



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HIGH COURT CRIMINAL APPLICATION NO. 1 OF 2017**

**PETER MUTWIRI KABETE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. **PETER MUTWIRI KABETE**, the applicant herein has moved this court vide a Notice of Motion dated 13<sup>th</sup> March 2017 under **Article 50** of the Constitution for reinstatement of his application dated 12<sup>th</sup> January 2017 so that the same can be determined on the merits.

2. The grounds upon which this application has been made are as follows namely:

*(i) That the application dated 12<sup>th</sup> January, 2017 was withdrawn on court's own motion due to non attendance of the Applicant's counsel on the date the application was scheduled for hearing.*

*(ii) That the applicant has been diligent in court attendance.*

*(iii) That the date the Application came up for hearing was taken ex parte and was not suitable to the Applicant's Counsel.*

*(iv) That no prejudice will be occasioned to the Respondent if this application was allowed.*

3. In his Supporting Affidavit sworn on 14<sup>th</sup> March 2017 the Applicant has deposed that his Advocate was unable to attend court due to the fact that the date given was inconvenient to his Advocate and that he has always attended court diligently himself.

4. The Respondent has opposed this application vide a Replying Affidavit by James Machirah learned Counsel representing the office of the Director of Public Prosecution. The Respondent contends that this application is unmerited, calculated only waste court's judicious time and meant to block finalization of **Marimanti Criminal Case No. 307 of 2016**. The Respondent has pointed out that the case in the lower court involves a child and that the best interest of the child which is primary consideration dictates that the trial should be concluded expeditiously. The Respondent has also pointed out that the prosecution closed its case on 8<sup>th</sup> June, 2016 but the case is yet to be concluded.

5. The Respondent has contended that the application sought to be reinstated is itself unmerited and has gone to great lengths to demonstrate that the same has no basis. In summary the Respondent contends that the Applicant has no legal or factual basis to seek for DNA sampling when the prosecution has closed its case.

6. This court has considered this Application and the response by the state. There is no doubt that the Respondent's main thrust in opposing this Application is its challenge on the merit of the substantive application dated 12<sup>th</sup> January, 2017. This court observes that the criminal matter pending in the trial court involves a child and that as a matter of law calls for expeditious disposal of the case for the interest of justice. I have not found good reasons why the Applicant's counsel failed to attend court on 20<sup>th</sup> February 2017. As a matter of fact the luckluster approach given to this matter is demonstrated by the

Counsel's conduct in coming to court late on 21<sup>st</sup> June, 2017 when this application was scheduled for hearing. However that approach notwithstanding, I find that the Applicant has been attending court even when his Counsel has been absent. Besides that, this court is minded in the latter and spirit of **Article 159(d)** of the **Constitution of Kenya 2010** to rather determine matters before it on substance rather on technicalities. It is only on this ground that this court is inclined to allow this application.

In the premises the application dated 12<sup>th</sup> January, 2017 is hereby reinstated. The hearing and disposal of the application shall be given priority by this court for the interest of justice. I therefore direct that a hearing of the said application be taken forthwith.

**Dated and delivered at Chuka this 18<sup>th</sup> July, 2017.**

**R. K. LIMO**

**JUDGE**