



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onindo v Prosecution (Criminal Appeal E004 of 2023)  
[2023] KEHC 17483 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17483 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E004 OF 2023**

**PM MULWA, J**

**MAY 11, 2023**

**BETWEEN**

**CHERYL LIKUYI ONINDO ..... APPELLANT**

**AND**

**PROSECUTION ..... RESPONDENT**

**RULING**

1. The court is called upon to determine the application by the appellant dated January 13, 2023 brought under article 159 of the [Constitution of Kenya](#). It seeks among other prayers stay of proceedings in MSO No. E112 of 2021 filed in Thika Chief Magistrate's Court.
2. The grounds of the application are that the appellant having been charged with the offence of defilement seeks to examine some of the crucial documents to wit a birth certificate of the complainant and verify the age of the complainant. It is contended that the appellant stands to suffer irreparable harm if the orders are not granted.
3. The application is supported by the annexed affidavit of Cheryl Onindo sworn on January 13, 2023 in which he depones that he was arrested and charged with defilement in December 2021. He disputes the victim was born in Kisauni on December 5, 2023 and according to him an age assessment and verification of the authenticity of the birth certificate is crucial. He had made a similar application in the trial court which was dismissed and hence the current application. If the orders are not granted the appeal will be rendered nugatory, it is averred. And further that the respondent will not be prejudiced by the orders sought.
4. In opposing the application, the respondent filed a replying affidavit sworn by Cpl Gladys Atieno on February 23, 2023 in which she depones being aware of the case before the trial court and contends that the applicant will have a chance to cross examine the prosecution witnesses during the hearing in the lower court and will suffer no prejudice. According to the respondent, the applicant will get a fair



hearing under article 50 of the Constitution and the instant application is premature and intended to stall the proceeding in the trial court and is an attempt to defeat justice. The court is urged to dismiss the application and allow the trial court proceed with the hearing in Thika Criminal Case No. 112 of 2021.

5. The application was canvassed by way of written submissions

#### **Appellant/Applicant's submissions**

6. Counsel for the appellant/applicant filed submissions on March 24, 2023 wherein he submitted the PRC form indicated the hymen was absent and the wound was still fresh, an issue that raised eyebrows and the appellant requires the complainant to be subjected to another medical test to confirm the issue of virginity.
7. According to counsel the prayers sought are beneficial to both the prosecution and the appellant.
8. Counsel urged the court to allow the application.

#### **Respondent's submissions**

9. In opposing the application, the state counsel Ms Ngesa filed submissions on February 24, 2023. She submits that a letter dated May 12, 2022, by the registrar of births confirms the authenticity of the birth certificate as a true copy. And that subjecting the complainant to a virginity test is traumatizing.
10. According to counsel penetration is proved through medical process and the relevant documents are the filled P3 form and PRC form which have been supplied to the appellant. And it was immaterial as to whether or not the complainant had engaged in previous sexual activities prior to the incident.
11. Counsel urged the court to reject the grounds of the appeal lift the stay orders that had been granted and allow the trial court proceed with the matter to its final and logical conclusion. It was submitted that the appellant is employing delaying tactics.

#### **Analysis and determination**

12. I have considered the application, the replying affidavit and the submissions in support of the various arguments. The issue for determination is whether this court should grant a stay of proceedings in Thika Criminal case no 112 of 2021.
13. Before I deal with the issues of the appeal I note that by the orders of this court on February 8, 2023 the prosecution conceded to prayers 1 and 2. The court went ahead and issued a stay of proceedings with the trial court for 20 days pending the age assessment of the complainant and the verification of the birth certificate. The issue of verification of the birth certificate has been complied with. What is still pending is the age assessment of the complainant.
14. In criminal cases stay of proceedings is granted only in the most exceptional circumstances as was stated in Goddy Mwakio & another v Republic [2011] eKLR where this court stated that:  

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”.
15. For this court to grant stay of proceedings in the trial court the appellant has to satisfy that the appeal is arguable, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory.



16. Article 50 of the *Constitution of Kenya 2010* states that: -

“ 50.

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right—
  - (a) to be presumed innocent until the contrary is proved;
  - (b) to be informed of the charge, with sufficient detail to answer it;
  - (c) to have adequate time and facilities to prepare a defence;
  - (e) to have the trial begin and conclude without unreasonable delay;
  - (j) to be informed in advance of the evidence the prosecution intends solely depend on, and to have reasonable access to that evidence.”

17. The above rights as envisaged cuts across board and should apply to both the accused and the complainant and the courts should ensure that in the dispensation of justice these rights are protected.

18. From the record the prosecution supplied the relevant documents to be used during the trial to the appellant in the year 2021, the appellant ought to have fully prepared for the trial. From the record it is clear the matter in the trial court has never kicked off as the appellant disputes the issue of the birth certificate.

19. The registrar of civil registration has on two occasions verified the authenticity of the Birth Certificate but the appellant is not satisfied with the results.

20. The letter dated May 12, 2023 confirms the impugned birth certificate as a true copy of their records a further letter dated May 16, 2022 also confirms the birth certificate tallies with the register in their custody and thus a true reflection of their records. Based on this information I do not see anything wrong with the birth certificate, which is to be used to determine the age of the complainant. It is also trite to note that the age of complainant can be proved by other means in place of a birth certificate.

21. I have perused the impugned birth certificate which indicates the complainant was born on December 5, 2003, the commission of the offence occurred in the year 2021, a quick calculation gives the complaint to have been 17 years at the time of commission of the Act.

22. In my view, I do not find staying of the proceedings in the trial court will serve justice. article 50 (e) of the *Constitutions* allows parties to have the trial begin and conclude without unreasonable delay. I am not persuaded that the appeal will be rendered nugatory if the orders herein are not granted. The lower court case was registered in 2021 and needs to be set down for hearing and I am alive to the issue of erosion of the facts as they occurred and the challenge of tracing witnesses with the passing of time.



23. I do agree with the prosecution counsel that the appellant is employing some delay tactics. I find that in this instance if the High Court were to stay the proceedings of the trial court, it will lead to impediment of justice and in turn cripple the operation of the trial court
24. In *Judicial Termination of Defective Criminal Prosecutions – Stay of Applications*, at page 83 Chris Corns highlights the grounds for staying proceedings in a criminal case as follows: -
- i. When the continuation of the proceedings would constitute an abuse of the process;
  - ii. When the resultant trial would be unfair to the accused; and
  - iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.
25. In my view proceeding with case at the trial court will not prejudice any party, and neither does the same amount to an abuse of the court process.

**Final Orders:**

- 26 In the circumstances thereof, I find the application dated January 13, 2023 lacks in merit. It is dismissed. The orders for stay of proceedings in the lower court are hereby vacated.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 11<sup>TH</sup> DAY OF MAY,2023.**

**P.M. MULWA**

**JUDGE**

**In the Presence of:**

**Kinyua/Duale – Court Assistants**

Mr. Muriuki -for State

Mr. Onduso - for Appellant/Applicant

