



REPUBLIC OF KENYA



KENYA LAW
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**Mutai v Republic (Criminal Case 23 of 2018)
[2023] KEHC 17874 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 23 OF 2018**

**RL KORIR, J
APRIL 19, 2023**

BETWEEN

JOSEPH MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The present appeal (formerly Kericho HCCR No 35 of 2018) dated June 20, 2012 was filed in Kericho High Court by Motanya & Company Advocates on behalf of the Appellant.
2. The appeal arose out of the judgment of Hon J Kasam Senior Resident Magistrate in Sotik P & C case No 17 of 2012 dated June 7, 2012
3. The appeal was transferred to this court on May 8, 2018 by the Judge sitting in Kericho. The parties were duly notified of the transfer. Despite notice, the Appellant took no further action on the matter.
4. The Appeal was listed for directions on October 17, 2022 and the Appellant failed to appear while prosecution counsel was present. Subsequently, a Notice to Show Cause why the appeal should not be dismissed dated November 10, 2022 was issued by the Deputy Registrar of this court.
5. On November 10, 2022 the Appellant's Counsel Mr Motanya appeared and sought time to prepare to prosecute the appeal. When the matter came up on March 7, 2023, Mr Njeru for the prosecution prayed for the dismissal of the appeal. He submitted that there was no criminal conviction or sentence and he was at a loss why there was an appeal. Mr Motanya for the Appellant was not present to shed light on their appeal.
6. I have perused the file. The matter in the trial court was a charge of child neglect contrary to section 127 1(a) of the *Children Act*, 2001. The proceedings show that judgment was delivered on June 7, 2012 in which the court granted custody of the children to the mother and directed the father (Appellant) to



provide maintenance. The court further directed the prosecution to file the income of both parties to enable the court determine the contribution of each parent. The court went further to give a mention date for that purpose.

7. The matter came up for mention June 21, 2012, when the Appellant (then accused) informed the court that he had filed an appeal. The court gave a further mention date for further directions and on July 19, 2012, further orders were given by the trial court with respect to the maintenance of the children.
8. The trial file was still active on January 10, 2013 when the court made an order that there were no more pending issues and marked the case as settled.
9. Under Section 118 of the *Children Act* 2001 a children's court has jurisdiction to make an order or give a judgment. However a judgment brings finality to a matter. What stands out in the judgement however is that there was no conviction or acquittal. Having tried the accused on a criminal charge, the court was obligated to enter a finding of acquittal or conviction and impose the penalty provided by law.
10. It appears from the proceedings that the trial court conducted both a criminal trial and child protection and care proceedings which are in nature civil proceedings under the same proceedings. This is apparent from the fact that after entering judgment the trial court proceeded to make maintenance orders and continued to mention the matter several times until the case was finally marked settled.
11. It is apparent from my reading of the trial court's judgment that the same qualified for a ruling as opposed to a judgment since the matter was on going. The correct procedure then was for the court to issue orders while the matter was ongoing and issue a judgment at the end at which point it would become *functus officio*. If indeed the same was a judgment then the rest of the proceedings were undertaken without jurisdiction as the court had become *functus officio*.
12. With respect to the present appeal, it is clear to this court that the appeal was premature as the appellant continued to participate in the proceedings before the trial court. The appellant made no effort to have the impugned judgement reviewed by the court or have any further proceedings stayed to enable him pursue the appeal. I agree with the Respondent's Counsel that the criminal appeal was not tenable as the impugned judgment had no acquittal, or conviction and sentence to be appealed.
13. Having made the above observations, I further observe that the appeal has not been prosecuted since 2013. Considering the subject matter, it must have been overtaken by events. It will serve no useful purpose for it to remain alive.
14. The appeal is thus dismissed for want of prosecution.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 19TH DAY OF APRIL, 2023

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Njeru for the Appellant, Siele (Court Assistant) and in the absence of Mr. Motanya for the Respondent.

