IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, MUSINGA & KIAGE JJ.A.)

CRIMINAL APPLICATION NO. NAI 3 OF 2012 (UR 3/2012)

BETWEEN

KINGSLEY CHUKWU ..... APPLICANT

AND

REPUBLIC .....RESPONDENT

(An application for grant of leave from the Court of Appeal to the Supreme Court of Kenya under Rule 22(1) of the Supreme Court Rules from the judgment of this Court delivered on 6th April, 2010

in

CR. A. NO. 257 OF 2007)

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RULING OF THE COURT

Kingsley Chukwu, the applicant, is a Nigerian national. He is in prison serving sentence meted out to him in Criminal Case No. Nbi Cr. No. 257 of 2007 which was later varied by the Superior Court as stated hereinafter.

The applicant applied to this Court by notice of motion dated 8th February 2012 for leave to appeal to the Supreme Court against the judgment of this court delivered on 16th April 2010 in Criminal Appeal No.257 of 2007 in which the applicant's appeal No.399 of 2004 to the High Court against conviction was dismissed and the sentence set aside and replaced with a fine of Shs.28,800,000/= and, in addition, life imprisonment.

The brief facts heralding the dismissal of the applicant's appeal by this Court on 16th April 2010 are that on 29th October 2003, the applicant was arraigned in the Chief Magistrate's Court in Nairobi Criminal Case No.2667 of 2003 in which he was charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994. It was alleged that on 24.10.2003 at Jomo Kenyatta International Airport in Nairobi the applicant trafficked in 9.605 kgs of narcotic drugs namely DIACETYMORPHIN commonly known as heroin valued at Ksh.9,605,000/= in contravention of the provisions of the Act. He denied the charge. He had legal representation.

The criminal case against the applicant went to full hearing and on 1st December 2004 the trial Chief Magistrate delivered a judgment in which he found the applicant guilty and convicted him as charged and proceeded, after mitigation, to sentence him to imprisonment for 15 years.

Aggrieved by the conviction and sentence, the applicant appealed to the High Court in Nbi H.C.CR. Appeal No.599 of 2004. After hearing the appeal in which the applicant was represented by counsel, the High Court dismissed the appeal against conviction but set aside the sentence and instead imposed a fine of Shs.28,000,000/= and in default imprisonment for a term of 12 years and in addition a further term of imprisonment for three and half years to run from the date of delivery of judgment of the trial court on 1st December 2004.

On 8th February 2012, the applicant filed the application seeking leave to appeal to the Supreme Court against the decision of this court dismissing his second appeal as stated earlier. He put forward, inter alia, the following grounds for making the application:

1. *That the applicant is desirous of filing an appeal to the Supreme Court for a final determination of the matter.*
2. *That the decision of the trial court and of the subsequent appellate courts i.e. the Superior Court and the Court of Appeal were unconstitutional and prejudicial to the applicant.*
3. *That the intended appeal has overwhelmingly chances of succession*
4. *That no prejudice will be occasioned to the respondent if the application is allowed.*
5. *That unless this Court grant leave to the applicant "for review of its judgment on priority, the applicant shall remain incarcerated for a life time and serve an illegal sentence"*

In his affidavit sworn on 8th February 2012 in support of the application, the applicant alleges that he was *"singled out, arrested and subsequently convicted because he is a Nigerian."* He contends that this violated his constitutional rights, including, the right to dignity and the right not to be discriminated against. He further contends that his health has been deteriorating and that he is mentally distraught and is developing depression as a result of being separated from his family for such a long time. He avers that he is "*haunted by intense thoughts on their survival, health and general well-being*.

Mr. John Sakwa, the learned counsel for the applicant urged us on 13th May 2013 to allow the application and grant the applicant leave to appeal to the Supreme Court on the issue of constitutionality of his sentence. He cited rule 22(1) of the Supreme Court Rules and Article 163 (4) (b) of the Constitution and contended that although the Constitution was promulgated in 2010, this did not create a bar to the order sought. It was Mr. Sakwa's case that the criminal charges against the applicant were not tenable and that the charge sheet was defective and that the applicant was denied a fair hearing.

On her part, Ms Jacinta Nyamosi, the Senior Principal Prosecution Counsel, opposed the application and submitted that the applicant had not demonstrated sufficient ground for the grant of the leave he seeks and the grounds proffered in his application did not meet the threshold either singly or cumulatively. In short, the learned Senior Principal Prosecution Counsel contended that the applicant had failed to make out a case for the grant of leave to move to the Supreme Court. She pointed out that the judgment of this Court was delivered on 16th April 2010 before the promulgation of the new Constitution and that this Court then was a court of final resort. It was her submission that the applicant came to this Court to seek leave on 08.02.2012 as an afterthought. In any event, she submitted, the application was not within the ambit of Article 163 (4) (a) & (b). She therefore urged us to dismiss the application.

In essence, the applicant's application is for grant of certification to appeal to the Supreme Court from the decision of this Court dated 16.04.2010. Rule 24(1) of the Supreme Court Rules 2012 requires such application to be made to this Court as the Court it is desired to appeal from.

The jurisdiction of the Supreme Court to hear appeals is stipulated in the Constitution. Article 163(4) of the Constitution stipulates as follows:

"appeals shall lie from the Court of Appeal to the Supreme Court-

a. *as of right in any case involving the interpretation or application of this Constitution; and*
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, subject to clause (5)."*

Further, Article 163(5) of the Constitution stipulates:

> *"(5) a certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."*

The new Constitution was promulgated on **27th August 2010**. It set up in **Article 163(1)** the Supreme Court of Kenya as a new tier at the apex of our judicial system with exclusive original jurisdiction to hear and determine disputes relating to the elections of the Office of President arising under Article 140 and appellate jurisdiction to hear and determine appeals from this Court and any other Court or tribunal as may be prescribed by National Legislation providing that appeals from this Court to the Supreme Court lie as of right in any case involving the interpretation or application of the Constitution and in any other case if the Supreme Court or this Court certifies that a matter of general public importance is involved, save that a certification by this Court may be reviewed by the Supreme Court and either affirmed, varied or overturned. In addition, the Supreme Court has jurisdiction to give advisory opinion at the request of national government, any State organ, or any County Government with respect to any matter concerning County Government. Decisions of the Supreme Court bind all other courts.

In its decision in the case of **Samuel Kamau Macharia & Another versus Kenya Commercial Bank Ltd and 2 Others**[1]**,** the Supreme Court held that decisions of this Court made before the promulgation of the Constitution on 27th August 2010 cannot be re-opened through an appeal to the Supreme Court as a certification to appeal to the Supreme Court cannot issue even if the intended appeal raises a matter of general public importance. In its ruling delivered on 23rd October 2012 in the said case, the Supreme Court posed the question:

"Can the Supreme Court entertain appeals from cases that had already been heard and determined by the Court of Appeal before it came into existence?"

After analyzing a plethora of principles of law the Supreme Court expounded the interpretation of its jurisdiction thus:

> *"... the issue for us 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 2010. The Supreme Court is a creature of the new Constitution. Before then, decisions of the Court of Appeal were final. The parties to the appeals derived rights and incurred obligations from judgments of that Court. If this Court were to allow appeals from the cases that had been finalized by the Court of Appeal before the commencement of the Constitution of 2010, it would trigger a turbulence of unmanageable proportions in the private legal relations of the citizens of this country. Every party against whom the Court of Appeal delivered Judgment in the past, however far in the history, would be entitled to approach the Supreme Court and seek a reversal of the same ....."*

The Supreme Court went on to expound thus:

> *"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) 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."*

In the light of the above and the law as it stands, it is clear that the door is not open for the applicant

to move to the Supreme Court by way of an appeal in the context of the facts stated in his application. Accordingly, we have no alternative but to dismiss which we hereby do the applicant's notice of motion dated 8th February 2012.

Dated and delivered at Nairobi this 21st day of June 2013.

G. B. M. KARIUKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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[1] **(Application No.2 of 2012)**