



REPUBLIC OF KENYA
Court of Appeal at Nairobi
Criminal Application 1 of 2012

BETWEEN

SAMUEL KIBUTHA KAMAUAPPLICANT

AND

REPUBLIC THROUGH DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Application for leave to appeal to the Supreme Court of Kenya against the judgment of the Court of Appeal in Nairobi (O’Kubasu, Githinji & Nyamu, JJ.A) dated 10thFebruary 2012

in

C.A.Cr. A No. 100 of 2010)

RULING OF THE COURT

The applicant was jointly charged with one **Charles Kibet** with the offence of murder. They were alleged to have murdered one **Francis Muhoho Ngugi** on 29th May 2005 at Kimunyu Trading Centre. The High Court (*Apondi J.*) after a full trial found the applicant guilty and sentenced him to death while his co-accused was acquitted and set at liberty.

Being aggrieved by the conviction and sentence, the applicant appealed against both to this court. His appeal (**No 120 of 2010**) was heard and a judgment rendered therein on 10th February 2012. This Court considered all the circumstances leading to the offence for which the appellant was tried and convicted and concluded thus;

***“The events which preceded the shooting of the deceased by the appellant were that the barrier was mounted as a result of recent robbery and carjacking incidents in the area, that the deceased vehicle (sic) emerged, failed to stop, braked suddenly and hit the barrier and pushed it, that after the deceased reversed the car and came out he resisted a search and a struggle ensued; that the deceased fired the pistol; that the appellant fired twice and the fatal bullet shot hit the deceased on the left arm; the bullet exited on the medial aspect of the upper arm, re-entered the chest on the left chest wall and exited on the right wall; that the deceased was not licenced to have the pistol and that the appellant shot the deceased in the course of execution of his duties.*”**

The appellant claimed that he shot the deceased in self defence. However, the appellant was in the company of another police officer who was also armed with a G3 rifle and both could have disarmed the deceased without shooting him. Although the circumstances do not exonerate the appellant from criminal responsibility, nevertheless, and as submitted by the appellant's counsel, there was no malice aforethought. Had the judge properly evaluated the evidence he could have reached the conclusion that the offence proved was manslaughter and not murder”.

So finding, the Court proceeded to quash the murder conviction and to set aside the death sentence imposed by the High Court. In substitution therefor, a conviction for manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** was entered. After taking into account the 5 years the appellant had already spent in pre-conviction custody, the Court sentenced him to seven (7) years imprisonment with effect from 26th February 2010, being the date when he was first sentenced.

It is against this Court's determination aforesaid that the applicant wishes to mount a challenge by way of appeal to the Supreme Court. He has applied to this court by Notice of Motion dated 6th March 2013 brought under **Article 163 (4)** of the **Constitution** and the Rules of this Court for the following orders;

- “1. ***THAT this application be certified urgent and fit to be heard forthwith.***
2. ***THAT the applicant be granted leave to appeal to the Supreme Court of Kenya against the judgment of the Court of Appeal in Nairobi Criminal Appeal Number 100 of 2010 (O’Kubasu, Githinji & Nyamu JJA.) Samwel Kibutha Kamau vs. Republic dated 10th February 2012.***
3. ***THAT upon grant of leave the applicant be released on bail pending appeal on favourable and lenient terms.***
4. ***THAT the cost (sic) of this application be provided for”.***

The motion is based on no less than a dozen grounds appearing on the face of it. The said grounds are replicated in substantially similar form in the applicant's supporting affidavit expressed as sworn on 6th March 2012 and can be summarized and paraphrased as follows;

1. ***That the conviction and sentence of the applicant constitute a miscarriage of justice.***
2. ***That the applicant ought to have been acquitted of the charges***
3. ***That the shooting incident occurred so fast the applicant had no opportunity to seek his colleague's assistance or disarm the deceased.***
4. ***That the deceased had in his possession on unlicensed gun not legally available to civilians.***
5. ***That the applicant as on duty and was justified in using his firearm for his own and the public's protection.***
6. ***That the judges did not afford him an opportunity to make submission in mitigation.***

We wish to comment at the very outset on the characterization of an application under **Article 163 (4)** of the **Constitution** to enable an applicant to appeal from this Court to the Supreme Court as an application for leave to appeal. The Constitution does not speak of leave. Rather it speaks of certification. We reiterate what we said recently in **GREENFIELD INVESTMENTS LTD vs. BABER ALIBHAI MAWJI** (Civil Application No. Sup 5 of 2012 (UR 4/2012)(unreported);

“Even though the application before us is styled as an application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya, the Constitution does not contemplate such an

application. Rather, it is certification that the constitutional provision cited speaks of and we treat the application as such”.

It is axiomatic from a plain reading of the Constitution that it was never the intention of the people of Kenya to open a new, higher battle ground for litigants disgruntled by all of this Court’s judgments in the form and shape of an all-receptive Supreme Court. Rather, the exercise of appellate jurisdiction from matters otherwise finally decided by this Court is closely circumscribed by the Constitution itself in the following terms;

“163 (4) Appeals shall be from the Court of Appeal to the Supreme Court –

....

(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,”

Both the Supreme Court and this Court have held repeatedly that an application for certification must, as a matter of good practice, which, we dare say is so binding as to be a peremptory postulate, be originated in this Court. In **SUM MODELS INDUSTRIES vs. INDUSTRIAL AND COMMERCIAL CORPORATION (Supreme Court Civil Application No. 1 of 2011)** for instance, that Court held that;

“This being an application for leave to appeal against a decision of the Court of Appeal (under Art 163 (4) (b) of the Constitution) it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved”.

In order to come within the limited scope within which a certification may be issued against the general commonsensical proposition that decision of this Court bear the imprint of finality, it behooves an applicant for certification, the intended appellant to the Supreme Court, to demonstrate that he intends to raise a matter of *general public importance*. What he intends to urge must be shown to go beyond the usual grievance, dissatisfaction and disappointment that attends the outcome of litigation. His issues must transcend the personal and private to occupy the general and public space sufficiently to invite the Supreme Court’s jurisdiction.

As regards what constitutes a matter of general public importance, this Court (***Githinji, Onyango Otieno & Koome JJA.***) had this to say in **HERMANUS PHILLIPUS STEYN vs. GIOVANNI GNECCHI – RUSCONE Civil Application No. Sup 4 of 2012 (UR 3/12)** (unreported);

“The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law. As Madan (JA) (as he then was) said in *Murai vs. Wainaina* [1982] KLR 38 AT PAGE 49 para 1;

(a question of general public importance is a question which takes into account the well-being of a society in just proportions)”.

We respectfully concur with and adopt those sentiments as applying whether the matter in question be civil or criminal. Applying the test of general public importance to the application before us, we come to the conclusion that nothing in the grounds, the supporting affidavit or authorities and gallant submissions of Mr. Macharia, learned counsel for the applicant, suffices to clothe this application with the character that would bring it within the purview of what is contemplated in **Article 163 (4) of the Constitution**. The grounds for which certification is sought as we summarized at the beginning of this ruling show that the appellants complaints are mainly factual and remain peculiar to his particular case. We are inclined to

agree with Mr. Monda, the learned Senior Prosecution Counsel that they do not espouse any point of general public importance.

We arrive at this conclusion not without sympathy with the applicant's fate given the circumstances under which the deceased met his death but we are mindful that the threshold for invocation of the certification jurisdiction is deliberately high, and property so. The applicant does not meet it.

In the result, we find the notice of motion before us to be unmeritorious and dismiss it in entirety.

We make no order as to costs.

Dated and delivered at Nairobi this 26th day of April 2013.

ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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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

/mwn