IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 62 OF 2013 (UR 41/2013)

BETWEEN

NISHA SAPRA ……..…….…… APPLICANT

AND

THE HON. ATTORNEY GENERAL ……..... RESPONDENT

INTERESTED PARTY

KULDIP MADAN MOHAN SAPRA

(Being an application for stay of execution pending hearing and determination of an intended appeal from the judgment/decree of at the High Court of Kenya at Nairobi (Majanja, J) delivered 30th March, 2012

in

HCJR/PETITION NO. 291 OF 2011)

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RULING OF THE COURT

1. Before us is the applicant's application dated 15th March, 2013 presented under ***Sections 3A and 3B of the Appellate Jurisdiction Act*** and ***Rule 5(2)(b) of the Court of Appeal Rules, 2010***. The substantive relief sought by the applicant in that application is for an order of:

> "***Stay of proceedings in Chief Magistrate's Criminal case No. 523 of 2008 pending the hearing and determination of applicant's intended appeal***."

Background

2. The applicant, ***NISHA SAPRA***, was charged with the death of ***YOGESH MADAN MOHAN SAPRA*** on the night of 20th and 21st August, 2005 at Lower Kabete in Nairobi. She was charged with the offence of manslaughter in Nairobi Criminal Case number 528 of 2008.

3. By a petition dated 9th May, 2008, the applicant applied to the High Court of Kenya at Nairobi to

declare, among other things, that the sustenance and prosecution of Chief Magistrate's Criminal Case number 528 of 2008 is contrary to the Constitution and is likely to deprive her of her fundamental rights and freedoms as guaranteed under the Constitution. She also sought a declaration that the proceedings in Criminal Case number 528 of 2008 against her are null and void.

4. The petition to the High Court was based on the ground that the applicant's fundamental rights and freedoms protected under the Constitution were infringed in that she was detained in police custody [for a period of 23 days between 11th September, 2005 to 3rd October, 2005 and thereafter from 15th January, 2008 to 28th January, 2008] in breach of ***Sections 70(a), 72(2) and (3)(b) and 77(2)(a) of the repealed Constitution***.

5. After hearing the petition, the High Court (the Honourable Mr. Justice D.S. Majanja) was not persuaded that the same had merits and in a judgment dated and delivered on 30th March, 2012 dismissed the petition.

6. Aggrieved by the whole of the judgment of the High Court, the applicant filed a notice of appeal on 13th April, 2012.

7. Pending the hearing and determination of the appeal, the applicant, by an application dated 15th March, 2013, seeks orders of this Court, under ***Sections 3A and 3B of the Appellate Jurisdiction Act*** and ***Rule 5(2)(b) of the Court of Appeal Rules, 2010***, as earlier herein stated, to stay proceedings in Chief Magistrate's Court Criminal case number 523 of 2008.

Submissions by Counsel

8. Mr. M. Billing who appeared with Mr. K. Kilukumi learned counsel for the applicant urged us to exercise our discretion in favour of the applicant and to grant the prayers sought in the application. Mr. Billing submitted that the applicant has an arguable appeal that will be rendered nugatory unless the order of stay is granted.

9. In that regard, he referred us to the draft memorandum of appeal and submitted that, on appeal, the applicant will argue that the learned judge of the High Court erred in: not holding that the applicant's fundamental rights, particularly under ***Sections 70(a) and 72(3) of the repealed Constitution*** were breached; not holding that the recommendation for the arrest and prosecution of the applicant by the trial magistrate who conducted the inquest was in breach of the applicant's fundamental rights and freedoms; not holding that the applicant was deprived of a fair trial contrary to ***Section 77(1) of the said Constitution***; in holding that the applicant was not entitled to an acquittal on the grounds that she was detained by the police for a period in excess of the time limited under ***Section 72(3)(b) of the Constitution***.

10. Further, Mr. Billing submitted that, the learned judge erred in holding that the Court of Appeal decision in the case of ***JULIUS KAMAU KURIA V R, NAIROBI CR. NO. 50 OF 2008,*** in which this Court held that the appellant therein was not entitled to an acquittal on the basis of having been detained for a period longer than that permitted under the said Constitution did not overrule previous decisions of this Court in which a contrary view was expressed.

11. On the question whether the appeal will be rendered nugatory unless the orders sought are granted, counsel for the applicant relied on the decision of this Court in the case of ***DR. CHRISTOPHER NDARATHI MURUNGARU V KENYA ANTI-CORRUPTION COMMISSION AND ANOR, CIVIL APPLICATION NO. NAI 43 OF 2006,*** where this Court stated that when considering the question of whether an appeal will be rendered nugatory in matters involving penal consequences, different considerations arise in that the appeal will have been rendered nugatory if the applicant is imprisoned.

12. Miss Mary C. Oundo, learned Principal Prosecution Counsel, appearing for the respondent opposed the application. She took us through the background to the present application beginning with the

commission of the offence in 2005; the inquest that was concluded in 2008 and the application by the applicant for review of the findings of the inquest and submitted that the applicant has occasioned delay in the prosecution of the matter and that further delay will be prejudicial to the prosecution.

13. Miss Oundo further submitted that the present application is frivolous and that the applicant has not demonstrated an arguable appeal. Counsel argued that the learned judge of the High Court carefully considered the matters that were raised by the applicant and correctly decided that the applicant's constitutional rights have not been infringed.

14. With regard to the contention that there are conflicting decisions of this Court on the question whether the detention of an accused person for a period longer than that permitted under the repealed Constitution entitles one to an acquittal, Miss Oundo submitted that this Court is not bound by those decisions and that this Court can choose to either adopt them or come up with its own decision.

15. We allowed Mr. Rebello, learned counsel for the interested party, the family of the deceased husband to the applicant, to address us. Mr. Rebello submitted that the issue raised by the applicant that the learned judge erred in not holding that the decision of this Court in the case of ***JULIUS KAMAU KURIA V R, [supra]*** in which this Court held that the appellant therein was not entitled to an acquittal on the basis of having been detained for a period longer than that permitted under the Constitution did not overrule previous decisions is academic, adding that that decision did not overrule earlier decisions but rather explained and moderated the effect of the earlier decisions. Mr. Rebello referred us to the case of ***DOMINIC MUTIE MWALIMU V REPUBLIC, CR NO. 217 OF 2005,*** where this Court stated that:

> ***"The mere fact that an accused person is brought to court either after twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of Section 72(3) above is in our view clear that each case has to be decided on the basis of its peculiar facts and circumstances."***

16. Mr. Rebello also drew our attention to the decision of this Court in the case of ***ELIUD NJERU NYAGA V REPUBLIC, CR NO. 182 OF 2006*** to the same effect.

17. Mr. Rebello also referred to ***Article 50 of the current Constitution***, which makes provision for a fair trial within a reasonable time and submitted that the applicant is creating delay by making numerous unmerited applications. Mr. Rebello urged the Court to dismiss the application.

18. In his brief reply, Mr. Billing reiterated that the learned judge erred in holding that the decision in the case of ***JULIUS KAMAU KURIA V R, [supra]*** did not overrule earlier decisions of this Court.

19. On the question of delay, Mr. Billing submitted that both parties are guilty of delay.

Our Decision

20. We have considered the application. The exercise of jurisdiction, in an application of this nature, is discretionary based on the principles whether the applicant has an arguable appeal and if so, whether the appeal will be rendered nugatory if we do not grant the orders sought. There are many authorities for that proposition going back to the case of ***GITHUNGURI V JIMBA CREDIT CORPORATION LIMITED, CIVIL APPLICATION NO. NAI 161 OF 1988***.

21. In ***ISHMAEL KAGUNYI THANDE V HOUSING FINANCE OF KENYA LTD, CIVIL APPLICATION NO. NAI 157 OF 2006*** this Court stated:

> **"The** ***jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an***

injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

22. In a recent decision delivered on 31st May 2013, *Githinji, JA* in ***EQUITY BANK LIMITED V WEST LINK MBO LIMITED, CIVIL APPLICATION NO. NAI 78 OF 2011*** expressed himself on ***rule 5(2)(b)*** follows:

> "***It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance……it is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals***."

23. Has the applicant demonstrated it has an arguable appeal? If so, will the appeal be rendered nugatory if the order sought is not granted? Should we exercise our discretion in favour of the applicant?

24. As we have already stated the applicant was charged, in April 2008, with the offence of manslaughter contrary to ***section 202 of the Penal Code***. The particulars of the offence were that on the night of 20th and 21st August 2005 at lower Kabete Nairobi she unlawfully killed Yogesh Mohan Sapra.

25. On 9th May 2008 she petitioned the High Court to declare that her prosecution contravened the Constitution and was likely to deprive her of her fundamental rights and freedoms guaranteed under the Constitution. The substance of her complaint was that she was detained in police custody for a period beyond that permitted under the Constitution with the result, in her view, that her prosecution was a nullity. She found support for that contention in previous court decisions including ***PAUL MWANGI MURUNGA V R, NAKURU CR NO. 35 OF 2006; GERALD MACHARIA GITHUKU V R, NAIROBI CR NO. 119 OF 2004*** and ***ALBANUS MWASIA MUTUA V R, NAIROBI CR NO. 120 OF 2004,*** where courts held that pre trial detention in excess of time limited under ***Section 72(3)(b) of the Constitution*** entitled an accused to an acquittal.

26. The learned judge of the High Court was not persuaded by that contention and preferred, and followed the decision of this Court in the case of ***JULIUS KAMAU KURIA V R, [supra]*** taking the view that non compliance with the time frames set out under ***Section 72(3)(b) of the Constitution*** did not entitle an accused to an acquittal and that "***that section cast a burden on a person who alleges that any detention beyond the specified period is still constitutional, of proving that the suspect was still brought before the court as soon as is reasonably practicable***" and that in effect that decision overruled the previous decisions. The applicant submits that the learned judge of the High Court was wrong in taking that view.

27. We are not at this stage dealing with the main appeal and caution ourselves against making pronouncements that may prejudice the court that will ultimately hear the appeal. Although we are reluctant to say that the intended appeal is frivolous we think the case of ***JULIUS KAMAU KURIA V R, [supra]*** represents the current and correct view of matters relative and/or similar to the matter now under consideration.

28. The view of this Court as expressed in that case is that the only instance where a breach of ***section 72 (3) (b)*** would entitle an accused person to an acquittal would be where such a breach would have a direct impact on the accused's right to a fair trial, as guaranteed by ***section 77 of the retired Constitution***. Where such a violation, of ***section 72 of the Constitution*** did not adversely affect the accused's right to a fair trial, then the only remedy available to him, was in damages. The Court stated:

> ***"However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. [sic] As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime,***

or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable [sic] by damages."

29. The court considered that a deprivation of personal liberty, by that fact alone, would not entitle an accused to an acquittal. This Court stated:

"…had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would compromised. [sic] If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under Section 84 (1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in Section 72 (6) was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages…"

30. A similar view was taken by this court in ***ALEX WAFULA V REPUBLIC, [2009] e-KLR***. This was an appeal from the High Court where among other grounds of appeal, the appellant had argued that his right to personal liberty was violated as he was brought to court four days after the allowable period. This Court noted that the trial judge had correctly found that the failure to bring the appellant to court within the specified time would only entitle him to compensation for a breach of his rights.

31. To buttress the contention that the applicant has an arguable appeal counsel for the applicant indicated that the applicant intends, at the hearing of the main appeal, to request the President of the Court to constitute a five judge bench. While such request would be in keeping with the practice of this Court, we would hasten to add that a bench of three has powers to depart or reverse its own decisions. The point was made by this Court in the case of ***INCOME TAX V T, [1974] EA 546*** where Spry, Ag. VP stated:

"…***where it is intended to ask this Court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges although a bench of three has the same powers***"

32. We consider that this Court did exactly that in the case ***JULIUS KAMAU KURIA V R, [supra]***.

33. Will the appeal be rendered nugatory if we do not grant the orders sought? The applicant relied on the case of ***DR. CHRISTOPHER NDARATHI MURUNGARU V KENYA ANTI-CORRUPTION COMMISSION AND ANOR, [supra]*** where this Court stated that:

"***It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only a week. The appeal would have been rendered nugatory***."

34. In the same case, this Court clarified that the Kenya Anti-Corruption Commission was free to continue to independently investigate the appellant and could recommend prosecution based on findings of the fresh investigation. The Court also stated that:

"***We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished***…"

35. We are alive to the fact that the decision to charge the applicant with the offence that she faces was reached after the conduct of an inquest. Being of the view as we are, that the applicant's remedy for

deprivation of liberty, if any, lies in damages, we are not persuaded that the appeal will be rendered nugatory if we decline the application. In the totality of the circumstances as we have set out above, we do not think that we should interfere with the conduct of the proceedings in Criminal case No. 523 of 2008. For those reasons the application fails and is dismissed. The costs of the application will abide the outcome of the appeal.

Dated and delivered at Nairobi this 26th day of July, 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

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