



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lasoa v Director of Public Prosecutions; Kimutai & 2 others (Interested Parties) (Miscellaneous Criminal Application E002 of 2022) [2022] KEHC 11616 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11616 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2022**

**EKO OGOLA, J**

**MAY 30, 2022**

**BETWEEN**

**MARGARET LASOA ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**AND**

**JOHN KIMUTAI ..... INTERESTED PARTY**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY**

**CHILD WELFARE SOCIETY ..... INTERESTED PARTY**

**RULING**

1. By way of Notice of motion dated 25<sup>th</sup> February 2022, the applicant seeks the following orders;
  - a) That the applicant is seeking orders that the accused be brought to court during the hearing thereof pursuant to section 116 of the Criminal Procedure Code
  - b) That the applicant is humbly seeking for orders under article 159 (2) for alternative dispute resolution mechanisms and section 39 (2) of the *Sexual Offences Act*.
2. The application is based on the affidavit sworn in support of the same.
3. The brief facts underlying the application are that the applicant was the complainant in SPM Criminal Case 177 of 2017 where the accused was sentenced to 15 years imprisonment on 17<sup>th</sup> December 2019 after the court found him guilty of the offence of defilement.



4. The applicant's case is that as a result of the defilement, she was impregnated and gave birth to an issue; that the accused was a supportive responsible parent and she is now unable to pay for the child's living expenses and school fees due to financial constraints. She asked the court to withdraw the punishment against the accused and release the accused to safeguard the fundamental rights of the child.
5. Learned counsel for the state, Mrs. Brenda Oduor, opposed the application vide a replying affidavit dated 4<sup>th</sup> March 2022. She deposed that the application cannot be entertained as it seeks orders that are unheard of in law. Due process was followed and the accused was duly punished. Further, that an appellate court can only interfere with a decision if
  - a) Due process of the law was not followed.
  - b) Where there was miscarriage of justice which was prejudicial to an accused person during the trial process.
  - c) Where the conviction and sentence were tainted with errors on the face of the law/record.Counsel submitted that the application should be dismissed as the court had no reason to interfere.
6. Upon perusing the application and the pleadings filed I have identified the following issue for determination;
  1. Whether the court should withdraw the punishment of the accused
7. The accused was tried for the offence of defilement contrary to section 8(1)(4) of the [Sexual Offences Act](#). The trial court found him guilty and sentenced him to 15 years imprisonment. The applicant seeks what is essentially a review or setting aside of the conviction and sentence meted out. In essence, the applicant seeks to appeal through the backdoor.
8. Section 347 of the Criminal Procedure Code states:
  347. Appeal to High Court
    - (1) Save as is in this Part provided—
      - (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
    - (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.
9. Section 350 (1) of the Criminal Procedure Code provides;
  - (1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.
10. The guidelines for interfering with a sentence were set out by the Court of Appeal in the case of [Bernard Kimani Gacheru v Republic](#) [2002] eKLR where it was held that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that



the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

11. The applicant has approached this court for orders unknown in law. This court cannot simply overturn a conviction and sentence because the applicant needs support in taking care of her child. The accused was convicted of a serious offence and sentenced accordingly. The process to have the sentence and conviction set aside is well set out in law. Further, even if the court was to consider setting aside the sentence, the applicant has not shown to this court that the threshold to set aside the decision has been met.
12. In the premises I find that the application has no merits and is dismissed accordingly with no orders as to costs.

**DATED, SIGNED AND DELIVERED THIS 30<sup>TH</sup> OF MAY 2022.**

**E. K. OGOLA**

**JUDGE**

