REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Application 8 of 2009

JUVINALIS ONNO …….. APPLICANT

AND
THE ATTORNEY GENERAL …… RESPONDENT

(*An application for stay of execution of the Ruling of the High Court of Kenya at Nakuru (Maraga, J) dated 29th July, 2009 but read on 30th July, 2009*

In

H.C. Petition No. 5 of 2008)
****

RULING OF THE COURT

By an application expressed to be made under ***rule 5 (2) (a)*** of the Court of Appeal Rules, the applicant, Juvinalis Onno, applies in the main for an order of "*stay of execution of the ruling*" of the superior court (Maraga, J) made on 30th July, 2009 pending the hearing and determination of an intended appeal. The application is based on the grounds set out on the body of the application and also on the affidavit of the applicant. The matter before the superior court which gave rise to the present application related to a constitutional petition under ***sections 70, 72 (1), (2), (3), 77 (1)*** and ***84 (1)*** of the Constitution as well as ***section 123*** of the Criminal Procedure Code. In that petition, the applicant sought a declaration that his prosecution in Nakuru Chief Magistrate Criminal Case No. 1258 of 2002 was oppressive, discriminative and a gross abuse of his constitutional rights to a fair trial, hence null and void. He sought unconditional discharge. It was based on the ground that he was unlawfully detained in a dark and unsanitary cubical at the Nakuru Central Police Station for a period of six days before he was taken to court. He argued that he ought to have been produced before the court within 24 hours of his arrest.
After hearing argument, the superior court declined to grant the declaration sought. In doing so, the learned Judge expressed himself thus:-

"The Petitioner in this case was arrested on the 3rd July, 2002 for alleged commission of bailable offences. He was therefore supposed to be taken to court within 24 hours. However, delay *per see (sic)* ***is not*** *ipso facto* ***proof of breach of that constitutional provision if there is reasonable explanation for it. The Court of Appeal made this quite clear in*** **Dominic MutieMwalimu vs. Republic**, ***Criminal Appeal No. 217 (CA Nairobi).***

> ***--- In this case the prosecution stated that the delay was caused by the Petitioner's escape from lawful custody and the time it took to contact the complainant after the Petitioner was rearrested. The Petitioner has not disputed his alleged escape. As a matter of fact one of the charges he faces in the said case is escaping from lawful custody. In the circumstances***

> ***I find the prosecution explanation for the delay reasonable. Besides that 3rd July, 2002 when the Petitioner was arrested was a Wednesday and he was taken to court the following Monday. As courts do not operate during weekends, the delay in this case was therefore for only two days and not for six days as claimed by the Petitioner."***

It is against that decision that the applicant intends to appeal, and in respect of which he has filed a notice of appeal dated 3rd July, 2009. For now, he seeks in his own words, "*a stay of the ruling*" on the grounds essentially that his prosecution in the lower court (slated for 5th October, 2009) will cause him embarrassment, prejudice and gross abuse and/or denial of his constitutional rights and that he would suffer irreparable loss should the prosecution continue.

Mr. Maragia Ogaro, learned counsel for the applicant, reiterated that the application was under ***Rule 5 (2) (a)*** of this Court's Rules and submitted that if stay was not granted the appeal would be rendered nugatory. Mr. P. M. Gumo, learned Assistant Director of Public Prosecution for the respondent, argued that the superior court, not having made any orders, there was nothing to stay.

We agree with the submission of the learned Assistant Director of Public Prosecution that the superior court did not make any positive orders capable of being stayed. It simply declined to issue the orders sought by the applicant. Accordingly, there is nothing to stay.

Moreover, we are of the view that the application before us is incompetent as it is brought under ***rule 5 (2) (a)*** which states as follows:-

> ***"Subject to the provisions of*** *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 58, 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;***

There is no evidence before us that the applicant is being held in custody, or that there is a warrant of distress issued against him for execution. In fact, his counsel confirms that there is no such thing. Accordingly, ***rule 5 (2) (a)*** under which this application has been brought is inapplicable, hence making this application incompetent. We, therefore, order that the same be and is hereby struck out.

Dated and delivered at Nakuru this 26th day of February, 2010

R.S.C. OMOLO
……
JUDGE OF APPEAL

P.N. WAKI
…….
JUDGE OF APPEAL

ALNASHIR VISRAM
……..
JUDGE OF APPEAL

Icertify that this is a
true copy of the original.

DEPUTY REGISTRAR.