



**Director of Public Prosecutions v Okemo (Miscellaneous Criminal Application E183 of 2023) [2023] KEHC 26753 (KLR) (Crim) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26753 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E183 OF 2023  
K KIMONDO, J  
DECEMBER 20, 2023**

**BETWEEN**

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

**AND**

**CHRYSANTHUS BARNABAS OKEMO ..... RESPONDENT**

**RULING**

1. The Director of Public Prosecutions (hereafter the DPP or the applicant) craves leave to lodge an appeal out of time. The notice of motion is dated 17<sup>th</sup> May 2023 and predicated upon the deposition of Mr. Victor Owiti, Principal Prosecution Counsel.
2. The motion is fervently opposed by the respondent through a replying affidavit sworn on 27<sup>th</sup> June 2023.
3. The background is fairly straightforward: On 30<sup>th</sup> November 2022, the lower court dismissed the DPP's request to extradite the respondent to Jersey Island. Those proceedings were in the Chief Magistrates Court at Nairobi in Miscellaneous Application No. 9 of 2011 DPP v Samuel K Gichuru & Chrysanthus B. Okemo.
4. The DPP failed to lodge his appeal within 14 days as ordered by the lower court. In a nutshell, the DPP assigns the delay to the need "to consult with various actors in the criminal justice system" and the failure by the registry to supply him with the certified copies of proceedings. Regarding the latter, the DPP avers that he made an application immediately and delivered a number of reminders (exhibits JVO-1, 4 & 6). The Registry had indicated the proceedings would be ready by 24<sup>th</sup> April 2023. However, they did not supply them until 11<sup>th</sup> May 2023 (exhibit JVO-7).



5. In the meantime, and on 16<sup>th</sup> December 2022, the applicant made an application for leave to appeal out of time at the High Court. On 13<sup>th</sup> February 2023, the court (Bwonwonga J) ruled that the motion for leave was premature “as the applicant had not been supplied with the certified copy of proceedings”. A draft Petition of Appeal had been annexed to that motion.
6. The respondent on the other hand contends that the supply of the certified copies of proceedings or ruling was not a bar to drawing and filing a petition of appeal. It is deposed that the DPP was a party throughout the proceedings and the grounds of any appeal were apparent. Furthermore, there is no good explanation why such petition was not formulated immediately after receipt of the proceedings on 7<sup>th</sup> December 2022.
7. It is thus contended that the delay is not well explained. Counsel argued that the DPP could have lodged an interim petition and sought to amend it later under section 350 of the [Criminal Procedure Code](#). He is also faulted for failure to name the “actors in the criminal justice system” that he was consulting. In any case, such consultation would fly in the face of his constitutional independence under Article 157 of the [Constitution](#).
8. The respondent further submitted that the intended appeal lacks merit in view of the fact that the DPP elected to proceed by documentary evidence and not call witnesses. Finally, learned counsel submitted that there must be an end to litigation noting that the respondent is 77 years; and, the litigation has been in the courts for 12 years.
9. I take the following view of the matter. In view of the nature of orders that I propose to make, it would be prejudicial to delve into the merits of the intended appeal.
10. The legal parameters of an application of this nature are well settled: This court has wide and unfettered discretion to extend time. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), [Mungatu v Republic](#), Court of Appeal Nairobi, Criminal Application E009 of 2023 [2023 KECA 671 (KLR)].
11. I can also safely state as follows. The DPP was an active participant in the extradition proceedings. A diligent prosecution counsel may well have formulated some grounds of appeal and drafted a petition of appeal even without waiting for the certified copies of the proceedings. It would remain open to seek leave to amend it later under section 350 of the [Criminal Procedure Code](#).
12. I am at great loss why the DPP required to consult unnamed actors in the criminal justice system before making up his mind on whether or not to prefer an appeal. Article 157 (10) of the [Constitution](#) is explicit that in the exercise of his powers or functions, the DPP “shall not be under the direction or control of any person or authority”. Learned Principal Prosecution Counsel Mr. Victor Owiti, offered a lame excuse: That since the matter related to extradition proceedings across jurisdictions, such consultations were necessary.
13. That said, I note that the applicant applied for the proceedings without delay. But I also find that he dithered after receipt of the certified copy of the ruling on 7<sup>th</sup> December 2022 as admitted in paragraph 4 of the supporting affidavit. Surely, any grounds of appeal were now apparent in the impugned ruling.
14. However, when the time for lodging the appeal expired, a suitable motion was immediately made to the High Court on 16<sup>th</sup> December 2022 attaching a draft petition of appeal. Like I stated, on 13<sup>th</sup> February 2023, the court (Bwonwonga J) ruled that the motion for leave was premature “as the applicant had



not been supplied with the certified copy of proceedings”. Granted those circumstances and the ruling, I am unable to condemn the applicant for the delays.

15. I agree that at 77 years of age, the respondent is now an elderly man. The litigation has also been in our courts for a lengthy 12 years. As to whether the door to this case should now be closed, or, whether the intended appeal is meritorious, the answers fall within the province of the first appellate court. The less I say about it the better.
16. For all those reasons, I am minded to exercise my discretion in favour of the applicant. My final orders shall be as follows:
  - a. That leave be and is hereby granted to the applicant to lodge an appeal out of time. The petition of appeal *must* be formally filed and served upon the respondent within 14 days of today’s date.
  - b. That in default, the leave granted shall automatically abate.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2023.**

**KANYI KIMONDO**

**JUDGE**

Ruling read virtually on Microsoft Teams in the presence of: -

Mr. Mungla & Mr. Wamalwa for the respondent instructed by Paul Mungla & Company Advocates.

Mr. E. Ombuna, Court Assistant

