REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & President; Ibrahim; Ojwang; Wanjala; & Njoki, SCJJ)

CRIMINAL APPLICATION NO. 2 OF 2018

REPUBLIC.....APPLICANT

VERSUS

AHMAD ABOLFATHI MOHAMMED.....1ST RESPONDENT

SAYEED MANSOUR MOUSAVI.....2ND RESPONDENT

(Being an application for review of the decision of the Court of Appeal (Nambuye, Musinga & Gatembu, JJA) given at Nairobi on 16th February 2018 dismissing the applicant's application for certification that the matter herein is one of general public importance warranting a further appeal to the Supreme Court).

R U L I N G

Backgound

[1] The respondents, Iranian nationals, were charged with and convicted for the offences of being in possession of explosives contrary to **Section 29** of the Explosives Act; committing an act intended to cause grievous bodily harm contrary to **Section 231** of the Penal Code; and preparing to commit a felony contrary to **Section 308(1)** of the Penal Code. They were each sentenced to life imprisonment on count 1, 10 years' imprisonment on count 2 and 15 years' imprisonment on count 3. The sentences were ordered to run concurrently.

[2] The respondents' appeal to the High Court against conviction was dismissed. The one against sentence was, however, partially allowed with the result that the sentences imposed upon them by the trial court were set aside and in lieu thereof they were each sentenced to a consolidated term of 15 years' imprisonment. Their second appeal to the Court of Appeal was allowed; their convictions were quashed and the sentences imposed on them were set aside and the Court of Appeal ordered their immediate repatriation. Aggrieved by that decision, the State wishes to appeal to this Court.

State's Application

[3] Its application for certification having been dismissed by the Appellate Court, the State has now, in its amended Notice of Motion, applied to this Court, under **Articles 159(2)(a), (d) & (e); 163(4)(b) & (5)** and **259(1)** of the Constitution as well as **Rule 24(2)** of the Supreme Court Rules 2012, to review and set aside the said decision and in its stead to find that the State's intended appeal raises matters of general public importance and grant it leave to appeal to this Court. Pending the hearing and determination of the intended appeal, the State seeks a further order staying the execution of the Appellate Court's orders acquitting the respondents and directing their repatriation back to their country.

[4] The application is based on 5 main the grounds that:

a) the applicant has an arguable appeal with high chances of success;

b) the intended appeal involves a matter of general public importance as it touches on national security;

c) the net effect of the judgment of the Court of Appeal will affect the investigations of all criminal cases and transcends this particular case;

d) the intended appeal has a significant bearing on the public interest with respect to criminal matters which the Court of Appeal in its ruling of 16th February 2018 failed to consider; and

e) *that the intended appeal will be rendered nugatory if stay is not granted and the respondents leave the jurisdiction of the Court.*

[5] Expounding on these grounds and basing his arguments on the averments of two affidavits sworn by Peter Mailanyi, Senior Assistant Director of Public Prosecutions, in support of the application as well as the applicant's counsel's written submissions, Mr. Gatonye, learned counsel appearing with Messrs. Okello and Ondimu for the State, submitted that this matter, which has a bearing on the security of this country, is of great general public importance to warrant a further appeal to this Court. Urging this Court to take judicial notice of the fact that this country has in the past immensely suffered from terrorist attacks, counsel submitted that the respondents in this case were found in possession of cyclotrimethylene trinitramine (RDX), one of the most lethal explosives used in warfare, which, if detonated, would have caused untold harm to innocent citizens and foreign residents in this country.

[6] Besides the matter being of great general public importance, counsel for the State also argued that the Appellate Court's decision has left unsettled crucial points of law which warrant a further consideration by this Court. They are whether or not an appellate court has jurisdiction to stay the execution of an order of acquittal; whether information given by a suspect leading to discovery of material evidence in a case is inadmissible unless it is a confession regularly recorded as the Appellate Court held, an issue that has a significant bearing on all criminal investigations in this country; whether or not courts are entitled to draw inferences/presumptions from facts arising from confessions as provided for under **Section 119** of the Evidence Act; and the apparent conflict between **Sections 25A** and **111(1)** of the Evidence Act and what amounts to a confession under Section 25A of the Evidence Act. Counsel argued that all these points of law, which were raised and were determined by the courts below, will be also be the focus of its intended appeal and this Court's decision on each of them will transcend the facts of this matter.

[7] In support of the application, counsel relied on this Court's decisions in the cases of **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR, Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 Others [2012] eKLR *(Supreme Court Petition No. 2 of 2012)*** and **Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell [2013] eKLR**, as well as **Section 24**, of the Supreme Court Act and urged us to allow this application in its entirety.

[8] On stay of execution, counsel for the State argued that as this Court observed in the case of **Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell [2013] eKLR** and on the provisions of **Section 24** of the Supreme Court Act, it has jurisdiction granted by statute to make interlocutory orders not only to preserve the subject matter of an appeal but also to ensure that an appeal or intended appeal is not rendered nugatory thus defeating the course of justice.

[9] Besides the jurisdiction conferred by statute, counsel for the State further submitted, this Court has also unquestionable inherent jurisdiction to grant the orders of stay sought in this application to preserve the subject matter of the intended appeal. In support of those submissions, counsel referred us to the Indian Supreme Court's decision in **The State of UP v. Poosu & Another, 1976 AIR** and the old Indian High Court decision in **Express of India v. Mangu & Others, (1880) ILR 2 ALL 342** as well as the Malaysian Court of Appeal decision in **Prosecutor v. Bird Dominic Jude, Criminal Appeal No. W-05-216-09/2012** in all of which orders staying acquittals were granted.

[10] On those submissions, counsel urged us to review and reverse the Appellate Court's order declining to grant certification or alternatively grant the State leave to appeal against the Appellate Court's decision acquitting the respondents and setting them free. Pending the filing, hearing and final determination of the intended appeal, counsel urged us to stay the execution of the Appellate Court's orders of acquittal and repatriation and authorize the remand of the respondents in police or prison custody until the intended appeal is filed, heard and determined.

Respondent's Submissions

[11] The application is strenuously opposed. In their written submissions, M/s Ahmednasir, Abdikadir & Company Advocates for the respondents raised seven issues with the applicant's application:

a) whether the jurisdiction of the Supreme Court, as the apex Court, is special, at large, and infinite;

b) whether a single judge or a bench of two judges of the Supreme Court has jurisdiction to sit as the Supreme Court of Kenya;

*c) whether the Supreme Court of Kenya and the Court of Appeal have concurrent and distinct jurisdictions under **Article 163(4)(b)** of the Constitution to grant certification to appeal to the Supreme Court and whether parties are at liberty to approach either of them directly and independently;*

*d) whether the Supreme Court of Kenya has jurisdiction to issue any order before it certifies or gives leave to appeal under **Article 163(4)(b)** of the Constitution;*

*e) whether the Supreme Court of Kenya has jurisdiction under **Article 163(5)** of the Constitution to review a denial of certification or leave to appeal by the Court of Appeal under **Article 163(4)(b)** of the Constitution;*

*f) whether **Sections 23** of the Supreme Court Act and **Rules 24** and **26** of the Supreme Court Rules 2012 are unconstitutional on account of being in conflict with **Article 163(2)** of the Constitution; and*

*g) whether the Supreme Court of Kenya should depart from its decisions in **Hon Lemanken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR; Deynes Muriithi & 3 Others v the Law Society of Kenya & Another [2016] eKLR; Erad Supplies & General Contractors versus National Cereals & Produce Board [2016] eKLR; Sum Model Industries Limited v Industrial and Commercial Development Corporation [2011] eKLR; and Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2013] eKLR**.*

[12] While highlighting his firm's written submissions, Mr. Ahmednasir Abdullahi, learned counsel for the respondents, made elaborate submissions on the issue of this Court's jurisdiction. He urged that as this Court correctly stated in the **Hermanus Phillipus** case, **Article 163(4)** provides for two distinct and separate rights of certification for leave to appeal to the Supreme Court: one is to apply to the Court of Appeal and the other is to seek such certification from the Supreme Court. In the circumstances, the two Courts have concurrent original jurisdiction on the matter. On that argument, he faulted this Court's decision in the **Sum Model Industries Ltd** case that, on certification, it is an abuse of court process to ignore the Court of Appeal and come straight to Supreme Court as that denies a party the right of choice given by **Article 163(4)**. He said the Supreme Court has no power to curtail a right granted by an express constitutional provision. When a party has made its choice and sought certification from the Court of Appeal, counsel said where the Court of Appeal denies certification, that is the end of the matter and this Court has no jurisdiction to entertain such party's application for review under Article 163(5).

[13] On the order of stay of execution, counsel for the respondents started by attacking the initial order made by Justice Ojwang in this matter requiring the respondents to be retained within the jurisdiction of this Court as having not been sought by the applicant and made without jurisdiction. In his view, any order of the Supreme Court can only be made by the Court when sitting with quorum as provided by **Article 163(2)** of the Constitution. He contended that individual Judges of the Supreme Court have no jurisdiction to issue any orders as they do not constitute the court. In support of those submissions, he referred us to several decisions of this Court including **Ngoge v. Ole Kaparo** and **In the Matter of Interim Independent Commission;** as well as **Samuel Macharia v. KCB** all of which he said made it very clear that the jurisdiction of this Court is granted by either the Constitution and/or statute and cannot assumed by any craft of interpretation.

[14] On those submissions, counsel invited us to declare **Sections 23** and **24** of the Supreme Court Act unconstitutional and depart from our previous decisions in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 Others [2013] eKLR; Anami Silverse Lisamula v The Independent Electoral & Boundaries Commission & 2 Others [2014] eKLR; Hon Lemanken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR; and Deynes Muriithi & 3 Others v. the Law Society of Kenya & Another [2016] eKLR** the effect of which conflicts with the clear provision of **Article 163(2)** of the Constitution on quorum of the Supreme Court.

[15] On the merits of the plea for stay, counsel submitted that this Court has no jurisdiction to stay the Appellate Court's acquittal

of the respondents and order of their repatriation. In his view it is better for the respondents to be repatriated and never return to this country than to illegally hold them. In the circumstances, he urged us to dismiss this application in its entirety.

Analysis

[16] As stated above, counsel for the respondents has raised several points particularly on the jurisdiction of this Court which issues he has also raised in the case of **Golden Lime v. Blue Sea Shopping Mall Ltd & 3 Others, SC Petition No. 21 of 2016**. We shall deal with those issues in that case. In this matter, we shall limit our determination to this Court's review jurisdiction under Article 163(5) of the Constitution. If we find that this Court has jurisdiction, we shall then consider whether or not we should review the Appellate Court's decision and grant the State leave to appeal to this Court against the Court of Appeal's judgment allowing the respondents' appeal, quashing their conviction and ordering their repatriation.

[17] As stated, counsel for the applicant urged us to find that this Court has jurisdiction under Article 163(5) of the Constitution to review a denial of certification by the Court of Appeal. In support of these submissions, counsel relied on **Rule 24(2)** of the Supreme Court Rules, 2012 which he said clearly vests this Court with jurisdiction to review a denial of certification by the Court of Appeal.

[18] Counsel for the respondents on the other hand forcefully asserted that this Court's review jurisdiction under Article 163(5) is limited to the "**grant**" and not "**denial**" of certification by the Court of Appeal. In other words, this Court has no jurisdiction to review, under Article 163(5), a dismissal by the Court of Appeal of an application for certification. He based his contention on the literal reading of Article 163(5) and urged that in view of this provision, **Section of 24** of the Supreme Court Act is and should be declared unconstitutional. Counsel termed this Court's reasoning in the cases of **Sum Model** and **Hermanus** on this point as "confusing."

[19] We have considered these rival submissions. As this Court observed in the **Hermanus** case, in interpreting the review jurisdiction in Article 163(5), regard should be had to the dictum of harmonization under Article 259(1) of the Constitution and giving the term "certifies" or "certification" in Article 163(4)(b) of the Constitution a broad interpretation. In that regard therefore, and on the facts of this case, the principles of non-discrimination under Article 27 and fair hearing under Article 50 should never be lost sight of. We therefore find that to deny a party aggrieved by a refusal to grant certification that a matter is one of general public importance is discriminatory and contrary to **Article 27** and a denial of the right to a fair hearing under Article 50(1) of the Constitution.

[20] In the circumstances, we reiterate this Court's finding in both the **Sum Model** and **Hermanus Cases** that Article 163(5) of the Constitution vests the Supreme Court with jurisdiction to review the Court of Appeal's decision to grant or decline certification that a matter is one of general public importance. We therefore also affirm the words of **Rule 24(2)** of the Supreme Court Rules, 2012 that "*[w]here the Court of Appeal has certified or has declined to certify a matter to be of general public importance, an aggrieved party may apply to the Court for review within fourteen days.*

[21] On the merits of the application, it will be recalled that the State is aggrieved by and wishes to challenge the Appellate Court's decision allowing the respondents' appeal and acquitting them of all the charges they faced thus setting them free. It can only be availed that opportunity if, as required by Article 163(4)(b) of the Constitution, it is granted leave to appeal after it has demonstrated that the issue to be canvassed on appeal is a matter of general public importance "*the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest*." Has the applicant in this matter made out a case for such certification to warrant a review of the Appellate Court's refusal"

[22] It's a matter of common notoriety that this country has, in the past suffered several horrendous terrorist attacks as a result we have lost hundreds of innocent Kenyans and thousand left were maimed and seriously injured with personal disabilities and permanent scars. Due to the nature of the terrorist attacks the Kenyan public has for a time lived in fear and felt insecurity in their own motherland. The crime of terrorism undermines our National security as well as the peace and tranquility of the people of Kenya and all others who live within our borders. Consequently, and on the principles this Court set out in the cases of cases of **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR, Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 Others [2012] eKLR *(Supreme Court Petition No. 2 of 2012)*** and **Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell [2013] eKLR**, as well as **Rule 24(2)**, of the Supreme Court Rule 2012, we find that that the applicant has made out a case for review of the Appellate Court's orders of 16th February 2018 denying the applicant leave to appeal to this Court. We therefore hereby allow prayers 2 and 3 of the amended application and find that the intended

appeal involves a matter of general public importance and accordingly substitute the Court of Appeal's order declining certification with one granting the State leave to appeal against the Court of Appeal Judgment acquitting the respondents and ordering their immediate repatriation.

[23] Having allowed the main ground of this application that the intended appeal involves a matter of general public importance, we do not need to consider the other grounds as to whether the net effect of the judgment of the Court of Appeal will affect the investigations of all criminal cases and transcends this particular case; whether information given by a suspect leading to discovery of material evidence in a case is inadmissible unless it is a confession regularly recorded as the Appellate Court held, an issue that has a significant bearing on all criminal investigations in this country; whether or not courts are entitled to draw inferences/presumptions from facts arising from confessions as provided for under **Section 119** of the Evidence Act; the apparent conflict between **Sections 25A** and **111(1)** of the Evidence Act and what amounts to a confession under Section 25A of the Evidence Act; and that the intended appeal has a significant bearing on the public interest with respect to criminal matters which the Court of Appeal in its ruling of 16th February 2018 failed to consider. Those issues will also be considered in the intended appeal itself. What remains for our consideration in this application is ground 5 that the intended appeal will be rendered nugatory if stay is not granted and the respondents leave the jurisdiction of the Court.

[24] On stay of execution, in its ruling on the application for certification, the Court of Appeal observed that it was "*not aware of any law that grants…[it] jurisdiction to stay an acquittal of an accused person so that he continues to be held in custody as a suspect awaiting a possible finding of guilt by the Supreme Court*." Citing this Court's decision in **Law Society of Kenya v. The Centre for Human Rights and Democracy & 12 Others, Petition No. 14 of 2013**, the Appellate Court held that the inherent jurisdiction of the court "*cannot be the basis for granting the orders of stay that have no constitutional or statutory basis*" but instead "*negate the constitutional presumption of innocence until the contrary is proved*."

[25] Having considered the matter, we are of the view that the Appellate Court erred on this point. Admittedly, unlike in the Indian cases of **Express of India v. Mangu & Others, (1880) ILR 2 ALL 342** and **The State of UP v. Poosu & Another, 1976 3 SCC 1** as well as the Malaysian case of **Prosecutor v. Bird Dominic Jude, Criminal Appeal No. W-05-216-09/2012**, where there were express statutory provisions granting the court discretionary authority to arrest and detain a respondent pending the hearing and determination of the State's appeal against his acquittal, there is no express statutory provision in our statutes granting the court jurisdiction to stay an acquittal. Does this mean the Kenyan appellate courts are helpless in such matters" As stated we do not think so.

[26] It is not in dispute that **Section 348A** of the Criminal Procedure Code, introduced by the Security Law (Amendment) Act No. 19 of 2014, grants the Director of Public Prosecutions (DPP) the right of appeal on both facts and law against the acquittal an accused person. It reads:

(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

[27] Although there is no mention of the Supreme Court in this provision, it is not in dispute that **Article 163(3)(b)** of the Constitution grants the Supreme Court jurisdiction "*to hear and determine appeals from [inter alia] the Court of Appeal*" which meet the criteria of matters involving "*the interpretation or application of the Constitution*" and those certified by either the Court of Appeal or Supreme Court to be "*of general public importance*" as stated in Clause (4) of that Article. We have already reviewed the Court of Appeal decision declining certification and granted the State leave to appeal to this Court against the Court of Appeal's decision acquitting the respondents and setting them free. So in this matter, the State's said intended appeal is properly grounded on the Constitution.

[28] In exercise of its jurisdiction, **Article 259** requires the Supreme Court, like other courts and tribunals, to interpret the Constitution "***in a manner that—***

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance."

[29] In the development of the law that clause (c) of Article 259 permits, **Article 20(3)** of the Constitution requires that "***In applying a provision of the Bill of Rights, a court shall—***

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom." [Emphasis supplied]

What Clause (a) of this Article requires the court to do, in what appears to be in mandatory terms, is, **under its inherent jurisdiction**, to develop the law where there is a lacuna especially in "applying the provisions of the Bill of Rights" to ensure that such provisions are not rendered ineffectual. One of the rights and fundamental freedoms in the Bill of Rights is the right to a fair trial under **Article 50(1)** of the Constitution.

[30] Justice cuts both ways. In both civil and criminal cases, the court has to be fair to all the parties before it. It follows that in this criminal matter, the right to a fair trial under **Article 50(1)** of the Constitution demands of this this Court even-handed treatment of both the applicant and the respondents. The applicant has been allowed to come before us under Article 163(4)(b) as read with **Section 348A** of the Criminal Procedure Code. Are we to turn it away on the respondents' contention that there is no provision in our law bestowing us with jurisdiction to grant stay of an acquittal order and hold the acquitted person(s) in custody pending the hearing of the appeal against their acquittal" We think not. To do that will, with respect, be a dereliction of our constitutional obligation under Articles 20, 50(1), 163(3)(b) and 259 of the Constitution.

[31] As a matter of public policy, this Court, and indeed any other court, cannot and should not exercise its jurisdiction or act in vain. To enable it stamp its authority and deliver on its constitutional mandate in any matter properly before it and to uphold both parties' right to a fair trial under Article 50(1) as well as ensure that its processes are not abused, scuttled or negated by any mischievous or nefarious conduct, we find and hold that this Court has inherent jurisdiction, not expressly conferred by the Constitution or any statute, but accruing to it by its existential nature as a court of law duly constituted to administer justice, to issue any orders to ensure that the ends of justice in any particular case are met. In the circumstances, we find and hold that this Court has inherent jurisdiction to grant the orders of stay sought in this application if merited.

[32] Invoking a court's inherent jurisdiction is not a novel proposition we are plucking out of the air. By its very nature, the inherent jurisdiction of the court is neither conferred by statute, nor by any external authority or process. Rather, it emanates from the court's broader and primary power to administer justice. In the major jurisdictions across the world, in cases of lacunae in the law, inherent powers of the court have been recognized and invoked in contexts where it is deemed necessary to serve the ends of justice. As far back as 1812, the U.S. Supreme Court concluded in the case of **United States v. Hudson, 11 U.S. 7 Cranch 32 32 (1812)** that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."

[33] In respect of the English jurisdiction, Sir Jack Jacob once observed that:

"... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such a jurisdiction has been called 'inherent'.... For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner"[1]

Sir Jack Jacob went on to define the inherent jurisdiction *"... as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of*

the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."[2]

[34] *Save for the express statutory provisions granting jurisdiction to stay acquittals, fairly similar situations to the one before us of the risk of the respondents' flight, obtained in the said Indian case of* ***The State of UP v. Poosu & Another, 1976 AIR 1750, 1976 SCR (3)1005*** *and Malaysian case of* ***Prosecutor v. Bird Dominic Jude, Criminal Appeal No. W-05-216-09/2012.***

[35] In India, Section 390 of the Indian Code of Criminal Procedure, 1973 grants the High Court jurisdiction to stay an acquittal. It reads:

"When an appeal is presented under s. 411A subsection (2) or section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail."

However, the Indian Supreme Court, which has no such express statutory jurisdiction held in the case of **The State of UP v. Poosu & Another, 1976 3 SCC 1** that it has inherent jurisdiction drawn directly from the Constitution to stay an acquittal and even remand in custody the person whose acquittal is being challenged. In that case the accused-respondents were acquitted of capital offences. The State was granted leave to appeal and under Article 136 as read with 142 of the Constitution, the Supreme Court ordered the re-arrest and detention of the accused. These orders were challenged by the accused - respondents on the grounds that their acquittal and the findings on which it is based remained fully in force during the pendency of the State appeal, and that in the absence of a specific statutory provision, the Supreme Court's inherent power under the Criminal Procedure Code or under Article 142 of the Constitution cannot be invoked to order the deprivation of the acquitted pension's liberty.

[36] In issue therefore was whether the Supreme Court had the same powers as the High Court to cause an accused person to be re-arrested and committed to prison pending an appeal. An examination of Articles 136 and 142 of the Indian Constitution under which the Supreme Court acted is imperative.

Article 136 of the Indian Constitution provides:

"(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

While Article 142 provides:

"(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

[37] In finding that it also had powers to order for the re-arrest and committal to prison of the accused-respondent, the Supreme Court observed:

"Thus there can be no doubt that this Court while granting special leave to appeal against an order of acquittal on a capital charge is competent by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has under s. 427. Whether in the circumstances of the case" The attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant is a matter which rests entirely in the discretion of the Court.

[38] Referring to Section 390 which Indian Code of Criminal Procedure, 1973 which grants the High Court jurisdiction to stay an acquittal, the Indian Supreme Court further observed that:

"even before the enactment of this provision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused-respondent or his enlargement on bail, pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code." [Emphasis supplied]

[39] In Malaysian case of **Prosecutor v. Bird Dominic Jude,** an Australian national was charged with trafficking in dangerous drugs, an offence that was punishable by a mandatory death sentence. Upon trial, he was acquitted but the state appealed against that acquittal and applied, under the Malaysian Courts of Judicature Act, 1964, for his arrest and detention in prison custody pending the hearing and determination of the appeal. **Section 56A** of that Act reads:

"Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail."

[40] Granting that application, the Malaysian High Court observed that that Section

"serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non- attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State."

[41] This does not mean that the court's inherent power is unlimited. Where there is a clear and explicit rule in statute, no such power can be invoked against a clear expression in the law or statute. The Indian Supreme Court in the 1968 case of **Padem Sen v State of UP AIR 1961, SC 218** recognized this principle. Referring to a provision in **Section 151** of the Indian Penal Code, the court noted that, "it is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code".

[42] It follows from these authorities that even without a specific statutory provision like Section 390 of the Indian Code of Criminal Procedure, 1993 or Section 56A the Malaysian Courts of Judicature Act, 1964, as it observed in the case of **Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell [2013] eKLR** and on the provisions of **Section 24** of the Supreme Court Act, this Court has inherent jurisdiction to grant interlocutory orders not only to preserve the subject matter of an appeal but also to ensure that an appeal or intended appeal is not rendered nugatory thus defeating the course of justice.

[43] Besides maintaining the authority of the court, the further rationale for the invocation of the inherent jurisdiction as the Court of Appeal stated in the case of **Republic v. Danson Mgunya, Criminal Appeal No. 21 of 2016**, is that:

"***In our view, an appeal to a higher court against acquittal of an accused person does not constitute a new or different and distinct trial of the accused person for the offence in respect of which he was acquitted and therefore does not violate Article 50 (2) (o) of the Constitution. A conviction or acquittal does not mark the end of one trial and an appeal against conviction or acquittal the beginning of another trial. An appeal is a continuation of the same trial in a higher court; a different stage of the same trial for the purposes of correction of errors, if any, and ensuring that there is no miscarriage of justice."***

[44] A similar principle as above was applied in **The State of UP v. Poosu & Another, 1976, 3 SCC 1**, when the court laid it down, inter alia, as follows:

"Where an appeal against an accused person who has been acquitted by a trial court or a lower court has been lodged, the status of an accused person and the proceedings against him revive. Hence, the question of judging his guilt or innocence in respect of the charge against him, once more becomes sub-judice. The accused person remains in the status of a defendant in the criminal

justice system until the completion and disposal of the appeal."

In the circumstances and in light of the above persuasive authorities we have referred to, we find that it would throw out of the window the objective of a fair trial under Article 50(1) of our Constitution if we were to concur with the Appellate Court that courts in this country have no jurisdiction to stay an order of acquittal and remand in custody a respondent whose acquittal is being challenged on appeal.

[45] We would, however, wish to point out that an application for stay of an acquittal and remand of an acquitted person, whose innocence has been declared by a court of competent jurisdiction, is a very serious matter as it seeks to restrict such acquitted person's constitutional right to freedom of movement. It is therefore a matter that requires to be considered with great circumspection. Orders of stay and remand of an accused-respondent should sparingly granted. The prosecution must demonstrate to the court the risk of flight likely to render the appeal or intended appeal an academic exercise if the respondent is not remanded.

[46] The jurisprudence from **Malaysia** on this issue is very illuminating and persuasive. In the said case of **Prosecutor v. Bird Dominic Jude**, the Malaysian Court of Appeal considered the nature of the powers under section 56A as being discretionary and as any discretionary power they are to be exercised within the principles of natural justice. In framing the principles for courts when exercising the discretion under section 56A, it endorsed the principles set by the Malaysian High Court in exercise of equal discretion under section 315 of the Criminal Procedure Code in **Ment & Ors v Public Prosecutor [1994] 1 MLJ 201** thus:

"[34] The first case is Ment & Anor v Public Prosecutor … ***the High Court in exercising its jurisdiction under s 315 of the Code has to bear in mind the following:***

(a) The provisions of S. 315 also exhibit an intention of the legislature that the grant of bail is the rule and committal to prison without bail is an exception.

(b) The discretion in favour of the prosecution is exercised only sparingly and upon being satisfied that there are special circumstances to move the court.

(c) The quantum of bail set should be realistic and should not be such as to have the effect of depriving the person, who stands acquitted of the charge, of his liberty.

(d) The mere fact of an admission of appeal to the High Court from the decision of the magistrate's court does not by itself constitute special circumstances.

(e) It is desirable to also order an early hearing of the appeal itself should the court's discretion under this section be exercised."

[47] Ultimately the Malaysian Court of Appeal delimited the following as the factors that guide the court in exercise of the discretion under section 56A of the Act thus:

"It is appropriate at this juncture, without laying down any inflexible rule, we set out the factors that this court should consider in exercising its jurisdiction under section 56A of CJA. The list of the considerations is not exhaustive and there may be other considerations as well which may emerge from the facts and circumstances of each case. Generally speaking, this court would take into account the following:

(1) The order made must be objectively fair and proportionate.

(2) The discretion should never be exercised arbitrarily.

(3) The discretionary power should be sparingly invoked.

(4) The nature and seriousness of the offence.

(5) The accused person has been proven not guilty and has been acquitted; there is a presumption of innocence in favour of the

accused person.

(6) It is in the interest of the public and the state to preserve the integrity of the prosecution's appeal.

(7) The absence or non-attendance of the accused person at the hearing of the prosecution's appeal will render the appeal nugatory.

(8) The length of time which is likely to take for the appeal nto be heard.

(9) If bail is admitted, whether the security and conditions imposed will ensure the attendance of the accused person.

(10) The probability of the accused person absconding, if released on bail.

(11) A balance has to be struck between the right to individual liberty and the interest of the public and state.

(12) Where the issue relates to the safety and security of the state much weight will be given to the application of the Public Prosecutor.

[48] The upshot is that in Malaysia, the power of the court to stay an acquittal is statutory provided for and the Court of Appeal has laid down principles on how that power, which is discretionary should be exercised.

[] In the said case of **The State of UP v. Poosu & Another, 1976 3 SCC 1,** the Indian Supreme Court had this to say on the exercise of this discretion:

"Although, the discretion is exercised judicially, it is not possible to comp uterise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court woul d take into account the vari ous factors such as, "the nature and seriousness of the offence, the character of the evidence, ci rcumstances peculiar to the accused, possibility of his absconding, tampering with evidence, larger interest of the public and State"-see The State v. Cap t. Jagjit Singh(2). In addition, the Court may also take into consideration t he period during which the proceedings against the accused were pending in th e courts below and the period which is likely to elapse before the appeal com es up for final hearing before thi s Court. In the context, it must be remembered that this over-riding discreti onary jurisdiction under Article 136 is invoked sparingly, in exceptional cas es, where the order of acquittal recorded by the High Court is perverse or cl early erroneous and results in a gross miscarriage of justice."

Way forward

[49] The upshot is that an appellate court is not totally handicapped. It may where satisfied grant an order staying an acquittal pending the hearing and determination of the appeal by the State. This power may be statutory provided for, like the case of Malaysia, or drawn from the Constitution, like the case of India.

[50] Kenya has no legal provision either in the Constitution or Statute that directly speaks to the power of an appellate Court, be it the High Court, Court of Appeal or Supreme Court, to grant orders of committal to prison of an acquitted person pending the

hearing of the appeal. However, flowing from the holding above, we have found that the Supreme Court is not handicapped as to be totally curtailed from granting such an order.

[51] It is the opinion of this Court that time is now ripe for the legislative arm of the government, Parliament, to consider such legislation. We call upon Parliament, the Attorney General, Director of Public Prosecution and other stakeholders in the justice system, including the Law Reform Commission and the Law Society of Kenya to consider such a legislative framework. Consequently, direct that copies of this Judgment once delivered be transmitted to the said stakeholders for their noting and necessary action.

[52] However, before the legislative framework is enacted, we reiterate that the Supreme Court in exercise of its inherent jurisdiction and unfettered jurisdiction as pronounced by Rule 3 of the Supreme Court Rules, 2012 has the power to grant an order staying an acquittal pending the hearing of an appeal filed by the State, through the office of the Director of Public Prosecution. This jurisdiction is discretionary and has to be exercised judiciously and not whimsically. This calls for settling of guidelines/principles on how the Court(s) exercises this jurisdiction. Consequently, drawing from the comparative jurisprudence above, we delimit the following as the principles for consideration in an application for stay of acquittal pending the hearing and determination of an appeal:

(1) The discretion to grant stay of acquittal should be exercised sparingly;

(2) The discretion shall be exercised judiciously and not whimsically;

(3) The accused person has been found not guilty and acquitted, hence there is a presumption of innocence in favour of the accused;

(4) It is in the interest of the Public, the State and the Court before which the appeal has been filed to preserve the integrity of the appeal;

(5) It is not automatic that upon the State's filing of an appeal stay will be granted. The onus is on the State (Director of Public Prosecution) to lay a basis to the satisfaction of the Court as to the existence of special circumstances that militates against the release of the acquitted person;

(6) In considering what amounts to special circumstances, the Court shall consider the following:

(a) The nature and seriousness of the offence;

(b) Whether the absence or non-attendance of the accused person at the hearing of the appeal will render it nugatory;

(c) The probability of accused absconding court if released, is he/she a flight risk;

(7) A balance has to be struck between the right to individual liberty of the accused and the interest of the public;

(8) The length of time which is likely to take for the appeal to be heard.

(9) The Court shall expedite the hearing and determination of the appeal.

[53] Turning to the case at hand, the respondents are foreigners. They are Iranians. Kenya has no extradition treaty with Iran. We therefore accept the applicant's submission that if repatriated, it will be difficult to secure the respondents' presence in Kenya to complete their imprisonment term if the State's appeal is allowed. In the circumstances, we allow the application for stay of execution of the respondents' acquittal and repatriation.

Disposition

[54] In the result, we find and hold that Article 163(5) vests this Court with jurisdiction to review the Appellate Court's denial to grant certification under Article 163(4)(b) of the Constitution and the applicant has made out a case for certification. Consequently, we hereby review and set aside the Appellate Court's said decision of 16th February 2018 declining to grant certification that this matter is of general public importance and denying the applicant leave to appeal to this Court against the Court of Appeal's decision of 26th January 2018 which allowed the respondents' appeal, quashed their conviction and ordered their repatriation. We thus substitute that denial of certification with an order granting the applicant leave to appeal. We also find that the principle of harmonization under Article 259 and the spirit of the right to a fair trial under Article 50(1) of the Constitution read with Section 348A of the Criminal Procedure Code bestow upon this Court inherent jurisdiction to stay the acquittal of a respondent pending the determination of the appeal challenging that acquittal. Consequently, we order that pending the filing, hearing and final determination of the applicant's intended appeal, the respondents' acquittal by the Appellate Court is hereby stayed and the respondents shall be held in police custody. We direct that the applicant shall file and serve its appeal within thirty days. Once filed the appeal shall be heard on priority basis.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **28th day** of **September, 2018**

..... **.....**

D. K. MARAGA **M.K. IBRAHIM**

CHIEF JUSTICE & PRESIDENT **JUSTICE OF THE SUPREME**

OF THE SUPREME COURT **COURT**

..... **.....**

J.B. OJWANG **S.C. WANJALA**

JUSTICE OF THE SUPREME **JUSTICE OF THE SUPREME**

COURT **COURT**

.....

S.N. NDUNGU

JUSTICE OF THE SUPREME

COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

[1] (1970) Current Legal Problems 23. It is reprinted in The reform of civil procedural law, London: Sweet & Maxwell (1982), quoted in Jeffrey D. Pinsler 'The inherent powers of the court' *Singapore Journal of Legal Studies* (July 1997) at p. 11.

[2] as above