



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & GATEMBU, JJ.A.)

CRIMINAL APPLICATION NO. NAI.1 OF 2013 (UR 1/2013)

BETWEEN

WILSON THIRIMBU MWANGI.....APPLICANT

AND

REPUBLIC.....RESPONDENT

*(Being 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 delivered on 20th May, 2011*

*in*

**CR. APPEAL NO.51 OF 2004)**

\*\*\*\*\*

**RULING OF THE COURT**

On 16th January, 2013 the applicant herein *Wilson Thirimbu Mwangi* filed in this Court an application invoking **Articles 163, 50 of the Constitution** plus **Rules 14, 18, 26, 42 of the Supreme Court Rules**. Based on the heading of the application, it would seem that the application was initially intended to be presented to the Supreme Court. Be that as ti may, the prayers sought in the application were:

- “(1) That this Court has jurisdiction under Article 163 and 50 of the Constitution under Rules 14, 18, 26 and 42 of the Supreme Court Act and Rules 2012 to hear and determine this application.***
- (2) That, may this Court be pleased to find the misdirection canvassed in the trial record and the judgment is fatal to the prosecution case and contrary to Section 169(1) of the CPC Cap 175 Law (sic) of Kenya.***
- (3) That, may this Court be pleased to order for a new trial (retrial) in the instant matter for justice to prevail.***
- (4) That, this court be pleased to consider my health status since I am suffering from mild superficial chronic gastritis and high blood pressure and which requires urgent medical attention not available in prison.***

**(5) That, I do feel that my application is meritorious and have (sic) great chance of success once heard and determined.**

**(6) Any other order it may deem fit in the circumstances of this matter.”**

In the supporting affidavit the applicant stated, *inter alia*, that he was the fourth appellant in Criminal Appeal No. 51 of 2004 at Nairobi Court of Appeal following the conviction in HC. Cr. No.40 of 2000 wherein he was sentenced to death and the conviction and sentence was in this Court confirmed on 20th May, 2011. Then he added:

**“3. That this esteemed Supreme Court of Kenya has jurisdiction under Section 163 and 50 of the Constitution and rules 14, 18, 26 and 42 among others to be heard and determined and give directions on the matters raised by this application.**

**4. That may this Court be pleased to find the misdirection canvassed in the trial record and judgment is fatal to the presentation case contrary to Section 169(1) of the CPC Cap 175 of Law (sic) of Kenya.”**

Paragraph 4 (above) reproduces ground 2 in the notice of motion (above). Appended to this affidavit is a document headed “***In the Supreme Court of Kenya***” bearing the title “***PETITION***” which was not referred to during the proceedings before us. The notice of motion having been drawn up by the applicant in person definitely appears not quite clear. But when Mr. Bryant appeared for the applicant at the time of hearing the motion, he adopted it and proceeded to make clear the position. He told us that according to the provisions of the Constitution and the law narrated by the applicant, all he was praying for was leave of this Court to have his appeal go to the Supreme Court, established by Article 163, for determination as provided for under **Article 163(4) of the Constitution** which reads:

**“163(1) ....(3) ....**

**4. Appeals shall lie from the Court of Appeal to the Supreme Court:**

**(a) as of right in any case involving the interpretation of the Constitution; and**

**(b) in any case in which the Supreme Court or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)”.**

From the outset Mr. Bryant made it clear that the applicant's case fell within Article 163(4)(a). The applicant was claiming that passing a death sentence over him which was confirmed by this Court violated his constitutional rights under the Bill of Rights namely, that he was condemned to suffer death – an inhuman punishment (Art.29(f)). Learned counsel added that he was aware that appealing to the Supreme Court via Article 163(4)(a) was as of right as opposed to proceeding under Article 163(4)(b) which required leave of this Court or the Supreme Court itself. Asked then why his client was seeking leave from this Court to appeal to the Supreme Court, Mr. Bryant answered that it was because there was in operation a practice by the Supreme Court registry staff to refuse appeals being made directly to the Supreme Court and directing parties instead, to seek leave of this Court first. We confess no such practice has been brought to our attention or to the attention of any one else, whether conveyed orally or in writing. But that was Mr. Bryant's firm stand even as we expressed our clear doubts.

At that point we directed that Mr. Bryant do file written submissions plus authorities for the ease of conducting/following the proceedings. He did so and continued with the argument, not based on the leave issue, but that death sentence constituted inhuman and degrading punishment, if meted out to any convicted person and so the Supreme Court should make a pronouncement on that.

We heard that this Court outlawed death sentence in the case of ***Ngotho Mutiso vs R Mombasa Cr.A 17/2008*** on 30th July, 2010 before the judgment in the appeal that the applicant had before this Court (Cr. A.51/2004), which like other earlier ones, was dismissed on 20th May, 2011. Although we are

not dealing with the interpretation the court accorded the death sentence under S.204 Penal Code (for murder), it does no harm to point out that in the conclusion of the **Mutiso appeal** the learned judges delivered themselves thus:

***“We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that Section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and the spirit of the Constitution, which as we have said, makes no such mandatory provision.”***

Our reading and understanding of this **Ngotho Mutiso** case, does not lend itself to the position advanced by Mr. Bryant that that case outlawed the death penalty. We leave it at that.

Mr. Bryant however continued that when it came to the applicant's appeal this court deviated from the jurisprudence in the **Ngotho Mutiso** case when it confirmed the death sentence imposed on the applicant, together with his co-appellants. Counsel did not tell us whether the **Ngotho Mutiso** case was referred to during the submissions in the applicant's appeal, to the effect that death sentence under **S.204 of the Penal Code** was not the only and therefore mandatory sentence. However, we were urged, from the stand-point of several foreign authorities and international instruments placed before us, that death sentence was inhuman so in the present status of the law in Kenya, the Supreme Court now has the chance to determine the legality of that sentence under **Section 204 of the Penal Code** for all the courts in the land to know and therefore proceed in murder cases on a sound footing as regards the correct sentence to mete out. We did not go into the authorities Mr. Bryant placed before us, being of the view that they were not relevant at this stage. Asked why the applicant was seeking leave or a certificate from us in order to advance to the Supreme Court when Article 163(1) did not envisage such leave or certificate, Mr. Bryant concluded:

***“So that jurisprudence is developed, even if I had/have an automatic right to go to the Supreme Court.”***

We have already commented on such automatic leave to a party intending to appeal a decision of this Court where that party wants the Supreme Court to entertain an issue regarding the interpretation or application of this Constitution.

M/s. F. N. Njeru, prosecution counsel did not appear to have a stand on this important application. She initially seemed to oppose the application but then remarked that the applicant could be given leave to proceed to the Supreme Court. And then she left the whole matter to us. We noted that neither Mr. Bryant nor M/s. Njeru touched on Article 50, regarding fair hearing, cited in the motion. We do not thus address it.

We have considered the whole matter with the attention it deserves. However, our determination is brief. Article 163(4)(a) is quite clear that where a party wishes to appeal from this court ***on a matter involving interpretation or application of the Constitution, going to the Supreme Court is as of right.*** Mr. Bryant emphasized that the applicant was invoking the powers under this Article and that he was well aware that appealing to the Supreme Court, as in the case of the applicant, was as of right. So without more, we find and hold that there was no basis to bring and argue this application before us. The argument that the applicant felt that seeking our leave or certificate when he was appealing a decision of the death sentence this Court confirmed was unconstitutional, did not have merit. No leave is required in these circumstances and we should plainly and firmly state so, as we hereby do. We state that nobody whose appeal falls under Article 163(4)(a) proceeding to the Supreme Court, needs to come here for leave or certificate. Taking such a course is as of right and there should be no hindrance or bar placed in the way of the intending appellant. There is no such bar in the laws of Kenya or practice or even the Constitution 2010 itself. In the case of **Lawrence Nduttu & 6000 others vs Kenya Breweries Ltd and Anor, Petition 3 of 2012**, the Supreme Court stated that:

***“At the outset, we consider it crucial to lay down once again the principle that only two types of***

***appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is from a case involving the interpretation or application of the Constitution. In such a case, no prior leave is required from this Court or Court of Appeal.”***

If the Supreme Court registry staff members have refused the applicant to move to the Supreme Court under Article 163(4)(a) requiring that he first obtains leave from us, they have been undoubtedly wrong. They should stop such practice forthwith, if any, and the Registrar of the Court should acquaint them with the correct course. The guideline to the registry staff should include an aspect that only appeals from this Court to the Supreme Court requiring our certificate first, are the ones that are deemed to involve a matter of general public importance (Article 163 (4)(b)) be it civil or criminal.

We are alive to the decision of the Supreme Court of Kenya in the case of ***Peter Oduor Ngoge vs Francis Ole Kaparo & 5 others [2012] eKLR*** to which we were referred by Mr. Bryant where the Supreme Court acknowledged the existence of the constitutional right of appeal to the Supreme Court in Matters ***“involving the interpretation or application of the Constitution – such that it becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court.”***

In the case the Supreme Court went on to say:

***“We draw analogies with the plurality of autonomous structures created by the Constitution of Kenya, 2010, which represents a progressive new trend in governance. The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of eh respective jurisdictions of the other Courts and tribunals....***

***...in the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”***

In keeping with that principle, if, as Mr. Bryant certainly considers, there is a conflict between the decision of this Court in the case of ***Ngotho Mutioso vs R [2010] eKLR*** and the decision of this Court intended to be appealed to the Supreme Court, perhaps this Court should, when the occasion arises, in the first instance resolve that conflict by Constitution of five judge bench before matter is escalated to the Supreme Court.

Having said as much, it becomes clear that the applicant's move to seek leave from us before appealing to the Supreme Court under Article 163(4)(a) was misconceived and misplaced and if that court registry put hurdles in his way, and we had no evidence of that anyway, the Supreme Court has made it clear as to the applicability of ***Article 163(4)(a) of the Constitution***. The applicant should travel that way. And to this we add that any party intending to go to the Supreme Court by the route of Article 163(4)(a), that party should do so directly ***as of right*** and not burden this Court with unnecessary applications like the current one. There is a need and indeed a desire on the part of this Court to do justice without undue delay, technicalities or wastage of time and resources. Taking the direct and correct path while seeking justice contributes greatly to that end.

Now what do we make of the need for the Supreme Court to loudly and firmly pronounce the law in Kenya regarding the proper approach when a sentence of death features in a given crime? Such crimes are murder, treason, robbery with violence contrary to S.296(2) and S.297(2) of the Penal Code. We cannot say much about it now because it is time the Supreme Court made a determination to guide all and by all we mean the courts, the convicts, lawyers, prosecutors, victims or their relatives, scholars and the wider public generally. It is of concern to all these categories that the status and applicability of the death sentence is made clear, certain and final, if not all the time, for the time being. We say this because there have been many cases before this court, the High Court and the subordinate courts where challenges have been raised about the death penalty. Some views have been to the effect that that sentence is

unconstitutional. Others are that it is not mandatory. There have been cases of conflicting decisions too. Such is an environment of uncertainty and confusion, as a result of which applications have been made for setting up a bench consisting of five judges to deal with this issue as opposed to the usual three who have handled the question in the past. It is now time the highest court in the land, the Supreme Court of Kenya settled the matter. Its decision will spell out the law, lay on the table the jurisprudence for all of us to follow and apply. And to that end, if the applicant's case is the first, may it blaze the trail. If it is not, then let it join the others already filed to state the applicability of a death sentence in Kenya. But with the decision in the *Ngoge* case (supra), Mr. Bryant would do well to apply for a five-judge bench first. And on that note we make the following orders:

1. The present application is dismissed. According to the Constitution, it did not merit to be brought the way it was.
2. The Registrar of the Court do liaise with the Registrar of the Supreme Court to issue proper guidelines as to the applicability of Article 163(4).
3. The applicant do consider to have a five-Judge bench of this Court deal with the issue before moving to the Supreme Court as of right.

*Dated and delivered at Nairobi this 14<sup>th</sup> day of June, 2013*

**J. W. MWERA**

.....

**JUDGE OF APPEAL**

**P. M. MWILU**

.....

**JUDGE OF APPEAL**

**S. GATEMBU-KAIRU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

/jkc