



REPUBLIC OF KENYA



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**Muraguri v DPP (Miscellaneous Application E036 of 2021)
[2023] KEHC 21223 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E036 OF 2021**

SM MOHOCHI, J

JULY 26, 2023

BETWEEN

PAUL MUCHINA MURAGURI APPLICANT

AND

DPP RESPONDENT

RULING

Introduction

1. The Applicant filed the Instant Appeal on the November 23, 2021 and subsequently without the leave of the court filed an undated amended petition of Appeal on the January 25, 2023. The Appeal is yet to be admitted and set down for hearing.
2. Before me is an Application dated December 20, 2022 filed on January 25, 2023, made pursuant to Section 36 of the *Sexual Offences Act* (No 3 of 2006, Revised), Rule 6 of the *Sexual offences (Medical Treatment) Regulations, 2012*, Section 358 of the *Criminal Procedure Code* (Cap 75 Laws of Kenya) Article 49 & 50 of the *Constitution, 2010* and all other enabling Laws.
3. The Applicant seeks the following Orders;
 - i. That the Court certify the Application as being extremely urgent and be heard in the first instance ex-parte" Spent
 - ii. That the Court grants an Order, to conduct a medical report and /or subjecting the Applicant herein to a scientific test as contemplated in Section 36 of the *Sexual Offences Act*, (Act No 3 of 2006 as revised) and Rule 6 of the *Sexual Offences (Medical Treatment) Regulations, 2012* of the Laws of Kenya.



- iii. That the Court grants an Order, subjecting the Applicant to a medical examination to ascertain and/or confirm that the Applicant suffers and /or suffered erectile dysfunction and/or related adversity before or during the alleged date of commission of the offence.
 - iv. That the Court to admit new evidence pursuant to medical report tabled in items 2 and 3 above and the Court, do direct the mode of taking such evidence.
 - v. That the expenses (if any) incurred in the conduct of the medical examination or related examination in items 2 and 3 above be borne by either party to this Application.
 - vi. That the Court grants leave to the Applicant to adduce additional evidence and the Court to give directions on the manner in which the evidence shall be taken.
4. The application is based on nine (9) grounds as follows:
- i. That the arising issue of erectile dysfunction goes to the root of the offence, as it sheds light on the Appellant /Applicant's capacity to Commit the crime.
 - ii. That the said evidence is relevant to the issues before this Honorable Court.
 - iii. That the probative value of the said evidence sought routs the evidence by the Respondent herein and creates doubt as to the guilt of the Appellant/Applicant.
 - iv. That the additional evidence is a request to subject the Appellant/ Applicant to a medical examination and a medical report be produced herein as to whether the Appellant/ Applicant suffers and/or suffered erectile dysfunction.
 - v. That the Respondent does not stand to suffer any prejudice if the borders sought are granted.
 - vi. That the urgency of this Application is the lapse of the time as well the age factor of the Applicant herein who is languishing in prison at 78 years old, a senior citizen.
 - vii. That it is in the interests of justice that this application be allowed.
 - viii. That this Application has been brought without undue and unreasonable delay.
5. This motion does not have the evidence of the Applicant but rather the Advocate on record Mr. Job Marasi, swore the Affidavit in support of the Application deponing on substantial matters of fact that the Advocate could not under normal circumstances depone to.
6. This Affidavit was a perfect candidate for striking-out entirely or significantly but this court has not done so, in the interest of justice the Applicant's Advocate Affidavit of Support shall be considered as the Applicant's Submissions together with annexures thereto.

The Applicants' Case

- 7. The Applicant's Advocate submits that he is on record with personal conduct of this matter therefore duly competent and authorized to swear the affidavit deemed as submissions.
- 8. The Applicant seeks Orders to admit additional evidence as well as Orders to be subjected ("Applicant") herein, to a medical and scientific test and the same be admitted by the Court as additional evidence.
- 9. The Applicant was convicted and sentenced to life imprisonment following the Trial in MCSO No E. 052 31 OF 2021 and is a senior citizen of 78 years old, who is sickly and suffers great physical pain due to the harsh conditions inside the prison cell, hence, the need for the Application to be heard and determined in good time.



10. The Applicant suffers natural physical and emotional pain due to the natural course of human living and humbly prays that this Application be certified urgent and heard and determined in good time
11. The Applicant's nuclear family resides in the United States of America (USA), being, the Applicant's estranged wife and children.
12. The Applicant has been suffering from erectile dysfunction for several years, unfortunately, being in the village, he sought for locally assembled herbal medicine ("miti shamba") for reprieve, unfortunately, this did not work and he quickly fell into depression and alcohol abuse.
13. The Applicant sees this health issue of erectile dysfunction as a taboo, due to the cultural background, the Applicant would not talk about it or admit the condition.
14. The Applicant eventually owed up and admitted to his condition (erectile dysfunction) during a visit of the Appellant in Prison, by defence Advocate and a village elder.
15. The Applicant raised this issue during trial at cross-examination by saying:-....My wife left Kenya in 2018. I do not have another wife, even God knows, I do not do that work."
16. That the above and the context of cross-examination in the Court Proceedings, the reference "that work' derives from the act sexual activity, unfortunately, this was not pursued as it should have.
17. The Applicant has annexed to the Defence Advocate Affidavit now deemed submissions, a notarized affidavit of his wife vouching that he (the Applicant) suffers from erectile dysfunction.
18. The Applicant contends that, while it is true that scientific test including but not limited to DNA is not a mandatory requirement for proof of commission of sexual offence, however, in cases where evidence on record is insufficient, it is prudent to direct that a scientific test including but not limited to DNA examination be undertaken.
19. That the Application seeks the Court's indulgence so as to have the said medical examination conducted, since, having been made unavailable, has the capacity to exonerate or cast doubt upon the decision arrived at, upon which conviction and sentence were unsafe.
20. That the evidence of medical, forensic and scientific nature requested to be undertaken in this Application as contemplated Section 36 (1) of the [Sexual Offences Act](#) and Rule 6 of the [Sexual Offences \(Medical Treatment\) Regulations, 2012](#) is not limited to DNA testing but any other forensic and scientific testing that will enable this Court ensure the decision at the trial Court was safe.
21. That the evidence sought to be called was evidence not readily available at the trial stage, however, it is relevant to the issues at hand and has capacity to cast reasonable doubt in the mind of this Court as to the guilt of the Applicant herein if it was brought at the trial stage.
22. That this being a criminal case that has resulted to the invocation of a life sentence, it is justiciable that the Applicant herein be accorded all the available avenues to ventilate his case.
23. That no prejudice shall be suffered upon the Prosecution or the alleged victim in the event additional evidence is conducted by this Honorable Court before the Appeal is heard.
24. That Section 358 (1) of the [Criminal Procedure Code](#), empowers the Court the discretion to take additional evidence especially where there exists sufficient reason and that the additional evidence intended to be produced in the event a medical report is commissioned and tendered before this Court is not intended to make out a fresh case in Appeal but to satisfy Court that the Judgment, Conviction and Sentence, being a life sentence, is safe.



25. That the intended additional evidence will actualize the Applicant's fundamental rights as contemplated in Article 50 of the Constitution, 2010 and such actualization is not prejudicial to the Prosecution or alleged victim.
26. The Applicant herein did not raise the issue of erectile dysfunction at the trial stage as it is deemed to be a taboo in his culture and also considered shameful.
27. That, the problem of erectile dysfunction is not one to which the Applicant is ecstatic about considering his estranged wife does not cohabit with him due to the same problem among others.
28. That prior to the Sentence, the Applicant lived alone and had not sought to re-marry or have any sexual relationships as he was well aware of his erectile status, which he does not disclose as it is considered a taboo and shameful especially for a man of his era, or rather age.
29. That the Prosecution will not suffer prejudice if the same is conducted and admitted to this Court as additional evidence as securing Justice and a safe conviction and sentence should be the objective.
30. That justice knows no end and that it ought to be a sword hovering over our heads.
31. That the doctrine "litigation should always come to an end ought to be weighed against justice as the former should not override the latter, especially at the cost of the Applicant, a senior citizen, who was granted life imprisonment.
32. That this being the first Appellate Court, it has an obligation to satisfy itself that the Judgment, Conviction and Sentence by the trial Court is safe.
33. That, the crux of this Application is to seek justice as it ought to be and not to seal the cracks/weaknesses of the trial Court. It is to ascertain that the Judgment, Conviction and Sentence are safe and that justice is properly administered.
34. That, the medical report including but not limited to DNA as contemplated in the Sexual Offences Act is not a pre-requisite to prove the offence of defilement, however, it is precautionary as it assists in ascertaining the charges.
35. That, the medical report requested to be conducted is one of a scientific nature and sheds more light on the allegations facing the Applicant.
36. That, the fact that the said reports were not requested for at the trial stage, does not preclude this Court from conducting its own medical reports as requested in the Application herein as it is justiciable to do the same and that justice ought to be the end objective.
37. That the trial proceedings present a lot of inconsistencies that warrant this Honorable Court to conduct the medical reports and admit the medical evidence as new evidence to satisfy itself that the Judgment, Conviction and subsequent Sentence were safe.
38. The Applicant attempted to invite the court to consider the witness testimony in the trial court at this interlocutory stage on the alleged glaring inconsistencies that would make ripe the Application, that, PW3, who found the victim, upon cross-examination stated that he found the victim "..... at the sitting saw victim had no problem while leaving the house." Further to which PW3 used the Applicant's phone to contact the victim's mother. This clearly casts doubts into the Prosecution's case.
39. that PW3 also testified that he heard the victim beingassaulted, beaten by her mother...." such material information was withheld by both the victim and victim's mother, which also sheds light on the events of that night and inconsistencies in the statements.



40. That, from the Proceedings whereas the victim, being PW1 testified to have been dressed in "...in red clothes, and I had a sweater and skirt..." PW2, PW4 and PW5 all testify to other articles of clothing including the victim having worn "...a blue trouser..." which inconsistency is not negligible and warrants the Orders as prayer in this Application.
41. That in consideration of the above excerpts and the glaring inconsistencies therein vis-a-vis the purpose of this Court in upholding Justice by ensuring the Judgment, Conviction and Sentence are safe, it warrants this Court to Conduct such medical tests as requested and as contemplated by Section 36 of the *Sexual Offences Act* as well as conducting an erectile dysfunction test.
42. That, it is noteworthy that the weight placed on forensic evidence and/or results depends on the circumstances of each case and that forensic evidence establishes the nexus between the victim and the Applicant herein.
43. That it would be just, fair and reasonable to allow the Application herein and that failure to allow the Application will render the intended Appeal and the Application herein nugatory.

Respondents Case

44. The Application is opposed by the State vide the Replying Affidavit of Ms. Monicah Mburu Prosecution Counsel dated May 2, 2023 and written Submissions dated May 30, 2023.
45. The Respondent Submits that, the gist of the application is that the applicant undergoes a medical examination to ascertain that he suffers and/or suffered erectile dysfunction and /or related adversity before or during the date of the commission of the offence.
46. This if allowed in essence will be new evidence which the applicant prays be admitted for purposes of the appeal filed by himself. Section 358(1) of the *Criminal Procedure Code* provides thus;
 - “ 358. Power to take further evidence
 - (1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”
47. The Respondent Submits that, in dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be direct it to be taken by a subordinate court.
48. From the provision above it is clear an appellate court discretion to allow additional evidence, however there is a rider; that is, the court shall only do if it thinks that the same is necessary. It is therefore not an absolute right of the applicant that additional evidence will be admitted.
49. Over time jurisprudence in terms of case law has also been developed. The court in the case of *Martin Musembi Mutyeleli vs Republic* (2022) eKLR cited with approval the case of *Samuel Kangu Kamau vs R* (2015) eKLR wherein the court of appeal held thus;
 - “It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal.”



50. From the above the following can be deduced;
 - a. Whether the evidence is new; and
 - b. Whether the same will make a significant impact in the determination of the appeal.
51. In satisfaction of this checklist and looking at the instant case, an important question to ask at this juncture is whether the evidence that the applicant seeks to introduce is new and/or fresh.
52. The Respondent Submits that, if the answer is in the affirmative, then it means that the applicant herein did not suffer the condition that he now alleges to suffer at the time of the commission of the offence.
53. This is because if the condition existed at the time, then the same would have been raised during trial.
54. However, the same was not raised during trial and this can only mean that the said condition did not exist at the time he is said to have committed the offence.
55. We submit that had this condition been existent at the time of the commission of the offence, nothing would have prevented the applicant from mounting such a defence at trial.
56. This in turn raises the question; “will this evidence be relevant? Will it make a significant impact in the determination of the appeal?”. The answer to these two questions is negative.
57. The Respondent Submits that, a cursory look at the record of appeal shows that the appellant was represented by a competent advocate during his trial at the subordinate court.
58. Therefore, the Respondent Submits that, the Applicant was sufficiently made aware of his rights during trial and had the benefit of a legal counsel while defending himself. It is through Counsel, that he ought to have brought to the fore the issue that he now raises and sought the orders that he now seeks in the trial court.
59. The Respondent Submits that, this leads to one inescapable conclusion; that this is an afterthought, an abuse of this court’s process and is solely aimed at derailment of justice.
60. The Respondent Submits that, the trial court was presented with sufficient material to enable the court make a determination and, in this case, to convict the Applicant.
61. Finally, the Respondent Submits that, no material has been placed before this court to demonstrate that this appellate court will not be able to pronounce judgement in this appeal on the basis of the evidence already at hand and which was tendered during trial.
62. The Respondent Submits that, the application is devoid of merit and the same ought to be dismissed.

Analysis and Determination

63. The Application is without the Applicants affidavit deponing to facts he is presenting before court.
64. I now turn to the request by the Applicant/appellant to adduce further evidence on appeal. In this regard, section 358 of the [Criminal Procedure Code](#) (cap.75) allows an appellate court to admit fresh



evidence in the interests of justice. Courts have severally dealt with this issue. I will only cite the case of *Samuel Kangu Kamau vs Republic* (2015) eKLR where the Court of Appeal stated as follows –

“It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal.”

65. In the present case, the Applicant has not sought for leave to introduce fresh evidence on Appeal and neither has he been candid on whether the intended additional evidence is new, and when he became aware of the same. He also has not complained that the evidence he seeks to introduce was available to the prosecution but concealed to the Applicant.
66. In my view, the Applicant has neither demonstrated that the purported additional evidence is new, nor that he could not avail it or act on it at the trial.
67. The fact that the Applicant in his cross examination, mentioned that;

“My wife left Kenya in 2018. I do not have another wife, even God knows, I do not do that work.” And that the same denotes his “erectile dysfunction” health condition is a stretched argument by the Applicant’s advocate and is not sufficient reason to justify introduction of additional evidence on appeal.
68. The omission of the Applicant to swear an affidavit and his advocate swearing one calls for this court disturbing attention raising the question as to whether an advocate can swear an affidavit on behalf of his client in a matter he/she is appearing?
69. This court seeks guidance from established civil procedure, Order 19 Rule 3 (1) of the *Civil Procedure Rules, 2010* provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”
70. Further, Rule 9 of the *Advocates (Practice) Rules* states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”
71. The Applicant does not yet have fresh and new evidence that was unavailable during trial and in fact seeks to invite the court to undertake a fishing expedition.



72. The Court of Appeal expressed the following concept in *Hakika Transporters Services Ltd vs Albert Chulab Wamimitaire* [2016] eKLR, citing its decision in *Salama Beach Ltd V Mario Rossi*, CA. No 10 of 2015:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, CA. No 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

73. The Court thus finds that the Affidavit was irregular warranting striking out of which this court has reluctantly avoided and relied on the same as submissions by counsel.

74. The Applicant admits at knowing his condition during trial and failing to rely on his condition during trial, it thus cannot be said that the evidence was unavailable and unknown to the Applicant.

75. While the court has found the Application to be devoid of merit, the *Constitution* empowers the court to admit fresh evidence in which case the Applicant has future opportunities before the Appeal is set down for hearing and an option to petition for a fresh trial in line with the *Constitution*.

76. The Court is equally unpersuaded that, invocation of Section 36 of the *Sexual Offences Act* (No 3 of 2006, Revised), Rule 6 of the *Sexual offences (Medical Treatment) Regulations, 2012* was a mandatory requirement to be undertaken upon the Applicant.

77. The extraction of samples upon an accused person in line with the regulations is intended to facilitate forensic analysis including DNA profiling and would not suffice for determining erectile dysfunction of which no samples are required.

78. In the case of *Robert Mutungi Mumbi vs Republic* [2015] eKLR, the court held that, Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples, including DNA testing to establish the linkage between the accused person and the offence. That provision is not couched in mandatory terms and DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See also *Hadson Ali Mwachongo vs Republic* [2016] eKLR.

79. It is not for the court to subject the Appellant/Applicant to a medical examination and a medical report be produced herein as to whether the Appellant/ Applicant suffers and/or suffered erectile dysfunction.

80. This court thus finds the Application to be without merit and dismiss the same.

81. The Appellant should set down his Appeal for a hearing.

It is so ordered.

SIGNED, DATED AND DELIVERED IN VIRTUALLY AT NAKURU ON THIS 26TH JULY, 2023.

MOHOCHI S.M

JUDGE



Quorum;

Applicant- Present

J. Marasi for Applicant

Ms Mburu Prosecution Counsel for the state

Schola; CA

