



**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; DCJ & VP, Ibrahim, Njoki, Lenaola & Ouko SCJJ)*

**PETITION NO. E023 OF 2024**

**-BETWEEN-**

**DAN KANG'ARA MBURU..... APPELLANT**

**—VERSUS—**

**REPUBLIC.....RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Kiage, Ali-Aroni, Achode, JJ.A) delivered on 24<sup>th</sup> May 2024 in Criminal Appeal No. 35 of 2020)*

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**Representation:**

Mr. Evans Ondieki & Ms. Maureen Nyakundi for the appellant.  
*(Ondieki & Ondieki Advocates)*

Ms. Angela Fuchaka for the respondent.  
*(Office of the Director of Public Prosecutions)*

**RULING OF THE COURT**

**[1] BEARING IN MIND** that jurisdictional questions are fundamental and may be raised at any point in judicial proceedings; and **RECOGNIZING** this Court's power pursuant to Section 18 of the Supreme Court Act to strike out petitions that are fundamentally flawed for lack of jurisdiction; and **GUIDED BY** this Court's established practice and precedent, which affirms the discretion to address preliminary objections at the threshold stage to ensure efficient administration of justice; and

**[2] TAKING INTO ACCOUNT** that this Court has deemed it appropriate to exercise its discretion by considering, at the outset, the respondent's Notice of Preliminary Objection dated 8<sup>th</sup> July 2025, which contests this Court's jurisdictional competence to adjudicate the Petition of Appeal dated 12<sup>th</sup> September 2025; and

**[3] NOTING THAT** from the record, the appellant was originally charged before the Chief Magistrate's Court with offences relating to dealing with suspect property and abuse of office under the Anti-Corruption and Economic Crimes Act; that his conviction and sentence were affirmed by the High Court on first appeal, though with a modification to the sentence imposed; and that his further appeal to the Court of Appeal was unsuccessful, with the appellate court upholding the findings of the courts below regarding the sufficiency of the prosecution's circumstantial case; and

**[4] UPON PERUSAL** of the respondent's Notice of Preliminary Objection dated 8<sup>th</sup> July 2025, premised on the grounds that: this Court lacks jurisdiction as the Petition of Appeal does not fall within the ambit of Article 163(4)(a) of the Constitution, raising no issues of constitutional interpretation or application that were contested in the courts below; the appeal has not been certified as involving a matter of general public importance by the Court of Appeal as required under Article 163(4)(b) of the Constitution; the appellant has failed to identify the proper legal framework for the Appeal; and the appellant failed to file a Notice of Appeal within the fourteen-day period stipulated under Rule 36(1) of the Supreme Court Rules, 2020; and

**[5] UPON CONSIDERING** the respondent's written submissions dated 7<sup>th</sup> September 2025 in support of the Preliminary Objection, wherein it is contended, *inter alia*, that: for jurisdiction to be properly invoked under Article 163(4)(a) of the Constitution, the appeal must originate from the Court of Appeal where the issues of contestation revolved around the interpretation or application of the Constitution, and the appellant must be faulting that court on the basis of such interpretation, as held in ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Limited & Another*** [2012] eKLR; that the main issues before the

High Court and the Court of Appeal were purely factual and evidential, centering on whether the prosecution had proved its case beyond reasonable doubt, and did not involve any distinct constitutional questions; and that, in the absence of such a foundation, the appellant's failure to seek and obtain certification from the Court of Appeal under Article 163(4)(b) is fatal to the Petition of Appeal; and

**[6] COGNISANT OF** the respondent's Replying Affidavit sworn on 10<sup>th</sup> September 2025, by Angela Fuchaka, an Assistant Director of Public Prosecutions, filed in opposition to the Petition, wherein it is deposed, *inter alia*, that: the appellant's case before the superior courts did not raise distinct issues of constitutional interpretation and application; the broad issues for determination in the High Court were whether the prosecution had proved its case beyond reasonable doubt, whether the defence had dislodged the prosecution's case, and whether the sentence was excessive; the Court of Appeal similarly distilled the single issue for determination as being whether the prosecution proved its case against the appellant beyond reasonable doubt; and that the petition is premature, misconceived, and has not been certified by the Court of Appeal as involving a matter of general public importance; and

**[7] UPON CONSIDERING** the appellant's Supplementary Submissions dated 12<sup>th</sup> September 2025, in reply to the respondent's submissions, wherein it is contended that: this Court has jurisdiction under Article 163(4)(a) of the Constitution as the appeal involves the interpretation and application of Articles 10, 20, 25, 27, 48, 49, 50 and 159 of the Constitution; that the respondent's actions constituted an abuse of the criminal justice system, malicious prosecution, and a violation of the appellant's right to a fair trial; and that these constitutional issues were raised in the Court of Appeal but were ignored; and

**[8] FURTHER CONSIDERING** the record of appeal and the judgments from the superior courts below, it emerges that the appellant's appeals primarily contested the sufficiency of evidence to sustain a conviction, the credibility of witnesses, and the severity of the sentence imposed;

**[9] HAVING CONSIDERED** all the foregoing, **WE NOW OPINE** as follows:

- i. The foundational question before this Court is whether we possess the jurisdiction to entertain this appeal. The appellant invokes our jurisdiction under Article 163(4)(a) of the Constitution, which provides for appeals, as of right, from the Court of Appeal in any case involving the interpretation or application of the Constitution.
- ii. The settled jurisprudence of this Court, as articulated in ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Limited & Another*** [2012] eKLR and ***Hassan Ali Joho & Another Vs Suleiman Said Shahbal & 2 others*** [2013] eKLR, establishes a clear test: for an appeal to lie to this Court under Article 163(4)(a), the issue of constitutional interpretation or application must have been a distinct and central ground of contestation in the superior courts below, and the appellant must be faulting the Court of Appeal on the basis of its interpretation or application of the Constitution.
- iii. Upon a thorough perusal of the proceedings and judgments from the High Court and the Court of Appeal, we find that the core issues for determination revolved around whether the prosecution had proved its case beyond reasonable doubt, whether the defence had dislodged the prosecution's case, and whether the sentence was excessive. The substratum of the dispute was evidential and factual. We do not discern from the record that the appellant mounted a substantive challenge predicated on the interpretation or application of the specific constitutional provisions he now invokes.
- iv. The appellant's contention that the Court of Appeal disregarded constitutional issues finds no support in the record. The issues canvassed in the appellate proceedings were predominantly factual and evidentiary in nature, and the constitutional questions now presented were not distinctly raised as live issues for determination. The mere recitation of constitutional articles in submissions, without their integration as substantive grounds of appeal challenging the constitutional basis of the lower courts' decisions, is insufficient to invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution. The references to constitutional rights in the context of a criminal trial, such as the right to a fair trial, were incidental to the

application of criminal procedure and evidence law, and did not form the primary subject of interpretation by the superior courts below.

- v. Consequently, this appeal does not meet the jurisdictional threshold set by Article 163(4)(a) of the Constitution. Having failed to secure certification from the Court of Appeal under Article 163(4)(b) of the Constitution on the basis that the matter is one of general public importance, the issue of certification does not arise.
- vi. In light of our finding on jurisdiction, it is unnecessary to make a conclusive determination on the other procedural grounds raised in the Preliminary Objection, such as the failure to file a Notice of Appeal within the timelines.
- vii. This Court in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others***, (Petition 4 of 2012) [2014] KESC 31 (KLR) set the guiding principles on the award of costs. In exercising this discretion, the Court notes that this matter, stemming from a criminal cause, involves an appellant who has pursued his legal remedies through the judicial hierarchy. In the circumstances, and finding no element of vexatiousness in the appellant's approach, we are inclined to order that each party shall bear its own costs.

**[10] CONSEQUENTLY**, for reasons aforesaid, we make the following orders:

- (i) *The Notice of Preliminary Objection dated 8<sup>th</sup> July 2025 filed by the respondent is upheld.*
- (ii) *The Petition of Appeal dated 12<sup>th</sup> September 2025 be and is hereby struck out for want of jurisdiction.*
- (iii) *The sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.*
- (iv) *Each party to bear its own costs.*

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of December, 2025.**

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**P. M. MWILU**

**DEPUTY CHIEF JUSTICE &  
VICE PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM  
JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU  
JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA  
JUSTICE OF THE SUPREME COURT**

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**W. OUKO  
JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,  
SUPREME COURT OF KENYA**

