



REPUBLIC OF KENYA



**Opati v Republic (Criminal Appeal 73 of 2018) [2023] KEHC 3965 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3965 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL 73 OF 2018  
RE ABURILI, J  
MAY 3, 2023**

**BETWEEN**

**JASON OPATI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This appeal has been pending before this court from July 10, 2018 which is nearly five (5) years now. Despite the court requesting for the lower court file to enable this court admit the appeal to hearing and process the hearing and determination, it has not been possible to secure the lower court file from Maseno Senior Principal Magistrate's court.
2. At one moment, the Appellant wrote to the Commission on Administrative Justice complaining of the appeal not being heard and determined by this court. The CAJ initiated an inquiry with the Deputy Registrar of this court who vide letter dated July 28, 2021 stated that the file had been called for and was awaited. Again, the letter stated that vide letter of November 25, 2021, the lower court file had been received and the appeal was listed for November 25, 2021 wherein the court gave another date for March 15, 2022 for further directions.
3. The Commission on Administrative Justice (CAJ) therefore believed that the complaint by the Appellant had been sufficiently addressed. However, a perusal of the proceedings in this appeal reveals that the lower court file has never been availed and that there was conflicting information from the Appellant and Maseno Law Courts, with the latter claiming that the file was pending a ruling before Hon D A Okundi who had since retired from service of the Judiciary whereas the Appellant, vide warrant of commitment to prison filed on August 1, 2018 dated March 1, 2017 shows that he was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) and sentenced to serve life imprisonment.



4. There are several correspondences with Maseno Law Courts seeking for the submission of the lower court file to this court to no avail and the letter dated July 30, 2021 by the Court Administrator II, Mr R Mbaka to this court claims that the case was last marked for ruling on November 19, 2017 before Hon D A Okundi who had since retired from the Judiciary and that attempts to reach her had not borne fruit as she had not given any conclusive answer though she promised to communicate later hence the need to wait for that communication.
5. On October 12, 2021, the Judge issued an order directing the In-charge of Maseno Law Courts to trace the lower court file but to date, the file has not been traced.
6. Albeit the CAJ in their letter asserted that this court vide its letter of November 25, 2021 stated that it had received the lower court file, I have read that letter of the Deputy Registrar and I find no content of receipt of the lower court file.
7. The Deputy Registrar was clear that communication had been received from the Head of Station Maseno Law Courts and the Deputy Registrar even annexed the said correspondence.
8. This court also went ahead and directed the ODPP to liaise with the Police at Maseno Police Station to verify facts of the loss of the court file and to look up on their police file.
9. Vide letter dated March 14, 2022, the Officer Commanding Station (OCS) Maseno Police Station Chief Inspector Peter Makau wrote to this court stating that from their records at Luanda Police station, their efforts made to trace their police file was futile.
10. It is now one (1) year since that letter was written to this court and still, no evidence of tracing the police file or court file is forthcoming.
11. In my view, the many orders being issued by this court to Maseno Law courts are not bearing any fruit as the lower court has written stating clearly that they cannot trace the court file and neither can the police file be traced.
12. The charge facing the Appellant is defilement of a child under the age of twelve (12) years. The appellant was sentenced to life imprisonment. The Appellant had the right to file an appeal to challenge that conviction and sentence. He states that he is aged 80 years old.
13. However, despite all the above circumstances that I have described, of the missing police file such that the case cannot be reconstructed, and the missing court file in Maseno SPM Sexual Offences Case No 849 of 2014, there is a very unique feature in this appeal.
14. The conviction and sentence were passed on March 1, 2017. This is according to the Petition of Appeal filed on July 10, 2018 and the Warrant of commitment to prison (Cr 102) imp dated March 1, 2017 annexed and filed on August 1, 2018.
15. The question I pose is, why did the Appellant take over one (1) year to file his appeal to this court when he ought to have filed the same within fourteen days of the date of sentence? Did he obtain leave of this court to extend the time for filing of the appeal out of time? What happened to the police file and the court file between March 1, 2017 and July 10, 2018?
16. Again, upon perusal of the file herein, I observe that there is a Notice of Motion filed simultaneous with the Petition of Appeal wherein the Appellant herein was seeking in this same file, leave to file his appeal out of time against both conviction and sentence.
17. This Notice of Motion is not supported by an affidavit or grounds explaining the delay of over one (1) year to file the appeal. No orders were made in respect of the said Notice of Motion. No doubt,



this appeal which was filed over one (1) year and five (5) months from the date of sentence is suspect. I say 'suspect' because no reasons are advanced for the delay and the Notice of Motion is sandwiched between two copies of grounds of the Petition of appeal.

18. The Appellant ought to have first filed an application seeking for leave to appeal out of time and once that leave is granted by the court, he could then file his appeal.
19. Having filed an appeal out of time without first seeking and obtaining leave of court and which appeal was filed over one (1) year and five (5) months later and no reasons were supplied for the inordinate delay and filing, I find that the appeal herein is fatally incompetent. This court has been belabouring looking for the lower court file in an 'appeal' that is non-existent and fatally incompetent.
20. I hereby proceed and strike out this appeal for having been filed on July 10, 2018 out of the fourteen (14) statutory days and over one (1) year and five (5) months from the date of sentencing on March 1, 2017 without leave of this court.
21. This Ruling to be typed and send to the Appellant in prison for information and records although he is present virtually.
22. This file is closed. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF MAY, 2023**

**R. E. ABURILI**

**JUDGE**

