



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, AZANGALALA & SICHALE, JJ.A.)

CRIMINAL APPEAL (APPLICATION) NO. 129 OF 2016

BETWEEN

DIANA KETHI KILONZO.....APPLICANT

AND

REPUBLIC..... RESPONDENT

(Being an application for stay of proceedings pending an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 12th November, 2015

in H.C. Cr. Revision No. 47 of 2014)

RULING OF THE COURT

1. This is an application expressed to be brought under **rules 1(2), 5(2), (a) and 42 (1)** of this Court's Rules for one principal order namely, that there be stay of proceedings in Nairobi Chief Magistrate's Court **Criminal Case No. 1325 of 2013: Republic -v- Godfrey Ninito Lemiso and Diana Kethi Kilonzo**, pending the hearing and determination of an intended appeal against the decision of the High Court made on 12th November, 2015. The applicant is **Diana Kethi Kilonzo** (*hereinafter "the applicant"*). She has named the Republic as the respondent(*hereinafter "the respondent" or "the Republic"*).

2. The matter ended up in the High Court in this way. The applicant is charged together with one **Godfrey Ninito Lemiso** in the Chief Magistrate's Court at Milimani in the aforesaid case with one count of stealing contrary to **section 275** of the *Penal Code*. In the alternative, she faces a charge of handling stolen goods contrary to **section 322 (1)** of the same code. There is a second count of uttering a false document contrary to **section 353** of the same code. She pleaded not guilty and hearing was set to take place between 18th and 22nd November, 2013.

3. Before the date of hearing, by letter dated 3rd September, 2013, she applied to the **Director of Public Prosecutions (D.P.P.)** to be supplied with certain documents and witness statements, invoking **Articles 35 and 50** of the **Constitution** as her basis for the application. In response, the DPP directed her to the Criminal Investigations Department, (CID), to collect witness statements and documents she intended to rely upon. The trial court (D. N. Mulekyo (Ag. C.M.) on the 3rd September, 2013, made an order that the documents so requested be supplied within fourteen (14) days of her order. The applicant's advocates, between 11th and 12th November, 2013, collected some documents and witness statements but realized

that not all documents and witness statements had been supplied. The advocates by their letter, dated 13th November, 2013, informed the DPP of the missing documents. When the trial was to commence on 18th November, 2013, the missing documents had not been supplied. The trial was adjourned from 17th to 21st March, 2014, and the trial court (**K. W. Kiarie, C.M.**), ordered that the documents be furnished within fourteen (14) days of his order.

4. As the hearing approached without compliance with the said order, the applicant lodged a Notice of Motion dated 13th March, 2014, under **Articles 19, 20, 21 (1), 22, 48, 50 (1), 50 (2), (c), (e), (j) and (k)** of the **Constitution 2010**.

The applicant sought three reliefs namely:

1. A declaration that the prosecution had violated her rights and fundamental freedoms guaranteed under Articles 48 and 50 of the Constitution;

2. a declaration that the conduct of the proceedings is oppressive and contravenes her rights and fundamental freedoms;

3. dismissal of all charges.

5. On 18th March, 2014, the trial magistrate (H. N. Ndung'u (Miss) C.M.) dismissed the said application thereby provoking, by letter dated 28th May, 2014, an application to the High Court, for revision of that order. The applicant asked the High Court to enforce the trial court's order to supply the missing documents and witness statements. By her ruling dated 12th November, 2015, the High Court (**Ngenye - Macharia, J.**), declined the application with no order as to costs. The learned Judge was persuaded that the documents which had not been supplied had no bearing on the prosecutor's case and were not in their custody.

6. The learned Judge also felt that the Constitution could not be interpreted to compel the prosecution to avail any or all manner of documents the defence demanded. In her view and on the authority of **Cholmondeley -v- R. [2008] eKLR**, the prosecution is only mandated to produce to the defence all evidence listed by the prosecution even where such evidence may not be in their favour. The learned Judge, in the end, remitted the file to the trial magistrate for disposal of the trial.

7. That order declining revision of the trial court's order is the subject of the intended appeal. In the interim the applicant seeks an order staying proceedings, in the said Chief Magistrate's Court pending the hearing and determination of her intended appeal. As she lodged a Notice of Appeal on 24th November, 2015, the applicant is properly before us.

8. The Notice of Motion is premised on the grounds that the intended appeal, raises arguable grounds involving important points of law on the interpretation and application of **Article 50** of the **Constitution** regarding the applicant's rights to a fair trial and that unless stay is granted the intended appeal will be rendered nugatory as her trial will proceed thereby continuing to contravene her said fundamental rights and freedoms.

9. The application is opposed on the basis of grounds of opposition filed by the D.P.P. He contended that this Court has no jurisdiction to stay criminal proceedings in the Magistrate's Court and that the intended appeal is not arguable. According to the D.P.P., criminal proceedings may only be stayed in exceptional circumstances where an applicant faces trumped-up charges or his prosecution is not undertaken in accordance with the law or is actuated by malice, which is not the case here. In the D.P.P.'s view, the applicant has not demonstrated that her constitutional rights and freedoms have been or are being violated.

10. **Mr. Ojiambo**, SC, learned counsel for the applicant, in his submission before us, stated that specific evidence had been sought by letter dated 3rd September, 2013, and an order was made by consent to avail

that evidence. It is the same evidence which the applicant seeks before the trial commences. With regard to the jurisdictional issue, learned Senior Counsel submitted that **rules 1 (2) and 5 (2), (a)** of this Court's Rules donate the same and case law leaves no doubt that this Court has jurisdiction to grant the stay sought.

11. In learned Senior Counsel's view, the intended appeal is arguable. In this regard, he referred us to the draft Memorandum of Appeal which, according to him, demonstrates that the learned Judge of the High Court clearly erred. It was his contention that disclosure of documents is not restricted to what the prosecution will rely upon at the trial. For that proposition, he invoked our decision in the case of **Cholmondely -v- R.** (supra).

12. Learned Senior Counsel urged the further view that unless stay is granted the intended appeal even if it were to succeed, the success will be rendered nugatory as the trial will proceed without the evidence sought.

13. In resisting the application, **Mr. Ondari**, learned Deputy Director of Public Prosecutions submitted that the intended appeal is not arguable and that a stay of proceedings before a subordinate court is untenable under rule **5 (2) (a)** of this Court's Rules. Learned counsel however, conceded that a stay of criminal proceedings before a magistrate's court may be made in exceptional circumstances, such as where the prosecution is actuated by malice; where there are trumped-up charges or where the prosecution is not undertaken according to law. For this proposition learned counsel invoked our decision in the case of **Manilal, Jamnadas Ramji -v- D.P.P. - Criminal Appeal (Application) No. 57 of 2013 (UR)**. Those circumstances, according to learned counsel, had not been demonstrated in this case.

14. On the issue of disclosure, learned counsel submitted that the same does not go beyond what the prosecution has or intends to use in its case. In this case, according to learned counsel, the documents requested by the applicant were in the possession of ***Independent Electoral and Boundaries Commission (IEBC)***, a third party, and upon which the applicant should direct her application, failing which she can seek the aid of the court.

15. We have considered the record of this Notice of Motion, the submissions of learned counsel, the authorities cited and the applicable law. Having done so, we propose to first consider the issue of jurisdiction for without jurisdiction, we down our tools - See **The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil (Kenya) Ltd. [1989] KLR 1.**

16. The substantive provision of the law invoked is **rule 5 (2) (a)** of this Court's Rules. **Rule 5 (2) (a) and (b)** reads:

"5 (1) ...

2. Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -

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;

b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just".

17. It is plain to us that the format of the above rule demonstrates beyond peradventure that an order of stay of execution, an injunction or stay of further proceedings is available where both **sub-rules 5(2) (a) and sub-rule 5(2) (b)** are invoked. A stay of execution, injunction and stay of proceedings is not therefore limited to **sub-rule 5(2) (b)** of the rule. If the framers of the Rules intended so, the paragraph "**order a stay of execution, an injunction or stay of any further proceedings on such terms as the court may think**",

would come immediately below and after the sub-rule. Here, it is designed to apply to both **sub-rules 5 (2), (a) and 5 (2) (b)**.

18. In this case however, the notice of appeal lodged by the applicant is in respect of the decision of the High Court on revision which revision had been sought by the applicant. The learned Judge made no positive orders capable of being executed. There are also no further proceedings pending before the High Court. There are therefore, no proceedings before the High Court to be stayed. It follows therefore, that any order staying proceedings of the High Court will be in vain. In our view, **rule 5(2) (a)** of this Court's Rules was improperly invoked. **Mr. Ondari** was plainly right that this Court has no jurisdiction to grant stay of criminal proceedings pending before the Chief Magistrate's Court under **rule 5(2) (a)** of our Rules.

19. In **R -v- Kenya Anti-Corruption Commission & 2 Others [2009] eKLR**, the applicant, an employee of the Public Service Commission, sought a stay of proceedings in a criminal case against him pending an appeal against a decision of the High Court dismissing his judicial review application for orders of certiorari and prohibition. He invoked **rule 5 (2) (b)** of this Court's Rules. Although the application was allowed by a majority, the Court was unanimous that criminal proceedings before a magistrate's court would not be stayed pending an appeal from a decision of the High Court under **rule 5 (2) (b)**. The majority of the members of the Court however, determined that such criminal proceedings would be stayed as there existed precedent for doing so. See cases of: **R -v- Isaac Theuri Githae & Another, Civil Appeal No. 11 of 2002 (UR)**; **Dr. Christopher Ndarathi Murungaru -v- Kenya Anti-Corruption Commission & Another [2006] eKLR**; **Joram Mwenda Guantai -v- Chief Magistrate - Nairobi, Civil Appeal No. 228 of 2003 (UR)**; **Yagnesh Devan & 4 Others -v- Joseph Ngindari & 3 Others - Civil Application No. 136 of 2004 (UR)**, & **Civil Application No. 246 of 2005 (UR)** between the same parties and **Rerkely Northmarket & 3 Others -v-Attorney General and 3 Others - Civil Application No. Nai. 74/2005 (UR)**. The decision in **R. -v- Kenya Anti-Corruption Commission** (supra) was followed in **Manilal Jamnades Gohil -v- D.P.P. - Cr. Application No. 57 of 2013 (UR)** and **Helmith Rame -v- Nairobi C.A. Cr. Application No. 1 of 2015 (UR)**.

20. This Court had occasion to consider the issue of jurisdiction under **rule 5(2) a. and (b)** of the Court's Rules in **Mary Ngechi Ngethe -v- The AG & Another - C.A. Civil Application No. Nai. 157 of 2012 (UR)**. There, the applicant sought stay of criminal proceedings before a subordinate court pending disposal of an appeal against a judgment of the High Court dismissing the applicant's judicial review application where she had sought an order of certiorari. We 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".

21. The decision in the case of **Mary Ngechu** (supra) was followed in the case of **Eng. Michael Sistu Mwaura Kamau -v- The Ethics and Anti-Corruption Commission & 3 Others - Nairobi Civil Application No. 173 of 2015**. There, we stated:

"We are in agreement with the above findings (findings in the Mary Ngechu (Supra) case), 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".

22. The upshot on the issue of jurisdiction is, therefore, that under the inherent jurisdiction of this court and pending disposal of appeals from the High Court, an order of stay of proceedings can issue where it is

demonstrated that the prosecution is actuated by malice and there is abuse of the court process and/or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the applicant. The subordinate court criminal proceedings will also be stayed if it is demonstrated that the prosecution is instituted in derogation of the applicant's constitutional rights. The jurisdiction is sparingly used and only where the justice of the matter so demands.

23. In the application before us, the applicant has invoked the inherent jurisdiction of this Court in addition to the other provisions of the law already referred to at the beginning of this ruling. We shall, therefore, proceed to consider the merits of the application. The applicant is still bound to demonstrate first that the appeal is not frivolous or that it is arguable and secondly, that if it were to succeed, the success would not be rendered nugatory unless a stay is granted. See this Court's decisions in **Reliance Bank Ltd. -v- Norlake Investments Ltd. [2002] 1EA 227 and Githunguri -v- Jimba Credit Corporation Ltd. & Others (No.2) [1988] KLR 838.**

24. On whether the intended appeal is arguable, the applicant drew our attention to the draft memorandum of appeal annexed to this Notice of Motion. The draft enumerates five broad grounds of appeal, namely:

1. That the learned Judge failed to appreciate that the prosecution had not supplied the applicant with all documents she was entitled to including those that the prosecution intend to rely upon.

2. That the learned Judge erred by failing to appreciate that the trial magistrate acted in a manner prejudicial to the applicant by reviewing an order of another magistrate of concurrent jurisdiction.

3. That the learned Judge failed to correct the illegality/impropriety of the trial magistrate reviewing an order of her colleague without jurisdiction and without being moved to do so.

4. That the learned Judge failed to appreciate that the prosecution had earlier consented to supply the same documents.

5. That the learned Judge failed to appreciate that the ruling of the trial magistrate demonstrated bias and in failing to so appreciate demonstrated bias herself.

25. Through her advocates, the applicant in her letter dated 3rd September, 2013 sought 28 documents from the office of the D.P.P. On the same date, the trial court (*Hon. D. N. Mulekyo, Ag. Chief Magistrate*) made the following order:

"Defence to be supplied with documents prosecution intend to rely on and in particular the items in the letter from Soweto & Company Advocates for the 2nd accused and written to the ODPP dated 3rd September, 2013 within fourteen (14) days hereof" (sic). D. M. 3/9/013".

26. Not all the documents in the applicant's letter of 3rd September, 2013 were supplied as ordered. The failure to supply all the documents became the reason for an application for adjournment on 18th November, 2013 when the trial was expected to commence. **Mr. Ondari**, who then appeared for the Republic, informed the trial court that some of the documents sought in the letter of 3rd September, 2013 were not in their custody but were in the custody of different agencies. The learned DPPO added that the prosecution would not be relying upon the unfurnished documents and that they could only supply documents in their possession. The trial court then was presided over by **Mr. K. W. Kiarie (C.M.)**. The learned magistrate in allowing the application for adjournment, reiterated the order that the prosecution do supply the defence with copies of documents they intend to rely on within 14 days of his order. The trial was then adjourned to 17th to 21st March, 2014.

27. Come the 17th of March, 2014, the trial Court was presided over by **Hon. Miss Hannah Nd'ung'u (C.M.)**. Counsel for the applicant informed the court that she had lodged an application under a certificate of urgency which, according to her, had to be disposed of before the trial. The application was then fixed

for hearing the next day i.e. 18th March, 2014. The applicant sought a declaration that her prosecution violated her rights and fundamental freedoms under **Articles 48 5**

(1) and 50 (2) (c) (e) (j) and (k) of the **Constitution**. The applicant further alleged that the prosecution was oppressive. In the end, she sought the dismissal of the charge against her.

28. The learned magistrate, after hearing submissions of learned counsel, held that the prosecution could not be asked to disclose material it stated was not in its possession and upon which it did not intend to rely. The learned magistrate then advised the applicant to refer her complaints of violations of her rights under the Constitution to the High Court.

29. We are alive to the fact that the issues raised in the intended appeal will have to be dealt with in the intended appeal when the same is ultimately lodged and canvassed before this Court. It is however, clear beyond peradventure, that the simple controversy between the parties herein is whether the respondent can be compelled to disclose evidence requested for by the applicant even if the evidence is not in its custody and will not be relied upon by the respondent. The trial magistrate answered that question in the negative. The learned Judge of the High Court agreed. We have our doubts that however modern democratic or progressive our Constitution is, it envisages compelling any party even if that party has the awesome power of State to disclose that which it does not have. We therefore, entertain doubt about the arguability of the intended appeal. That finding is sufficient to dispose of this application.

30. However, in deference to learned counsel who canvassed this application before us, we shall briefly consider the nugatory aspect of the application. Should we refuse this application, what are the consequences? The trial before the magistrate will proceed. With the safeguards provided under **Article 50 (2) and 4** of the Constitution, the applicant, of course, will be presumed innocent until the contrary is proved, (**Article 50 (2) (a)**). The applicant will be accorded adequate time to prepare her defence, (**Article 50 (2) (c)**). She has been informed (even before the trial) of the evidence the prosecution intends to rely upon, (**Article 50**

(2) (j)). She will, of course, have the liberty to adduce and challenge evidence adduced (**Article 50 (2) (k)**). She need not give any self-incriminating evidence, (**Article 50 (2) (l)**), and of course if convicted, she has the right to appeal or apply for review in the High Court, (**Article 50 (2) (q)**).

31. In the event she loses the appeal at the High Court, she has a second opportunity to appeal to this Court. The trial and the entire appeal process presents the appellant with opportunities to challenge reliance upon inadmissible evidence. If there is evidence in the possession of third parties, including the IEBC, upon which the applicant wishes to rely, an appropriate application can be made before the trial court.

32. We are also alive to the fact that an applicant who suffers damage as a result of breach of Constitutional provisions is entitled to compensation. See **Timothy Isaac Bryant & 2 Others -v- Inspector General of Police & 7 Others [2015] eKLR (Criminal Application No. Nai. 3 of 2014 (UR)** where the Court stated:

"Where an award of damages is found to be sufficient remedy to compensate the applicant an order under Rule 5 (2) (b) will not normally be granted".

33. In those premises, our conclusion is that even if we were to consider the intended appeal arguable, the application would still fail as the intended appeal would not, in our view, be rendered nugatory if we decline the application.

34. We have said enough to show that this application cannot succeed. It is dismissed with costs being in the intended appeal.

Dated and delivered at Nairobi this 9th day of December, 2016.

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE JUDGE OF APPEAL

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

DEPUTY REGISTRAR.