



**Lemasai v Republic (Criminal Miscellaneous Application
E049 of 2022) [2025] KEHC 3132 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL MISCELLANEOUS APPLICATION E049 OF 2022**

SC CHIRCHIR, J

MARCH 13, 2025

BETWEEN

FREDRICK LEMASAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged at Kakamega Chief Magistrate's Court with the offence of defilement contrary to Section 8(1) and (3) of the *Sexual Offence Act* in the year 2015, in *S.O No. 40 of 2015*. The hearing was concluded and was scheduled for Judgment on 26/01/2017. That Judgment was however not delivered, apparently because the file could not be traced.
2. Consequently, the applicant filed the present Application seeking the following orders;
 - a). That the Honourable Court be pleased to declare that the proceedings of *S.O No. 40 of 2015 Public v Fredrick Lumasai* for seven (7) years because of a missing court file in an infringement of his right to fair hearing, within a reasonable time.
 - b). That this court declare that the delay in determination of Kakamega Sexual Offence *No. 40 of 2015* in the circumstantial amount to torture in human and degrading punishment hence illegal, unlawful and unconstitutional.
 - c). That this court exercises its original and inherent jurisdiction to protect fundamental rights and freedoms acquitting the applicant. The applicant and consequently discharging the applicant.

The Applicant's case

3. The Applicant states that he has made various visits to the said courts to know the fate of the said criminal proceedings but he has not been provided with any answers; that he was eventually informed



that the file cannot be traced. He further states that the case has been on for the last 7 years and therefore the applicant's rights to fair hearing, within a reasonable time, has been violated.

4. He states that the delay in the determination of the case has caused him tremendous pain, suffering and anxiety, and constitute an infringement of his constitutional rights to fair hearing.
5. He further states that his surety who offered the security for purposes of his bond has had his rights to property violated too.

The respondent's case

6. In response, the Respondent filed grounds of opposition dated 26th of September, 2022. The Respondent states that it has not been shown that the delay in concluding the criminal trial has been caused solely by the respondent, and that the intervention of the trial court has been sought in any event.
7. On the surety it is stated that the person who stood surety is at liberty to withdraw the surety and the Applicant is free to get another to stand surety for him.
8. The Respondent further states that failure to deliver judgment cannot be attributed to the respondent; that if the court file is missing which is denied, it is not attributable to the Respondent.
9. Finally, the Respondent states that the applicant has not sought for any relief and hence the application is a waste of judicial time.

Applicant's submissions

10. The Applicant submits that whereas the issue of a missing file is an administrative issue, when the delay is prolonged, as in this case, then it becomes a violation of right, and with particular reference this case, a violation of the right to access to justice and fair hearing.
11. It is submitted that based on the court's determination in the case of *Yeri Vs Republic* (2021) KEHC182 (KLR) this court has the powers to grant the orders sought as to put an end to the anguish caused by the missing file.
12. The respondent did not file any submissions.
13. I have considered the respective pleadings and applicant's submissions.
14. A summary of grounds 2, 5 and 6 of the Respondent's grounds of opposition is that the delay in conclusion of the case has nothing to do with the Respondent. I therefore find it necessary to first address the question of whether the respondent has been properly sued.
15. It is common ground that the hearing of Sexual Offence Case No. 40 of 2015, at Kakamega has been concluded and the file allegedly went missing after the matter had been fixed for judgment. It is apparent that judgment could not therefore be delivered because of the missing case file.
16. It follows that both parties to the case had done their part. That is to say the Respondent herein had duly prosecuted its case and the Applicant, had, logically, presented his defence, in whichever form.
17. In the circumstances, I am unable to see how the respondent herein can be said to have breached the rights of the Applicant. The respondent had duly prosecuted its case to conclusion. The file did not go missing in the hands of the prosecution as it is not the custodian of court files. It is the court that is the custodian of the case files.



18. Thus any delay that has been caused because of the missing case file has not been caused by the respondent. It follows any violations of rights arising from the delay cannot be attributed to the respondent.
19. In a nutshell the Applicant has sued the wrong person. I am therefore in agreement with the respondent that the Applicant has failed to demonstrate that the respondent is responsible for the alleged infringement. The Applicant's remedy lies elsewhere
20. In the circumstances I am left with no option but to strike off the application, which I hereby do.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 13TH DAY OF MARCH 2025.

S. CHIRCHIR

JUDGE.

IN THE presence of:

Godwin Luyundi- Court Assistant

