



Director of Public Prosecutions v Ruanda (Miscellaneous Criminal Application E036 of 2022) [2023] KEHC 17299 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2022**

EM MURIITHI, J

MAY 8, 2023

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

DAVID GUANTAI RUANDA RESPONDENT

RULING

1. The Director of Public Prosecutions seeks leave of court to appeal out of time from an acquittal of the Respondent in a criminal case for defilement contrary to section 8(1) and (3) of the [Sexual Offences Act](#) in a Judgment delivered on 21st April 2016 by D.A. Ocharo (SRM) in Nkubu PMC Criminal Case No. 561 of 2015 (formerly Githongo SRMC Criminal Case NO. 221 of 2014).
2. The grounds of the application are set in the Notice of Motion dated 27th July 2022 as follows:
 - a) That judgment herein was delivered on 21st April, 2016 wherein the respondent was acquitted and the conviction and sentence on the charges of defilement were dismissed in Nkubu S.O CR.561 of 2015 R v David Guantai (previously Githongo 221 of 2014).
 - b) That the applicant herein expressed dissatisfaction and intimated to court its willingness to appeal having noted an error propagated by the trial court where proceedings relied on passing the judgement were from a different file being Githongo Cf 539 of 2010 R v Peter Baithumbi
 - c) That it was due to the above noted mix up by the trial court, the applicant could not secure all the requisite documents including copies of the proceedings and judgment timeously for purposes of appeal.
 - d) That the intended appeal has overwhelming chances of success.



e) That no party shall suffer prejudice in the event the orders are granted.”

3. The factual basis of the application relied on by the Prosecution is set out in the supporting affidavit of Ms. P.W. Mwaniki, Principal Prosecution Counsel, sworn on 27th July 2022 principally as follows:

- “2. That the Respondent herein was originally charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* in Githongo criminal case No. 221 of 2014 R v David Guantai Ruanda where he took plea on the 20th of March 2014.
3. That the matter proceeded and upon close of prosecution's case the respondent was put on his defence and the matter was transferred to Nkubu Principal Magistrates Court through an application made by the respondent for the court to recuse itself owing to the fact that one of the prosecutions witnesses had been convicted and sentenced by the trial court being Githongo Cr 224 of 2014 R v Lillian Kangai for interfering with the evidence.
4. That the matter proceeded as Nkubu Cr 561 of 2015 and the trial magistrate called for proceedings from Githongo (previously 221 of 2014) and relied on the same in passing its judgment leading to the acquittal of the respondent under section 215 of the *Criminal Procedure Code* on the 21st day of April 2016.
5. That the victim was also involved in another case before Githongo Law courts where she had also been defiled and charges preferred against one Peter Bithumbi in Cr 539 of 2010 and he was also acquitted on the 8th of March 2013.
6. That the mother to the victim, one MK having been aggrieved by the decision to acquit the respondent in Cr NO. 561 of 2015 before Nkubu law courts made several attempts to get copies of the proceedings and judgment and was never successful.
7. That she filed several complaints at the Office of the Director Public Prosecutions within Meru County and the efforts to call for the proceedings were in futility.
8. That the Office of the Director of Public Prosecutions eventually got copies of the proceedings in February 2022 and noted upon perusal of the judgements delivered in the two files to have had a mix up as the evidence was contradictory as to how the defilement occurred in Cr 561 of 2015.
9. That it was further noted that the trial magistrate at Nkubu law courts in passing his judgment in Cr 561 OF 2015 (previously Githongo 221 of 2014) R v David Guantai Ruanda relied on the proceedings captured in Githongo Cr 539 of 2010 R v Peter Biathumbi Amuru.
10. That as a result of the above mix up the victim herein did not receive justice due to this error propagated by the court.



11. That however, the court did not immediately supply parties with copies of the judgment stating that it had noted several typographical errors which ought to be rectified before parties could get fair copies in due course.
 12. That our efforts to try and obtain copies of the proceedings and judgment from the registry in reasonable time was futile owing to the afore mentioned mix up.
 13. That the applicant herein has all the intention to pursue this appeal and seek the opinion of this superior court as we believe the intended appeal has overwhelming chances of success as the trial court clearly erred by relying on proceedings of a different file.
 14. That our appeal has high chances of success, attached here with is our draft petition of appeal marked PM1”
4. The mother of the complainant, MK, also filed a supporting affidavit seeking to explain the delay as follows:
- “ 1. That I am the mother of the Complainant PK, thus properly seized of the facts in this matter and therefore competent to swear this affidavit.
 2. That the Judgement of my child defilement case at Nkubu PM er no. 56 of 2015 formerly Githongo PM cmo 221 of 2014 was delivered on 21/4/2016 when the Respondent herein was acquitted.
 3. That I was not satisfied with the outcome of the said judgement and I lodged a complaint with the office of the Director of Public Prosecution Meru but unfortunately they could not immediately respond to the same.
 4. That despite my incessant visit to ODPP office Meru and Nkubu Law Courts the court file was said to be misplaced.
 5. That this prompted me to visit any relevant office that could led me a hear as can be attested by a bundle of my complaint letters attached herewith and marked MK1.
 6. That it was until recently the new head of Prosecution Meru intervened and called for the proceedings which miraculously resurfaced which disclosed that names of the witnesses did not tally with those mentioned in the judgement. Attached herewith is her letter dated 2/2/2021 and marked MK2.
 7. That it is imperative to note there existed another defilement case where my daughter PK was also a victim and the accused was Peter Baithumbi who was acquitted *vide* Githongo PM court Cr. No 539 of 2010 and it is these proceedings that were used in passing Judgement in Nkubu P.M court Cr no 56 of 2015.
 8. That Nkubu P.M court Cr no 561 of 2015 was formerly Githongo PM court no. 221 of 2014 having been transferred thereto upon the court recusing itself at the instant of an Application by the defence after the trial magistrate had convicted a prosecution witnesses for interfering with the Prosecution evidence *vide* Githongo P.M er no 224 of 2014. Attached herewith is a copy of the judgement Marked MK3.



9. That this Honourable court should take Judicial notice that at the time of transferring Githongo PM court er no. 221 of 2014 to Nkubu law courts, six (6) prosecution witnesses had already testified and accused put on his defence.
 10. That I reiterate that it is these wrong proceedings in Githongo PM courts er 539 of 2010 that were used to acquit the accused in Nkubu PM court Cr. no 561 of 2015
 11. That further from above, I am reliably informed by my counsel on record M/s Peninah Mwaniki Principal Prosecution Counsel, that this prompted the station in-charge to forward the proceedings to ODPP Headquarters for further directions.
 12. That I am privy to the directions given to the station in-charge vide a letter dated 28/4/2022 that they should move the court for an application to Appeal out of time. Attached herewith is the said letter marked MK4.
 13. That it is owing to this Mix up by the Trial magistrate, that the court file was untraceable/misplaced occasioning us not to procure the proceedings and file our Appeal within the stipulated time by the law.”
5. The Respondent has opposed the application by a Replying Affidavit of 10/8/2022 principally on the grounds of merit of the intended appeal, delay and prejudice to the accused, as follows:
- “ 1. That I am a male adult of sound mind well versed with the matters deponed to hereinabove and therefore competent to make and swear this affidavit.
 2. That my Advocates on record have read and explained to me the contents of the notice of motion dated the 2ih July 2022 along with the supporting affidavit and annexures thereto and it is in response thereto that I make and swear this affidavit.
 3. That the application and supporting affidavits are dishonest, misleading, skewed and fail to disclose material facts and obviously designed to mislead this Honourable court.
 4. That the applicant's instant application is based on the judgment delivered on 21st April 2016, well over 6 (six) years ago, hence the instant application is unwarranted and substantively defective and ought to be dismissed with costs.
 5. That the applicant has not demonstrate any efforts undertake for the court to consider this application or at all, in the least they ought to have even annexed the charge sheets and copy of the judgment which they purport to have been mixed.
 6. That in any case even from the face of the judgment (Annexed "MK3'~ it is very clear that the same is tilted as Nkubu Criminal Case No. 561 of 2015 (Formerly Gitongo Criminal Case No. 221 of 2014) hence the applicant's allegations are neither here nor there, just an afterthought seeking to deprive me of my constitutional right to freedom.
 7. That I am advised by my advocates on record and which advise I verily believe to be sound, that the applicant is guilty of inordinate delay, it is trite law that



equity aids the vigilant and not the indolent hence this great indolence cannot be excused.

8. That the courts registry and the courts were in operation throughout the intervening period and zealous representation required the concerned party to be on top of its game and prosecute its case fully.
 9. That it is very clear from the onset, that the inordinate delay has not been sufficiently explained and the upshot is that the instant application lacks merit and ought to be dismissed.
 10. That I am further advised by my Advocates on record and advise I verily believe to be true that in any case the applicant is not clear whether her intended Appeal is on the merits of the case and/or the alleged mix up, consequential whereof, chances of the intended Appeal succeeding have not been explained.
 11. That in the instant application it is purported that one MK lodged a complain with DPP Meru and visited their offices severally, how nothing has been annexed and no evidence put forward to support the said allegations.
 12. That it is in the foregoing circumstances that the delay coupled with misrepresentation of facts cannot favour the applicant and the Honourable court must deny the invitation to allow the application.
 13. That justice is two way, the judgment the applicants is seeking to Appeal against was delivered well over 6 (six) years ago, in this case I will be greatly prejudiced if the instant application is allowed.”
6. The court has considered the application, the Respondent’s replying affidavit and submissions filed by the prosecution.

Principles for grant of leave to appeal out of time

7. The principles for the exercise of the discretion to grant or to refuse leave to file appeal out of time, as in civil cases, must include a demonstration of an arguable case or serious questions to be put before the appellate court for determination; length of delay and explanation for the delay in filing the appeal; and the interests of justice including any prejudice to the accused or the respondent. See *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR where the Supreme Court gave guidance on the “the principles for extension of time, ... that a Court should consider in exercise of such discretion:
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

Arguable case

8. There is an undoubted right of appeal for DPP from acquittal or similar order is expressly provided for under section 348A of the [Criminal Procedure Code](#) as follows:

“ 348A. Right of appeal against acquittal, order of refusal or order of dismissal

When an accused person has been acquitted on a trial held by a subordinate 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, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law. [Act No. 13 of 1967, s. 3, Act No. 12 of 2012, Sch.]”

9. From the draft Petition of Appeal dated 27th July 2022, three issues are presented for determination as follows:

- “ 1. That the Learned trial Magistrate erred in law and in fact by failing to consider the ingredients of the offence of defilement contrary to section 8(1) as read with section 8(3) of the [sexual offences Act](#). No. 3 of 2006.
2. That the learned trial Magistrate erred in law and fact by relying on the wrong proceedings to acquit the respondent.
3. That the judgement of the trial court was against the weight of evidence adduced.

Reasons Whereof, the Appellant prays for this Honourable court to allow the appeal and proceed to convict the Respondent accordingly.”

10. It not possible to say that the questions put forward in the petition of appeal are frivolous. The ground of appeal No. 2 seems justified in that the magistrate did appear to rely on proceedings which were not before her when she ruled in her judgment that:

“Accused person gave evidence that he did not commit the offence, that he and accused persons mother used to live in the same' compound at the time and that it took the police over two years to arrest him when in fact he had not gone into hiding. He further said that the complainant and her mother are in the habit of framing people falsely. He said that the complainant had complained against another person over a similar allegation and the case proceeded before Githongo Law Courts but accused person was acquitted.

The only issue here is whether there is evidence that accused person did defile the complainant as stated in the charge sheet.

There is contradictory evidence as to how the defilement occurred. The complainant testified in court that it was by the river called Ngongo. The doctor testified that the complainant reported that she was defiled by accused person in his house.

According to the doctor, through the complainant were a bloodstained skirt during examination, and had a foul smelling discharge, from her vagina, there was no indication of



any laceration or tear on her vulva and her hymen was intact. He however indicated in the Post rape care form that the hymen was not present. I can only reconcile this contradiction by the same witness in favour of accused person.

I have also taken into account accused persons defence that he was arrested-over-two years after the date. The complainant says he defiled her and the reason for the omission has not been explained. I note that the offence is stated to have been committed on 18th September 2012 at 1600hours. Accused person was apprehended on 20/3/2014. The investigating officer PC Billy Mathenge No. 70627) of Gaitu Patrol Base did not offer any explanation as to why it took him so long to effect arrest. He did not say for example that accused person had gone into hiding or that he needed two years to finalize investigations. I therefore infer that the arrest itself must have been activated by bad faith.

Having said that let me now say that the evidence does not show that the accused person did either defile PW2 or that he committed an indecent act with her by bringing his penis into contact with her vagina.

I have also gone through the court record and I notice that PW2 had complained that on 30th March 2010 at Kamangun Village in Gaitu Location she was defiled by one Peter Baithumbi Amuru. The said person was charged *vide* CRC. No. 539 of 2010 before this court and acquitted on 8th March 2013 by the Honourable C.N. Ndubi Ag. Principal Magistrate. Since the evidence in the case is totally deficient, I might be tempted to believe that accused persons argument that PW2 and her mother are in the business of falsely implicating people is true. Since the evidence is deficient. I hereby pursuant to section 215 *CPC* acquit accused person of both the main and alternative charge and set him free forthwith unless he otherwise be lawfully held.

,

Judgment dated signed and delivered in open court this 21st April 2016.

D.A. Ocharo

Senior Resident Magistrate”

11. The argument that the appeal does not have overwhelming chances of success is a matter for the appellate court, once an arguable case is established. It is trite that an arguable case need not be one that must eventually succeed. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, where the Court of Appeal in a case for stay of proceedings pending appeal said:

“An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”

Delay explanation

12. With respect, the delay of six years since the judgment sought to be appealed from was delivered in 2016 is not sufficiently explained. The first correspondence by the complainant’s mother seeking assistance of Office of the DPP Nairobi is dated 27/9/2018. There is no explanation for the period of about two years since the impugned judgment. The alleged mix-up of files cannot explain the delay on the part of the DPP, bearing in mind that the petition of appeal could have been filed and amended subsequently upon obtaining the full record as is permitted under section 350 of the *Criminal Procedure Code*. The question then becomes whether, in the circumstance of this case with the arguable case presented and



the obvious delay in seeking to appeal, the interests of justice permit the extension of time to appeal, or otherwise.

Interests of justice

13. In accordance with the observation of the Court of Appeal while considering whether to order a retrial in *Opicho v R* (2009) KLR 369, 371, 375 where the accused had served prison custody of over two years on a conviction for the offence, c/s 234 of the *Penal Code*, of grievous harm on the appellant's child aged four years, the Court considers interest of justice having regard to the nature and importance of the criminal trial and the prejudice on the accused:

“The circumstances of the offence amount to what is generally referred to as child abuse

The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interests of justice that the appellant receives a fair trial and if he is to acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all the circumstances of this case to order a retrial.”

14. The complainant in the case was 12 years old at the time of the alleged offence; the case is one of defilement contrary to section 8(1) (3) of the *Sexual Offences Act*; and the prevalence of sexual and gender-based violence (SGBV) cases dictate that full prosecution of such cases be done to afford deterrence and protection of the vulnerable victims in society.

Prejudice to the accused

15. Six years since acquittal and ten since alleged commission of the offence is not too inordinate to counter the need for effective prosecution of the grievous offence of defilement of a minor child aged 12 years. There is no statute of limitation for criminal cases and an accused must be taken to understand that he could be prosecuted for an alleged offence any time during his life, subject only to the safeguards of a fair trial which, respectfully, in this case will be guaranteed in the appeal and any retrial, if so ordered.

Orders

16. Accordingly, for the reasons set out above, the Court finds merit in the DPP's application dated 27th July 2022 for leave to appeal out of time, which is allowed and the DPP is directed to file and serve the Petition of Appeal within seven (7) days.
17. In the interests of expeditious disposal of the matter, for everyone's sake, the Directions on the preparation and presentation of the Record of Appeal shall be taken on 29th May 2023.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Omari Advocate for Accused/Respondent.

Mr. Masila Senior Prosecution Counsel for DPP.

