



Republic v Nderitu & another (Miscellaneous Criminal Application E007 of 2024) [2024] KEHC 10474 (KLR) (27 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2024**

**LM NJUGUNA, J
AUGUST 27, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

FRANCIS GITONGA NDERITU 1ST RESPONDENT

EDDY GITONGA NDERITU 2ND RESPONDENT

RULING

1. The applicant filed a notice of motion dated 01st February 2024 premised on the grounds on its face and in the supporting affidavit thereof, seeking the following orders:
 - a. That the applicant be granted leave to file an appeal out of time against the discharge of the respondents under section 202 of the *Criminal Procedure Code* in Siakago Principal Magistrate’s Court Criminal Case no. 877 of 2021 on 11th December 2023; and
 - b. That the petition of appeal be deemed as duly filed
2. It is the applicant’s case that the respondents were discharged by the trial court after the complainant failed to appear in court despite the applicant seeking to withdraw the case under section 87(a) of the *Criminal Procedure Code*. That the case had been given a last adjournment and on the material date, the complainant arrived after the matter had already been dealt with. That the applicant requested for certified copies of proceedings from the court for purposes of appeal but the same were availed on 30th January 2024, when the window of appeal had already closed. It attributed the delay in filing the appeal to the late receipt of the certified copies of proceedings and urged that it is in the interest of justice that the application be allowed.
3. The 1st respondent opposed the application through a replying affidavit dated 27th February 2024 in which he deposed that the applicant should not be allowed to drag him through unending court battles



for a matter that it does not intend to prosecute. He urged the court to dismiss the application with costs. The 2nd respondent also filed a replying affidavit terming the application as vexatious, frivolous and an abuse of the court process. That the complainant was never present in court on 4 occasions and that it should be taken as a sign that the prosecution did not intend to prosecute the matter at all.

4. That even though it is the complainant who has pushed the ODPP to bring this application, he is not willing to have the matter prosecuted since it seems like he is being pushed by a 3rd party. That the orders sought herein may be granted at the discretion of the court but the court should be satisfied that the cause of delay is justified. That the applicant requested for proceedings 11 days after the ruling was delivered and 7 days after the complainant wrote a letter pushing them to appeal, thus the delay cannot be attributed to the court. He urged the court to dismiss the application stating that the appeal has no chances of success and that the applicant is determined to deny his freedom through endless litigation.
5. The application was canvassed by way of written submissions.
6. The applicant submitted that delay in obtaining a copy of the judgment is the only ground considered under section 349 of the *Criminal Procedure Code*, which the applicant has raised. It relied on the case of *Michael Mukwana Wanyonyi v. Republic* (2021) eKLR where the court allowed a similar application on the grounds that the trial court delayed in availing copies of the judgment and proceedings. The applicant asserted its right to appeal as provided for under Article 50 of the *Constitution* which guarantees every accused person the right to fair trial. That the delay of 1½ months in filing the application is not unreasonable and it urged the court to consider granting the application since the appeal raised arguable issues of law.
7. The respondents filed joint submissions stating that the reason for the delay in appealing is not sufficient neither does the appeal stand any chance. That the applicant is on record complaining that the complainant does not attend court, showing that he does not intend to prosecute the case. That the trial court acted within the law in discharging the respondents under section 202 of the Criminal Procedure Code. They relied on the case of *Republic v. Ahmed Fakir Mohamed* (2021) eKLR where the court cited the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR which laid down circumstances under which the court may extend the time to appeal.
8. It is their case that the applicant is not interested in prosecuting the case even though it is prompted to do so by the complainant. They stated that they are incurring costs in seeking representation while the complainant is being represented for free by the State and that this is a great inconvenience. They urged the court to dismiss the application as the applicant is undeserving of the orders sought.
9. The issue for determination is whether the application has merit.
10. Section 349 of the *Criminal Procedure Code* permits this court to exercise its discretion in enlarging time to appeal for good cause. Delay in obtaining the impugned judgment or order from the trial court is one such reason. This provision states:

“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.”



11. The applicant stated that it applied for copies of the proceedings, which includes the impugned order but the same was only availed on 30th January 2024. The said impugned order was made on 11th December 2023, following which the complainant wrote a letter dated 13th December 2023 requesting the ODPP to follow up on reinstatement of the case. In the said letter, he stated that he had already organized for his witnesses to attend court. On 22nd December 2023, the applicant wrote a letter to the trial court requesting for certified copies of the proceedings. The copies were availed on the date hereinbefore stated and thereafter, the applicant promptly filed the application herein together with the petition of appeal.
12. The respondents have opposed the application, stating that it is a ploy to cause them the pain of endless litigation since the conduct of the complainant and the applicant does not demonstrate their seriousness to prosecute the case. The issue of the conduct of parties at the trial court is a substantive issue of the appeal itself and it should be left out for now.
13. Indeed, there is a delay in filing the appeal but in the period between the impugned order and filing of the application herein, the applicant has demonstrated promptness in its intentions thus far. Considering the provisions of section 349 of the Criminal Procedure Code, this court is at liberty to admit an appeal out of time, being satisfied that the delay was in obtaining certified copies of the impugned order. The applicant has already filed a petition of appeal and seeks that the same be deemed as properly on record following granting of leave.
14. In the case of Samson Owiti Otambo v Republic (2018) eKLR the court stated:

“The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court.”

Further, in the case of Michael Onyango Owala v. Republic (2018) eKLR the court stated as follows:

“Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the Criminal Procedure Code to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an ‘appeal’ is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.”
15. In the circumstances, and for the reasons given herein, I find that the application has merit and it is hereby allowed as prayed.
16. The appeal is hereby deemed as properly filed and within the prescribed time.
17. The applicant/appellant to file the record of appeal within 14 days from the date of this ruling.
18. Thereafter the appeal to be prosecuted within 90 days failing which it shall stand dismissed.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA



JUDGE

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

