



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT MISC. CRIMINAL APPLICATION NO. 13 OF 2019

EDWARD ILANDI KITHEKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Edward Ilandi Kitheka**, the Applicant herein, has approached this court with a **Notice of Motion** dated **5th July, 2021**, brought under **Section 356(1) and (2) of the Criminal Procedure Code** asking this court for the following orders;

1) Spent

2) That this Honorable Court do issue interim orders of stay of proceedings in **Kitui Chief Magistrate's Court Criminal Number Sexual Offence Number 8 of 2019** pending hearing inter-partes and determination of this application since the Applicant is scheduled to be subjected to a DNA test before the Appeal is heard and determined.

3) That this Hon. Court do issue orders of stay of proceedings in **Kitui Chief Magistrate's Court Sexual Offence Number 8 of 2019** pending hearing and determination of the appeal against the judgement of this court.

2. The Applicant has listed the following as the basis for the reliefs sought;

(i) That the trial court in **Kitui Chief Magistrate's Court Sexual Offence Case Number 8 of 2019** made an order directing the Applicant to be subjected to a D.N.A test.

(ii) That the Applicant was dissatisfied and filed a petition before this court against the decision of the Lower Court but was unsuccessful.

(iii) That the Applicant has preferred an appeal to the Court of Appeal.

(iv) That the Applicant is apprehensive that if the proceedings are not stayed pending the hearing and determination of this application and the preferred Appeal, he might be summoned and/or arrested and a sample of his DNA taken forcefully from him.

(v) That the preferred appeal will be rendered nugatory and a mere academic exercise if stay of proceedings in **Kitui Chief Magistrate's Court Sexual Offence Number 8 of 2019** is not granted as the sample will be taken on 13th July, 2021.

(vi) That the Applicant's right of Appeal will be infringed and defeated if this application is not allowed.

(vii) That the Respondent will not suffer any prejudice, injustice or loss if the prayers sought are granted.

3. The Applicant has filed sworn affidavit sworn on 5th July, 2021 to support the above ground. He has basically reiterated the above grounds and has exhibited a Notice of Appeal and draft a copy of Memorandum of Appeal.

4. The Applicant's Counsel submitted before me that the Notice of Appeal filed should be treated as an appeal though he was at pains to explain the legal basis for the said contention.

5. The Respondent through Mr. Okemwa Learned Counsel from the Office of the Director of Public Prosecution, has opposed this and based his opposition to the grounds of opposition filed and dated 7th July, 2021.

6. The Respondent contends that, this application is re-judicata and that this court is now *functus officio*, having rendered a decision on the same issue vide a judgement delivered on 9th April, 2021. He cites the decision in ***Jackson Juma Kenga versus Republic [2019] eKLR*** to support his contention.

7. Mr. Okemwa further submits that, the application is premised on a wrong provision of law as ***Section 356 of the Criminal Procedure Code*** relates to bail upon conviction.

8. This court has considered this application and the opposition mounted by the state. This application raises 3 issues namely:

(i) *Whether the application is fatally defective for citing wrong provision of law.*

(ii) *Whether the issues raised are Res judicata.*

(iii) *Whether the application is merited.*

Firstly, I will deal with the provisions cited by the Applicant. This application is brought under ***Section 356 (1) and (2) of the Criminal Procedure Code*** which provide as follows:

“Bail and Stay of execution pending the entering of an appeal.

1. The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.

2. If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.”

9. My interpretation of the above provision is that, it only comes into play once a court has tried and convicted an Accused person and meted out a sentence. That person can then invoke the said provision in seeking bail or stay of execution of sentence pending appeal. The matter before me is somewhat different because, it is interlocutory in nature in the sense that, the trial in the subordinate court is ongoing and the trial court is yet to render its decision. The Applicant has not been tried and found guilty. Therefore, invoking of ***Section 356 (1) and (2) of the Criminal Procedure Code*** is a bit premature to that extent but this court is minded about the ***provisions of Article 159 (2) (d) of the Constitution of Kenya*** which calls upon this court to be guided by the principle that justice be administered without undue regard to procedural technicalities. The invocation of the wrong provision of the law or lack of invocation of the law generally is not fatal to an application. This court inclined to consider this application on merit rather than striking it out on procedural technicality.

10. Whether this application is Res Judicata.

The Respondent has pointed out an issue that this application raises an issue that is similar with an issue that had been raised earlier and determined which is partly true. The Applicant had approached this court with a petition challenging the decision by the trial court to order for a DNA to be carried out to determine the question of paternity of the child born as a result of defilement. He had also sought for a stay of proceedings in the Criminal count pending determination of that petition.

This court rendered itself on the said petition and found no merit in it. Further this court then directed that the trial be first tracked for the interest of justice and noted that stopping or staying of criminal trials should be done sparingly and only in rare occasions where there is an obvious likelihood of blatant breach of the Constitution.

In the instant application, the Applicant is seeking stay of proceedings pending an intended appeal and in my considered view the doctrine of *Res judicata* strictly speaking, cannot apply for the simple reason that a petition and an intention to appeal are not one and the same thing. The Applicant sought stay of proceedings pending determination of his petition before this court but here, he is seeking stay of proceedings pending determination of an intended appeal. *Res judicata* cannot therefore apply.

11. Whether the Application is merited.

The Applicant has premised this application on the fact that he has appealed which I find a bit misleading because he has not. He claims that he has filed a Notice to appeal which is factual but when pressed during the hearing of this application as to why he has not preferred an appeal and yet the typed proceedings were supplied on 21st May, 2021, he had no answer. The silence on the part of the Applicant or inaction can be taken to mean that the Applicant is either not interested about the appeal and is only out to delay or obstruct the course of justice or he believes he has no prospectus in the appeal. Either way, this court finds that, the Applicant has not established sufficient cause to warrant a stay of proceedings. This court finds that the reasons advanced, that the appeal would be academic or rendered nugatory is neither here or there because if the Applicant is successful on appeal, the evidence taken and perhaps used by the trial can be severed and a decision made on whether the threshold is reached notwithstanding the severance of evidence on DNA. As earlier observed, a stay of proceedings as sought

in this application can only be granted in very rare circumstances because of the attendant consequences of delay of trial which in itself run afoul of **Article 50(2) (e) of the Constitution of Kenya** which provides that trials be expedited.

Furthermore, it has to be noted that the offence upon which the Applicant is charged relates to a child and under **Article 53 (1) (d) of the Constitution of Kenya**, the courts have the obligation to protect the interests of the child and overall interest of justice.

The Supreme Court, in **Joseph Lendrix Waswa versus Republic [2020] eKLR** has also weighed in on this issue when it made the following observations in part;

“..... flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and wait the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the trial Court’s judgement. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

a) Where the decision concerns the admissibility of evidence, which if ruled inadmissible, would eliminate or substantially weaken the prosecution case;

b) When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;

c) Where the decision entails the recusal of the trial court to hear the cause.”

12. The Applicant’s right of Appeal should be weighed with the principles of a fair trial which in *inter alia* include right to a speedy trial and the right of the victims to access justice and protection of the law.

13. In the foregoing, this court finds that the interest of justice tilts against granting this application. As I found out in the petition herein, the Applicant herein has up to now maintained his innocence and the DNA test as far as this court is concerned is not fait accompli unless the Applicant knows otherwise and is reluctant to state so. Suffices to state that he is entitled to a fair trial which is currently ongoing in the trial court.

In the premises, this court finds no merit in this application. The same is disallowed. I further direct the parties herein, to comply with the earlier directive to expedite the ongoing trial for the interest of justice.

Dated, Signed and Delivered at Kitui this 12th day of July, 2021.

HON. JUSTICE R. K. LIMO

JUDGE