



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.34 OF 2014

BETWEEN

A O MAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the order of M. I. Shimenga, R.M. dated 19/02/2014 in Butere Senior Principal Magistrate's Court Juvenile Case No. 12 of 2014 – Republic – A O M)

RULING

1. The application before me is the Notice of Motion dated 30/07/2014 and filed in court on the same day. The applicant A O M seeks the following orders from this honourable court:-

1. The application be certified urgent and be heard on priority basis for service is dispensed with in the first instance.
2. That pending inter partes hearing, the orders of Learned Resident Magistrate be suspended or stayed.
3. The orders in paragraph 2 above once granted, remain in force until the final hearing and or determination of this appeal.

2. In support of the application the applicant has listed four grounds, the main one being that the applicant was condemned without being heard as to the compliance required of him. The applicant also alleges that he ought not be made to bear responsibility for children who are not his biological children.

3. The applicant has also sworn an affidavit in support of the application. From the said affidavit, the following information emerges:-

- The applicant was charged before the SPM's Court at Butere in Juvenile Case No. 12 of 2014 with the offence of neglecting 4 children aged between 11 years and 7 months old respectively;
- Though he denied paternity of the children, the trial court made orders compelling him to maintain all the 4 children by contributing KShs.5,000/= every month.
- The applicant contends that if the orders are made to take effect he stands to suffer irreparable damage as he may not be able to recover any moneys he will have paid to the respondent.

4. The applicant thus prays for orders of stay or suspension pending the hearing and determination of the appeal. He contends that if the case is allowed to proceed to full hearing, he will tender evidence to show

that the orders made by the trial court at Butere were erroneous.

5. Though the State did not file any replying papers to the application, the application was vehemently opposed when it came up for hearing.

6. At the hearing, Mr. Musiega Junior who appeared for the applicant submitted that the applicant is deserving of the orders sought because he was never given a chance to be heard. He also submitted that the applicant's appeal has high chances of success for the reason that the applicant is not the biological father of the four children for whom he was condemned to maintain.

7. In response, Mr. Ngetich for the State submitted that the instant application is made in bad faith for the reason that the application was not filed until some 9 months after the impugned orders were made. Counsel submitted that if indeed the applicant felt oppressed by the said orders, he would not have waited for 9 months to express his pain through the instant application.

8. Secondly, Mr. Ngetich submitted that though the petition of appeal was filed on 25/02/2014, neither the appellant nor his counsel has made efforts to serve the office of the Deputy Public Prosecutor with the record of appeal, which suggests that the applicant is not serious about his appeal. Further that no efforts have been made to set down the appeal for hearing.

9. Finally, Mr. Ngetich submitted that if the applicant's appeal were to succeed, his loss would not be irreparable because he can still file a suit for damages. Counsel urged the court to dismiss the application.

10. In reply, Mr. Musiega submitted that the appeal could not have been fixed for hearing because of the pendency of the instant application. Mr. Musiega urged the court to grant the orders as prayed.

11. This application is made pursuant to the provisions of **section 357** of the Criminal Procedure Code and all other enabling provisions of the law. The section provides for admission to bail or suspension of sentence pending appeal. The issue that arises for determination is whether the applicant has demonstrated to this court that he is deserving of the orders sought.

12. After carefully analyzing the material that is before me, I do not think that the applicant has satisfied this court that he is deserving of the orders of stay and/or suspension. It is clear from the record that the applicant took an inordinately long time, 9 months to be exact, to bring this application to the court. No explanation or reason has been given for the delay. Since the orders sought are a matter of discretion, I do find that the applicant has not acted diligently enough to benefit from the court's discretion. I would agree with Mr. Ngetich that the application as it stands was not made in good faith. The applicant appears determined not to provide for the said children. The applicant has also not shown that he has complied with the court order in any measure. It is my considered view that he who seeks equity must do equity. The applicant has not done equity in this matter.

13. Regarding the issue of whether or not the applicant's appeal has overwhelming chances of success, the record shows that the applicant denied paternity of only one child by the name G. That being the case, he should have proceeded to provide maintenance for the other 3 children. The trial court advised the applicant to arrange for a DNA test to confirm paternity for G whose paternity the applicant disputes. There is no indication from the applicant whether or not he has arranged for the DNA.

14. In the circumstances, I find no merit in the application and the same is accordingly dismissed. The interim order of stay issued on 01/08/2014 is hereby discharged.

15. Finally, the applicant must now proceed to compile, file and serve the Record of Appeal within the next 60 (sixty) days so that the appeal can be processed for hearing and final determination.

16. Orders accordingly.

Ruling delivered, dated and signed in open court at Kakamega this 23rd day of April 2015.

RUTH N. SITATI

JUDGE

In the presence of

Mr. Vadanga for Musiega Jnr (present) For Applicant

Mr. Ngetich (present) - For Respondent

Mr. Murumia – Court Assistant