



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Lenaola & Ouko, SCJJ)

#### APPLICATION NO. E041 OF 2023

– BETWEEN –

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

– AND –

**JULIUS KITSAO MANYESO ..... RESPONDENT**

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*Being application for extension of time to file an appeal against the judgment of the Court of Appeal (Nyamweya, Lesiit & Odunga, JJ. A.) dated 7<sup>th</sup> July, 2023 in Criminal Appeal No.12 of 2021)*

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#### Representation:

Ms. Fredah Mwanza for the applicant  
(Director of Public Prosecutions)

Mr. Byron Menezes for the respondent  
(L.G Menezes & Co. Advocates)

### RULING OF THE COURT

[1] **COGNISANT** that Julius Kitsao Manyeso, the respondent, was convicted of the offence of defilement under Section 8(1) of the Sexual Offences Act, and sentenced to life imprisonment pursuant to Section 8(3) thereof in the Chief Magistrate's court at Malindi; that his appeal to the High Court, **Criminal Appeal No. 60 of 2018**, challenging the said conviction and sentence was dismissed by a

judgment dated 14<sup>th</sup> May, 2022; and his second appeal to the Court of Appeal, **Criminal Appeal No. 12 of 2021**, was allowed by a judgment dated 7<sup>th</sup> July, 2023 to the extent that the sentence of life imprisonment was declared unconstitutional and substituted with a sentence of 40 years imprisonment; and

**[2] UPON** perusing the Notice of Motion before this Court dated 6<sup>th</sup> October, 2023 and lodged on 11<sup>th</sup> October, 2023 by the applicant under Article 163(4)(a) of the Constitution and Rules 15(2) & 33 of the Supreme Court Rules, 2020 seeking the following orders:

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1. *That the applicant be granted leave to file the petition/appeal out of time.*
2. *That this Honourable Court be pleased to admit and deem the applicant's attached intended petition to have been duly filed.*
3. *That this Court grants such other orders as it may deem fit and just.”*

**[3] FURTHER** considering the affidavit in support of the Motion sworn by Henry Achochi, a Prosecution Counsel, on 4<sup>th</sup> October, 2023 and the applicant's submissions dated 9<sup>th</sup> October 2023, all of which are to the effect that; following the delivery of the Court of Appeal judgment, the applicant filed a Notice of Appeal on 21<sup>st</sup> July 2023 intimating its intention to challenge the impugned judgment; that a team of prosecution counsel drawn from various counties was constituted on 27<sup>th</sup> July, 2023 to review the impugned judgment and give recommendations on a possible appeal to this Court; that by the time the team completed its mandate, there was no substantive holder of the office of the Director of Public Prosecution (DPP) to review the recommendations and give directions on the way forward; that it was not until 25<sup>th</sup> September, 2023 that the current holder of the office of the DPP was sworn in office and he thereafter gave directions on filing of the intended appeal; and

**[4] ADDITIONALLY**, the applicant deposed in the said affidavit that the delay was not intentional; that the intended appeal raises salient constitutional issues that are of public importance; that this Court has jurisdiction to deal with the intended appeal and settle jurisprudential questions/issues that have been raised by the superior courts' decisions on matters relating to Section 8(1) & (2) of the Sexual Offences Act; and that the applicant has met the principles for extension of time as delineated by this Court in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others***, SC Applic. No.16 of 2014; [2014] eKLR; and

**[5] TAKING INTO ACCOUNT** the respondent's submissions dated 25<sup>th</sup> January, 2024 and filed on 26<sup>th</sup> January, 2024 to the effect that the office of the Director of Public Prosecutions created under Article 157(1) of the Constitution is a constitutional office and ought to run smoothly in the absence of a substantive holder of the office of the DPP; that Section 12(1) of the Office of the Director of Public Prosecutions (ODPP) Act provides for the appointment of Deputy Directors to assist the DPP in execution of his/her duties and/or functions under the Constitution; that at the material time there were Deputy Directors in office and as such, there was no void in leadership; that the applicant has not offered a satisfactory explanation for the delay; that the applicant should also seek certification with respect to the issues it claims are of public importance; that the intended appeal is an affront to the respondent's right to certainty in the criminal process and finality of the judicial process; and that the applicant has not sufficiently made out a *prima facie* case to warrant the orders sought; and

**[6] BEARING IN MIND** that this Court is clothed with unfettered discretion under Rule 15(2) of the Supreme Court Rules to extend the time for filing an appeal; and that the principles that govern the exercise of such discretion as delineated in the ***Nick Salat Case*** are as follows:

“...

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”; and*

**[7] UPON DELIBERATIONS ON THE MOTION AND THE RIVAL SUBMISSIONS, WE OPINE as follows:**

- i. It is common ground that the applicant filed a Notice of Appeal on 21<sup>st</sup> July, 2023 evincing its intention to challenge the impugned judgment delivered on the same day.
- ii. From the Motion and the affidavit in support thereof it is clear that the applicant intends to file an appeal to this Court as of right pursuant to Article 163(4) (a) of the Constitution. In point of fact, the petition sought to be filed, a copy of which is annexed to the Motion, indicates as much. What is more, the applicant urged that the intended appeal raises constitutional issues that are of public importance, which the respondent has unfortunately erroneously misconstrued to mean that the applicant should seek certification under Article 163(4)(b) of the Constitution with regard to the issues of public importance.

- iii. It follows therefore that by dint of Rule 38(1)(a) of the Supreme Court Rules, the applicant should have filed the petition/appeal within thirty (30) days of filing the Notice of Appeal, that is, on or before 4<sup>th</sup> September, 2023. (See Rule 15 (1) (b) of the Supreme Court Rules and Section 57(d) of the Interpretation and General Provisions Act). Taking into account the fact that the Motion at hand was filed on 11<sup>th</sup> October 2023, the delay translates to 36 days which the applicant attributed to the absence of a substantive holder of the office of the DPP.
- iv. It is not in dispute that from June, 2023 to 25<sup>th</sup> September, 2023 there was no substantive holder of the office of DPP until the current DPP was sworn in office. We appreciate that Section 12 (1) of the ODDP Act provides for appointment of Deputy Directors to assist the DPP in the execution of his/her duties under the Constitution and/or in any other written law. Likewise, we cannot help but note that Section 12(2) thereof stipulates that, *'The Deputy Directors shall exercise the powers and functions subject to superintendence, directions and control of the Director'*. In the circumstances, the respondent's argument that the Deputy Directors could have discharged the DPP's powers/duties in the absence of a substantive holder of the said office cannot dent the applicant's case.
- v. We find that the applicant has adduced a plausible explanation for the delay in filing the petition/appeal up to when the current DPP was sworn in office. Equally, we find that the explanation is satisfactory for the delay between the assumption of office by the DPP on 25<sup>th</sup> September, 2023 and filing of the Motion at hand on 11<sup>th</sup> October, 2023. The delay of 17 days, in our view, was reasonable in order to allow the DPP to appraise himself with the matter and issue directions thereof.
- vi. Moreover, without pronouncing ourselves on the merits of the intended petition/appeal, we find that grounds of appeal raised therein warrant this

Court's consideration. In particular, whether the Court of Appeal erred in entertaining a constitutional issue that had not been raised at the trial court and the High Court; whether the Court of Appeal had misapplied this Court's decision and subsequent directions in ***Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)***, SC Petition No. 15 & 16 of 2015; [2021] KESC 31 (KLR) in finding the sentence of life imprisonment unconstitutional; and whether the Court of Appeal usurped the legislative powers of Parliament in substituting the sentence of life imprisonment prescribed under Section 8(2) of the Sexual Offences Act with 40 years imprisonment.

- vii. Based on the foregoing, the applicant has satisfied the requisite principles to warrant this Court to exercise its discretion by extending time within which it can file its petition/appeal. However, the applicant's prayer urging us to deem the petition annexed to the Motion as duly filed is untenable since the filing fees for the same have not been paid.
- viii. Taking into account the foregoing and this Court's decision in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others***, SC Petition No. 4 of 2012; [2014] eKLR, we deem it just to order that costs of the Motion shall abide the outcome of the intended appeal.

**[8] CONSEQUENTLY** and for the reasons afore-stated, we make the following Orders:

- i. The Notice of Motion dated 6<sup>th</sup> October, 2023 and filed on 11<sup>th</sup> October, 2023 is hereby allowed only to the extent that leave is hereby granted to the applicant to file and serve the intended petition/appeal within 30 days of the date of this ruling.***

*ii. Costs of the Motion shall abide the outcome of the intended appeal.*

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **1<sup>st</sup>** day of **March**, 2024.

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**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....

**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE PRESIDENT OF THE**  
**SUPREME COURT**

.....

**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy  
of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**