



REPUBLIC OF KENYA



KENYA LAW
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**Makari v Republic (Criminal Appeal E056 of 2021)
[2022] KECA 922 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 922 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E056 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JUNE 24, 2022**

BETWEEN

SIMON MOYI MAKARI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the ruling of the High Court in Kakamega (Farah Amin J) dated 28th May, 2021 in Kakamega Miscellaneous Criminal Application No. E067 of 2021)

JUDGMENT

1. The appellant was charged in Mumias Senior Principal Magistrate's Court Sexual Offence Case No. 9 of 2017 with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between 10th January 2017 and 23rd January 2017 at Eluosambu area Lubinu location in Mumias East Sub County in Kakamega County, he intentionally caused his penis to penetrate the vagina of GAS a child aged 13 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was tried and convicted on the main count and sentenced to 10 years imprisonment.
2. In his application dated 28th May 2021 filed under Certificate of Urgency in the High Court of Kenya at Kakamega, the appellant sought an order for extension of time to file an appeal out of time against the decision of the trial court. He also sought an order that the appeal attached to his application should be deemed as properly filed. Further, that pending the hearing and determination of the intended appeal, he should be granted bond. The grounds for the application were set out on the face of the application and the appellant's affidavit sworn on 28th May 2021.
3. The application was placed before Farah Amin J and in a ruling dated 28th May 2021, the Honourable Judge made the following orders:



1. Urgency not demonstrated.
2. Application for leave be and is hereby dismissed. The accused was convicted of defilement on the basis of DNA evidence on the child, product of the defilement.
3. There are no grounds put forward why the sentence should be interfered with.
4. Dissatisfied with the orders of the learned Judge, the appellant has filed the present appeal to challenge the ruling of the High Court on his application. The Memorandum of Appeal to this Court was not annexed. However, in the submissions dated 25th February 2022, the appellant refers to a Memorandum of Appeal dated 14th October 2021 and asks this Court to allow his appeal, set aside the ruling of Farah Amin J, and grant him leave to file an appeal against the decision of the trial court out of time. It is his case that the High Court denied him a chance to be heard, thus violating his right to a fair hearing. He makes further submissions regarding the evidence before the trial court, as well as the sentence imposed upon him, which fall outside the jurisdiction of this Court at this stage.
5. At the hearing of the appeal, Mr. Rana held brief for Mr. Wachakana for the appellant while Learned Prosecution Counsel, Mr. Okango, appeared for the State. While the State did not file a reply or submissions on the appeal, Mr. Okango conceded the appeal. He submitted that the 4-month delay in filing the appeal by the appellant was a short period and should have been considered by the High Court.
6. We have considered the record of appeal and the ruling of the High Court. The power to extend time for filing an appeal from a criminal conviction is provided for in section 349 of the [Criminal Procedure Code](#), which provides that:

“349. An appeal shall be entered within fourteen days of the date of the order or sentence appealed against.

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”
7. A cursory reading of the ruling of the High Court shows that in reaching the decision impugned in this appeal, the learned Judge did not consider the provisions of the [Criminal Procedure Code](#) set out above. Instead, and somewhat inexplicably, she considered the merits of the appeal that was yet to be filed or argued. The court did not afford the appellant an opportunity to argue his application, nor did it consider the reasons that he was advancing for seeking leave to file the appeal out of time. The decision reached was clearly erroneous and a misdirection, and it is our finding that the present appeal is merited, and we therefore allow it and set aside the orders of the learned Judge.
8. The appellant seeks extension of time to file an appeal to the High Court from the decision of the Senior Principal Magistrate’s Court. It is the High Court, therefore, that should consider the merits or otherwise of the application. We therefore remit the matter to the High Court for consideration, with directions that the application for extension of time dated 28th May 2021 shall be placed for mention before the High Court in Kakamega within fourteen (14) days of today for directions with respect to the hearing thereof.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

P. O. KIAGE



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JUDGE OF APPEAL
MUMBI NGUGI

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JUDGE OF APPEAL
F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

