



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 13 OF 2012**

**PETER GITHINJI KIOI.....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

**RULING**

The Appellant/Applicant **Peter Githinji Kioi** through his advocates **Wangechi Munene** and **Co-Advocates** moved this court through an application by way of Notice of Motion dated 25th June 2013 containing the following Prayers: \_

- a. That this Honourable court be pleased to allow the appellant/applicant to call for additional evidence to wit DNA test results of himself and the child born out of the alleged defilement by the complainant in the lower court.
- b. That upon grant of prayers one above this court be pleased to order such DNA tests to be carried out between him and the child born out of the alleged defilement and use his evidence in the appeal herein.
- c. That the costs of this application be provided for.

The application is premised on grounds that the appellant was charged and convicted in the lower court with the offence of defiling the complainant who was his daughter as a result of which she conceived and gave birth to a child on 13th November 2011; that a DNA test will conclusively prove paternity of the child born out of the alleged defilement and its results which were not available before the trial court will assist this court determine whether the appellant was rightly or wrongly convicted.

The application is supported by an affidavit sworn by the appellant/Applicant on 25th June 2013 and a supplementary affidavit sworn by his counsel **J.W. Munene** on 5th December 2012.

The application is not opposed by the state. Though served with the application the state did not file a replying affidavit in opposition thereto and on 9th May 2014 when the application was argued interpartes, learned state counsel **Mr Sitati** confirmed to the court that the state was not opposing the application provided the appellant met costs of the DNA testing.

**M/s Wangechi** for the appellant submitted that the application ought to be allowed in the interest of justice as the additional evidence in the form of DNA results will reveal the truth regarding the paternity of the child born to the complainant who according to the prosecution case in the lower court was conceived as result of the offence of defilement for which the appellant was convicted and sentenced to 20 years imprisonment.

I have considered the grounds upon which the application is premised and the fact that it is not opposed by the state.

The law at **Section 358** of the **Criminal Procedure Code** allows the High Court to take and admit additional evidence in a criminal appeal where in its opinion, such additional evidence is necessary.

The principles which the court should apply in the exercise of its discretion in deciding whether or not to allow additional evidence to be called in a criminal appeal were set out by the East African Court of Appeal in the case of **Elgood VS Regina (1968) EA 274** which was cited with approval by our Court of Appeal in **Simon Mwangi Wambui VS Republic Criminal appeal NO. 280 of 2011.**

Some of the guiding principles enumerated in the **Elgood case** are that the evidence sought to be called was not available in the trial court; it must be relevant to the issues raised in the Appeal; it must be credible in the sense that it is capable of belief and it must be evidence which if considered by the court, it is of the opinion that were it available before the trial court and was considered alongside other evidence, it may have created doubt regarding the guilt of the appellant as charged.

I have perused the record of the proceedings in the trial court and read through the judgment delivered by the trial magistrate on 13th February 2012. It is clear from the proceedings that the prosecution case hinged on the evidence that it is the appellant who defiled the complainant who was his daughter as a result of which the complainant conceived and bore a child on 31st October 2011.

From the trial court's judgment, it is clear that this evidence formed the basis of the appellant's conviction.

In this case, the additional evidence sought to be adduced on appeal is the result of DNA profiles of the appellant and the child the prosecution claimed was the product of the offence for which the appellant was tried, convicted and sentenced.

It is not disputed that the said evidence not available at the trial court. It is important to note that the appellant was not represented by counsel during his trial and the reasons given for his failure to produce the evidence he now wishes to adduce as additional evidence in his appeal are plausible and acceptable.

In view of the foregoing and considering that the appellant has all along maintained his innocence, there cannot be any doubt that such additional evidence is not only relevant to the issues raised in this appeal but is also necessary for the just determination of the appeal. Had such evidence been available to the trial court whether the results were positive or negative, I have no doubt in my mind that it would have influenced the mind of the learned trial magistrate one way or the other.

It is therefore my view that allowing the application as prayed will serve the interests of justice.

In the premises, I find that the application is merited and it is hereby allowed. I consequently make the following orders:-

1. That DNA samples be taken from the child in question identified in the birth certificate annexed to the supplementary affidavit as **PB** and from the appellant for DNA profiling by an independent Government analyst with expertise and experience in DNA screening.
2. The DNA screening to be undertaken in the nearest Government facility to be agreed upon by the parties.
3. The office of the Director of Public Prosecutions to liaise with the officer In charge of Children Services Kirinyaga County and the Prison's Department to facilitate the taking of the DNA samples from the child and the appellant at the appointed facility within the next 30 days.
4. The appellant to bear the cost of the entire exercise.
5. The appeal to be mentioned before the Deputy Registrar within the next two months for further orders.
6. These orders to be extracted and served on the officer Incharge Children Services Kirinyaga

County and officer Incharge of the Prison in which the appellant is serving sentence.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 28<sup>TH</sup> DAY OF MAY 2014** in the presence of:-

The appellant

Mr Sitati for state

Mbogo Court Clerk.