suggested that she was intent on leaving Kenya permanently; that her associate is in remand; that data recovered from her mobile phone and laptop seized from her on arrest revealed that the respondent and her associates plan to establish *"an ISIS/ISIL"* chapter in Kenya; that the data implicates the respondent and her associates in relation to the commission of terrorist and allied offences; that other suspects are being sought; that the respondent and her associates were at the planning stages of a terror attack and were mobilizing funds to achieve that purpose; that the respondent faces serious charges; that there is strong evidence against the respondent; that investigations are ongoing and that releasing the respondent would endanger public security, safety and the overall interest of the wider public.

[8] In view of the above, it is the DPP's contention that the learned Judge of the High Court erred in refusing to revise the order of the subordinate court granting the respondent bond pending trial.

[9] The respondent opposes the application and has filed a replying affidavit giving her reasons why the application should be declined. She has, among other things, deposed that she was released from custody on 21st July, 2016, pursuant to the order of the subordinate court as varied by the High Court; that her legal advisor has advised her that the order granting bail is in exercise of judicial discretion which may only be disturbed in exceptional circumstances; that the order sought by the applicant is intended to chip away the constitutional presumption of innocence and will not serve the ends of justice protected under ***Articles 49 (1) (h)*** and ***50 (2)*** of the ***Constitution***; that there are no compelling reasons to deny her bail pending trial; that she is not a flight risk as her passport has been surrendered and that the applicant has failed to demonstrate that he has a right of appeal or an arguable one. It has been conceded by the DPP that the respondent has already been released from custody on the terms set by the High Court.

[10] At the hearing of the application on 26th February, 2016, ***Mr. Ondimu***, and ***Ms Kanyiri***, learned Prosecution Counsel represented the DPP and learned counsel, ***Mr. Kilukumi,*** appeared for the respondent. Counsel reiterated their clients' respective stand-points taken in their respective affidavits. On his part, ***Mr. Ondimu*** emphasized that if the learned Judge of the High Court had properly appreciated the

security concerns raised, the evidence she was invited to view and the guidelines in the bail/bond policy, she would have arrived at a different conclusion. ***Ms Kanyiri***, on her part, focused on issues of national security, and the responsibility of the State to its citizens and was of the view that if the same had been properly appreciated, the respondent would not have been admitted to bail pending trial. To buttress her argument, she cited three publications on what constitutes national security and the activities of various terrorist groups.

[11] ***Mr. Kilukumi***, in addition to submitting that no basis had been laid to interfere with the order of the High Court, raised several legal objections to the application. In his view, the DPP has no automatic right to appeal to this court from an order of the High Court granting bail/bond in its appellate jurisdiction. Learned counsel submitted that an appeal would only be lodged with leave which in this case had neither been sought nor obtained. It was also learned counsel's further contention that the orders of stay sought could not be granted since the High Court issued a negative order which cannot be stayed. Learned counsel further submitted that in the event the DPP's proposed appeal will be deemed competent, it will be a second appeal and only issues of law will fall for consideration and no issue of law had been raised. It was ***Mr. Kilukumi's*** further view that the intended appeal will be against the exercise of judicial discretion by the High Court which exercise can only be interfered with in limited circumstances which circumstances had not been demonstrated.

[12] We have considered the application, the affidavits filed both in support and in opposition to the application. We have also given due consideration to the submissions of learned counsel, the authorities cited and the applicable law. We propose to first consider what would appear to be preliminary objections to the application raised by learned counsel for the respondent.

[13] On the question of whether the applicant requires leave to appeal, the matter is not settled. One school of thought argues that no leave is required. That school of thought cites the provisions of ***Section 361*** of the ***Criminal Procedure Code***.

Sub-section (1) of that section reads:

> ***"361 (1) A party to an appeal from a subordinate court may subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal under this section -***
>
> ***(a) on a matter of fact...".***

[14] In this application, the provisions of ***Section (8)*** are irrelevant. Further, the applicant intends to appeal against the order of the High Court refusing to exercise its revisionary jurisdiction. In that regard, the provisions of the same ***Section 361 sub-section (7)*** are relevant. The sub-section is in the following terms: -

> ***"361***
>
> ***....***
>
> ***7. For purposes of this section, an order made by the High Court in the exercise of its revisionary jurisdiction or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction".***

[15] It, would therefore, appear plain that there is a right of a second appeal to this Court in respect of orders made on revision by a Judge of the High Court. The only limitation would appear to be that that right lies in respect of issues of law only. It would, therefore, further appear that there is no warrant for a distinct and separate statutory provision donating such jurisdiction to this Court. The provisions of ***Article 164 (3)*** of the ***Constitution*** would also appear to put the issue beyond controversy: The ***Article*** reads:

> ***"164 -***

3. The Court of Appeal has jurisdiction to hear appeals from -

(a) the High Court...".

Those provisions would appear to be sufficiently express and brook of no ambiguity. But the matter is not as straightforward as it seems as we shall presently show.

[16] The 2nd school of thought argues that besides want of a specific statutory provision donating jurisdiction, ***section 379A*** of the ***Criminal Procedure Code*** leaves no doubt that there is no automatic right of appeal from a decision of the High Court exercising its revisionary jurisdiction. The Section reads:

"379 A. Appeals to the Court of Appeal on High Court's Original jurisdiction.

In proceedings under Section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic substances (control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti- Money Laundering Act and the Counter-Trafficking in Persons Act, where the High Court, in exercise of its original jurisdiction has granted bail or bond to an accused person, the Director of Public Prosecution, may, as of right, appeal against that decision to the Court of Appeal and the order may be stayed for a period not exceeding fourteen days pending the filing of an appeal".

This provision was introduced into the ***Criminal Procedure Code by Act No. 19 of 2014***. In our view this is, the first Legislative intervention which provides that an order granting bail by a lower court may be stayed by this Court pending an appeal to this Court.

[17] In the matter before us, the High Court in refusing to revise the order of the subordinate court granting bail to the respondent was not exercising its original jurisdiction but its appellate one. So, the applicant's right to appeal is not direct. The appeal is not as of right. Our view is that where the High Court, in exercise of its appellate jurisdiction like here, declines to revise an order of the subordinate court granting bail, an appeal against such an order would only lie with the leave of the court if the proceedings in which the order challenged are proceedings under ***sections 203*** or ***296 (2)*** of the ***Penal Code***, the ***Prevention of Terrorism Act***, the ***Narcotic Drugs and Psychotropic substances***, ***(Control) Act***, the ***Prevention of Organized Crimes Act***, the ***Proceeds of Crime and Anti-Money Laundering Act*** and the ***Counter-Trafficking in Persons Act***.

[18] We observe that even the intervention against an order granting an applicant bail pending an appeal or intended appeal is hedged with provisions to protect a person who has been granted bail. We say so because such an order may only last for a period not exceeding fourteen (14) days pending the filing of an appeal. Presumably the order may subsist for as long as the appeal is pending once the appeal is filed within the said period. If no appeal is filed within the appointed time the order granting bail/bond is reinstated.

[19] Given the provisions of ***Section 379A*** of the ***Criminal Procedure Code,*** it would appear that there is no clear basis upon which the DPP's application is based. There is no dispute that the respondent is facing offences under the ***Prevention of Terrorism Act*** which is one of the statutes listed in ***Section 379A*** above. There is further no contention that the DPP in reality seeks reversal of the order granting the respondent bail pending her appeal to this Court. There is further no dispute that the DPP has neither applied for nor obtained leave of the court to appeal against the impugned order.

[20] In the premises, the competence of the intended appeal is in doubt. Even if the intended appeal would be deemed competent, the period within which the same was to be filed is long gone beyond the appointed period of fourteen (14) days given in ***Section 379A*** of the ***Criminal Procedure Code***. With the competence of the intended appeal in doubt, would we entertain the DPP's application?

[21] The provisions of ***Section 379A*** of the ***Criminal Procedure Code*** would appear not to be in

consonance with the provisions of ***rule 5 (2) (a***) of this ***Court's Rules*** which in our view do not limit the jurisdiction of this Court to grant bail where a notice of appeal has been given. The sub-rule reads:

> ***"5 ....***
>
> ***(2) Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or stay execution, but the Court may -***
>
> ***(a) in any criminal proceedings, where a 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...".***
>
> (Underlining ours)***.***

[22] The applicant in this matter has indeed filed a notice of appeal, which gives us jurisdiction to entertain the application. However, this application is not seeking release of anyone on bail nor is execution of any warrant of distress sought to be suspended pending hearing and determination of the intended appeal. The sub-rule says nothing about seeking cancellation of bond or bail granted by the court or courts below. Obviously, therefore, the sub-rule is of no assistance to the applicant.

[23] In ***Jayendra Khimiji Malde & 2 Others, -v- R [2011] eKLR (Criminal Appeal No. 14 of 2010 (UR 10/2010)***, this Court had occasion to consider the scope of ***sub-rule 5 (2) (a)*** made under the ***Appellate Jurisdiction Act (Chapter 9 Laws of Kenya)***. There, an application was lodged under the said sub-rule seeking a stay of the ruling and orders of the High Court which orders enhanced bail/bond terms which had been imposed by the subordinate court. At the time of hearing the application in this Court, two of the applicants had already raised and paid the said enhanced cash bail. ***Githinji, J.A***., *inter alia*, rendered himself as follows:

> ***"The order, made by the superior court however, related to variation of bail and not for instance an order for retrial, enhancement of sentence or altering the nature of sentence. Indeed, the applicants have not been tried yet. By Section 347 of Criminal Procedure Rules (sic), it is only a person convicted on a trial by the subordinate court who is allowed to appeal to the High Court, if the appeal of such a person is dismissed, he can, by virtue of Section 361 (1) Criminal Procedure Code file a second appeal, to this Court on a point of law only. Similarly, by Section 379 (1) a person convicted on trial held by the High Court in exercise of its original jurisdiction and sentenced as specified may appeal to this Court and the Court has jurisdiction to grant bail in such a case (Section 379 (4). Furthermore, rule 59 (2) of the Rules stipulates that a notice of appeal should state the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal****".***
>
> ***By rule 59 (8) the notice of appeal should be in the prescribed Form B of the First Schedule thereto and Form B clearly shows that, the appeal should relate to conviction and sentence".***

[24] The learned Judge then set out the provisions of ***rule 5 (2) (a)*** of our ***Rules*** and concluded as follows:

> ***"It is apparent from the wording of Rule 5 (2) (a) as read with Rule 59 that the rule applies to cases where the applicant has already been convicted and sentenced either by the subordinate court or by the High Court. The case of Jivraj Shah -v- Republic [1986] KLR 606 aptly illustrates the application of rule 5 (2) (a). There this Court granted bail in the case of a second appeal against conviction and sentence".***

[25] The learned Judge then cited the case of ***Ademba -v- Republic, [1983] KLR 442*** where this Court declined jurisdiction to consider an appeal against refusal to grant bail to a convicted person pending his appeal to the High Court.

[26] In the end, ***Githinji, J.A.,*** doubted whether this Court has jurisdiction to entertain applications under

rule 5 (2) (a) by applicants yet to be convicted.

Githinji, J.A., however, held a minority opinion. His colleagues, ***Tunoi, J.A.,*** *(as he then was),* and ***Visram, J.A***., held the view that ***rule 59 (2)*** of this ***Court's Rules*** could not bar an applicant from invoking his right of appeal even though the appeal does not arise from *"acquittal", "conviction", "sentence"* or *"finding"* of a court. It is however, significant that the applicant therein sought release on bond on reasonable terms and not cancellation of bond granted previously by a lower court.

[27] In ***Ademba -v- Republic,*** *(supra),* the appellant had been convicted of the offence of personating a public officer, contrary to ***Section 105 (b)*** of the ***Penal Code*** (***Chapter 63 Laws of Kenya),*** on his own plea of guilty. His application for bail pending his appeal against sentence was declined. The appeal to the High Court against the refusal to grant him bail was also dismissed. When he challenged the High Court order, this Court held, *inter alia*, as follows:

> ***"3. The Court of Appeal has no jurisdiction to entertain an appeal from refusal of the High Court to grant bail to a convicted person pending an appeal against the decision to that court".***

[28] The second objection raised by the learned counsel for the respondent is that the stay sought in respect of an order of the High Court declining to exercise revisionary jurisdiction to reverse the order granting bail/bond to the respondent pending trial was not a positive order. That being the case, this court, according to learned counsel, cannot stay such an order. That is in fact what the predecessor of this Court held in ***Western College of Arts & Applied Sciences -v- Orange & Others, [1976] KLR 63***. There, Law, V. P., stated:

> ***"But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit.***
>
> ***...***
>
> ***In the instant case, the High Court has not ordered any of the parties to do anything, or to restrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction".***
>
> (underlining ours).

[29] We are also guided by the sentiments of this Court in ***Devani & 4 Others -v- Joseph Ngindari, [Civil Application No. Nai. 136 of 2014] (UR)***, where we stated:

> ***"By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done".***

[30] Counsel for the DPP urged us to consider the application under the inherent jurisdiction of the Court should leave be required to file appeal. Learned counsel expressed the further view that in the dispensation of the ***Constitution 2010***, the concern of the court should be to do substantive justice unhindered by procedural technicalities. Counsel was echoing ***Sub-Article 2 (d)*** of ***Article 159*** of the ***Constitution*** which reads:

> ***"159 -***
>
> ***2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles -***
>
> ***(d) Justice shall be administered without undue regard to procedural technicalities".***

[31] In ***Manilal Jamnandas Ramji Golli -v- Director of Public Prosecution, [2014] eKLR (Criminal Appeal (Application) No. 57 of 2013),*** the applicant sought, among other orders, stay of proceedings in a criminal trial before the subordinate court pending hearing and determination of an appeal. The High Court refused stay and the applicant lodged a notice of appeal against the refusal. In the interim, he approached this Court seeking a stay of proceedings. In his Notice of Motion, the applicant failed to indicate the provision of the law under which he had moved the Court and sought to have the application heard under the Court's inherent jurisdiction.

[32] On that failure to cite the enabling provisions of the law, we stated:

> ***"13. We agree, as did, Musinga, J.A., in Equity Bank Limited -v- West Link Mbao Limited [2013] eKLR***
>
> ***that:***
>
> ***'This Court's jurisdiction to grant interim orders of stay... in exercise of its inherent powers... is***
>
> ***deeply entrenched in its operations and has been applied over a long period of time. That***
>
> ***jurisdiction is of fundamental importance and without it the Court's effectiveness would be,***
>
> ***greatly compromised'.***
>
> ***14. We, however, think that it is good practice that parties invoke the relevant provisions of the law that give the Court jurisdiction because the inherent jurisdiction of the Court is limited to 'make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court'". (***Underling ours)

[33] In ***Feisal Mohammed Ali alias Feisal Shahbal -v- R, [2015] eKLR - Criminal Application No. 2 of 2015 (UR 1/2015)***, we had occasion to consider the scope of rules of procedure. There, the applicant sought to be released on bail pending trial. The trial magistrate ordered release of the applicant on bond of Kshs. 10 Million with one surety in addition to other conditions. The Republic successfully applied to the High Court for an order of revision. The applicant thereafter sought a review of that order on revision which review application was dismissed. The applicant returned to the trial court and made another application for release on bail. He succeeded thereby prompting the Republic to once again seek revision of the same. The High Court did not disappoint. It revised the order granting bail to the applicant. The applicant was undeterred, he again sought review of all the orders of the High Court refusing bail which application was declined.

[33] The last High Court order provoked an application before this Court in which the applicant sought extension of time to file and serve a notice of appeal and an order that he be released on bail or bond pending the hearing and determination of the application for extension of time. The state took a preliminary objection challenging the jurisdiction of this Court to entertain the applicant's application. The preliminary objection was upheld. In the course of our ruling, we stated:

> ***"It is trite therefore, that the devise of the notice of appeal invokes the appellate jurisdiction of this Court. That is the case whether the appeal or intended appeal is civil or criminal. In Joseph Limo & 86 Others v Ann Marz C.A. No. 295 of 1998, this Court emphasized that it is the notice of appeal, which initiates an appeal. Indeed, in terms of Rule 59 (1) of the Court of Appeal Rules, "...the notice of appeal shall institute the appeal". Further, in Safaricom Ltd., -v- Ocean View Beach Hotel Ltd,. C.A. No. 325 OF 2009' Omollo, J.A. observed that where there is no appeal or intention to appeal, as manifested by a lodged notice of appeal, the Court has no basis for meddling in the decision of the High Court".***

[35] We went further to state:

> ***"There is nothing unconstitutional about rules of procedure that regulate exercise of jurisdiction conferred by the Constitution or by any other law. This is particularly the case in situations like present, where it has not been demonstrated that the procedural requirement or rule is arbitrary and devoid of any rational or legitimate basis in light of the values or principle espoused by the Constitution".***
>
> (Underlining ours)

[36] In the ***Feisal Mohammed alias Shahlal -v- R.***, case *(supra)*, we cited the decision of the Supreme Court in ***Bwana Mohammed Bwana -v- Silvano Boru Bonaya & 2 Others, SC Petition No. 15 of 2015 (UR)***, which was an appeal against our decision striking out a record of appeal which did not contain, among other documents, a certified copy of the decree appealed from. On appeal to the Supreme Court, it was held that a court cannot exercise its adjudicatory powers conferred by law or the Constitution where the appeal is incompetent and that an incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues.

[37] It is of significant that the Supreme Court cited with approval the decision of the Supreme Court of Nigeria in ***Ocheja Emmanuel Dangana -v- Hon. Attai Aidoko Alo Usman & Others - SC 480/2011 and SC 11/2012*** (consolidated), where it was stated:

> ***"A court is competent, that is to say, it has jurisdiction when-***
>
> 1. ***It is properly constituted ...and***
> 2. ***the subject matter of the case is within its jurisdiction and no feature in the case... prevents the court from exercising its jurisdiction; and***
> 3. ***the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction".***
>
> (Underling ours)

[38] Given the above authoritative statement of the Supreme Court, the argument that our inherent jurisdiction may save the applicant's application is not persuasive. This is particularly so because the requirement for leave is not in a regulation but in the ***Act*** itself that is, ***The Prevention of Terrorism Act***. The intended appeal cannot come before the Court before leave is given. It is the condition precedent to the exercise of jurisdiction.

[39] We conclude our discussion on the issue of the inherent power of the court by citing the following passage from our decision in ***Bonface Kyalo Mwololo -v- Republic, [1916] eKLR,*** in which the applicant sought principally stay of orders of the High Court and stay of proceedings of a criminal trial before a subordinate court.

[40] We stated:

> ***"We are in agreement with the findings, that each case is considered according to its own merits. It is only in instances where an applicant is charged with offences not known in law or the prosecution is not undertaken according to the law, or it is blatantly actuated 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 and prevent the abuse of the process. The interests of the applicant and the victim must also be considered within the law and within the overarching parameters that judicial authority is exercised according to the purposes and principles set out in the Constitution. Justice is like a double edged sword, an instrument that cuts both ways and protects both the accused and the victim".***

(Underling ours).

[41] The DPP placed reliance upon the persuasive authority of ***Neeru Yadar -v- State of V. P. and Another, [Supreme Court of India Criminal Appellate jurisdiction Criminal Appeal No. 2587 of 2014],*** for the proposition that this Court can reverse the order granting bail to the respondents.

With respect to learned counsel for the DPP, the Indian case is of little assistance in this application. The Indian court was considering the substantive appeal which appeal, in any event, had been lodged with special leave of the court. That is not the position here where the DPP's Notice of Motion is at its nascent stage. We are also not certain that India has legislation similar to our ***Prevention of Terrorism Act*** with specific limitations on intervention of the Court of Appeal where bail has been granted by the courts below.

[42] In the end we have come to the conclusion that this application is incompetent as a condition precedent to our exercise of jurisdiction was not complied with. We cannot therefore, proceed to consider the arguments put forward by the DPP while urging his Notice of Motion as he may very well move the court afresh. We cannot entertain the Notice of Motion. Accordingly, we order that it be and is hereby struck out.

Dated and delivered at Nairobi this 12th day of August, 2016.

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR