



**Ayuka v Director of Public Prosecution (Miscellaneous Criminal Application
E013 of 2022) [2023] KEHC 3300 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E013 OF 2022**

PN GICHOHI, J

APRIL 20, 2023

BETWEEN

ERIC MOGAKA AYUKA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The Applicant who acts in person has moved this Court by way of a Notice of Motion dated April 12, 2022 brought under Art. 10, 18, 19, 20, 22, 23, 24, 26, 27, 45, 48, 50 (1), 53, 59, 100, 159, 165 (6), (7), 171, 172, 173, 247, 258, and 259 (10) of the Constitution of Kenya, High Court Act 2011, DCI Act 2011, DPP Act 2013, Children Act and Victim Act 2014.
2. He seeks orders that he be granted leave to file an Appeal in substitute of the Director of Public Prosecution (Respondent) whom he claims to have declined and/or refused to file the Appeal on his behalf. Further, he seeks that he be granted leave to file the appeal out of time and that the costs of the application be provided for. That application was supported by affidavit sworn on April 12, 2022 by Eric Mogaka Ayuka.
3. The background of the intended appeal is the judgment delivered on May 11, 2021 by Hon P K Mutai, (PM) in CMC CR Case No 833 of 2017 delivered on May 11, 2021 wherein the accused persons (George Bosire and James Nyakundi) who were charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code were acquitted. The Applicant states that he did not have the opportunity to seek the audience of this court earlier when ODPP-Kisumu refused to exercise its powers to Appeal on his behalf since 31st August, 2021 and even after being urged to do so by the EACC, JSC and CAJ to do so. He contends that the ODPP had lost its autonomy and is beholden to external interests to stall the Appeal. He further contends that the decision by the ODPP not to file an Appeal against the Judgment of the subordinate which had clear gaps was one that amounted



to an infringement of his fundamental rights. He decries that his intended Appeal will be rendered a nugatory if the orders sought are not granted.

4. In response to the Application, the Respondent filed grounds of Opposition dated August 15, 2022 and claims that the Application is bad in law and incurably defective on an account that the Applicant has failed to demonstrate that he deserves the orders sought . The Respondent argues that the application is speculative and only geared towards seeking for further investigation into a case that had already been concluded by the trial court.
5. The Applicant opposed the said grounds of opposition filed by the Respondent and urges the Court to allow the application as it does not cause any prejudice to the Respondent.
6. On October 17, 2022, the Court advised that the accused persons who had been acquitted by the lower be enjoined in the matter as Interested Parties for reasons that there was a likelihood that the decision of the Court was likely to affect them. The Court thus enjoined the accused persons as Interested Parties and directed that they were at liberty to file their responses within 14 days after service.
7. However, when served, with this application, Mr. Anyona Advocate for the Interested Parties intimated to Court that the application herein does not concern the Interested Parties and therefore, he had instructions that they were not going to participate in the application. As a consequence, they did not file any response to the application. The Applicant and the Respondent agreed that the application be disposed of by way of written submissions and they have since complied.

SUBMISSIONS

8. In his voluminous submissions dated April 13, 2022, the Applicant extensively laments how the ODPP-Kisii had casually handled the case at the lower court. He equally decries that the ODPP has totally refused to Appeal against the lower court judgment. He terms the DPP's refusal a violation for the victim's right to fair trial therefore forcing the Applicant to seek leave of the court to substitute the ODPP in appealing against the said judgment.
9. On his part, the learned counsel for the Respondent submits that only DPP is exclusively empowered and mandated to prefer an appeal in a criminal case. While relying on the cases of *Joseph Lendrix Waswa v R* [2020] eKLR, counsel submits that even though the *Victim Protection Act* allows victims to participate in criminal prosecution, such participation does not extend to taking over the prosecution powers of the DPP which include the decision to Appeal against an acquittal like in this case.

DETERMINATION

10. After considering the application, the material presented by parties for consideration by this Court it is discerned from the material from the Applicant that he is greatly aggrieved by the conduct of the in charge ODPP Kisii and has personalised the issue by directly attacking him. Be that as it may, what is clear is that the issues for determination in this application are ;
 1. Whether the Applicant should be allowed to substitute the Respondent to appeal against the Judgment of the lower court delivered on May 11, 2021.
 2. Whether the Applicant should be granted leave to file the intended Appeal out of time.
11. By relying on the *Constitution* and *Victim Protection Act*, the Applicant is drawing this Court's attention to the rights of the Victim in a Criminal trial and specifically the right of a Victim in participation in a Criminal trial. From the lower court record availed before this Court, it is clear that there was a counsel watching brief for the Complainant in those proceedings and he did participate.



The issue of the Victims participation in a criminal trial has been a subject of various interpretation by Courts until the Supreme Court decision in Joseph Lendrix Waswa case (supra) which gave guiding principles to as to the extent of participation by the Victim in the trial. These principles are:

- a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the Court;
 - b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;
 - c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;
 - d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation;
 - e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;
 - f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor;
 - g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;
 - h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP;
 - i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;
 - j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim;
 - k. While the Court has a duty to consider the victim's views and concerns, the Court has no obligation to follow the victim's preference of punishment. [Emphasis mine]
12. From those principles, it is clear that the Supreme Court emphasised the extent of the Victim's participation bearing in mind that the prosecutorial duties exclusively remained with the Director of Public Prosecutions. Indeed, the Court had this to say in paragraph 75 and 76 thereof:
75. We agree with this view and adopt it as the correct position in law. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.
76. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor..."



13. To be specific the Article 157 (10) of the Constitution provides that:
- “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
14. These powers are replicated in Sec 6 of the Office of the Director of Public Prosecutions Act 2013 that:
- “Pursuant to Article 157 (10) of the Constitution, the Director shall
- (a) not require the consent or authority for the commencement of criminal proceedings ;
 - (b) not be under the direction or control of any person or authority in exercise of his powers or functions under the Constitution, this Act or any other written law; and
 - (c) be subject only to the Constitution and the law.”
15. Flowing from the above, the participation by the Victim is not envisaged in a decision to prefer or not to prefer an appeal. That decision is the preserve of the Director of Public Prosecution and it is within his discretion to do so. In regard to appeal, section 348A (1) of the Criminal Code provides;
- “When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.”
16. There is no Constitutional or Statutory provision that allows the Victim to take over the duty of the DPP to file an appeal against the acquittal of an accused person by the lower Court or High Court. An attempt by the Applicant to seek such participation would be to elevate the Victim to the level of the DPP.
17. Without going to the appeal, I have looked at the judgment by the lower court on the reasons why the learned trial Magistrate acquitted the two accused persons under Section 215 of the Criminal Procedure Code and which decision the Applicant feels dissatisfied with unlike the DPP. This Court is alive to the fact that Article 157 (11) of the Constitution requires DPP to prevent and avoid abuse of office. Further section 4 (f) of ODPP Act obligates the DPP to take into account the need to serve the cause of justice.
18. The Applicant has not demonstrated that the DPP's failure to mount an appeal against the learned trial Magistrate's decision is in excess of his jurisdiction and a violation of the Constitutional or Statutory provisions, so as to require any interference with the DPP's prosecutorial powers whatsoever.
19. In the circumstances, the prayer by the Applicant to substitute the DPP and prefer an appeal against the acquittal of the two accused persons by the lower court must fail.
20. On the issue as to whether the Applicant should be granted leave to file the intended appeal out of time, Section 349 of the Criminal Procedure Code limits the period within which an appeal should be filed and that is Fourteen days of the date of the order or sentence appealed against. The Court however has



discretion to allow filing an appeal out of time where good cause for failure to enter an appeal within that period has been shown.

21. Having failed on the first issue, then there is no value in considering whether the Applicant has shown good cause as to why he should be allowed to file the intended appeal out of time. In the upshot, the Notice of Motion dated April 12, 2022 is dismissed for lack of merit. Each party to bear his costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 20TH DAY OF APRIL, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:-

Eric Mogaka Ayuka Applicant

Mr Ochiengo for Respondent

Kevin Isindu, Court Assistant

