



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Jefwa (Criminal Appeal E026 of 2021)
[2022] KEHC 17269 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 17269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E026 OF 2021
SM GITHINJI, J
MAY 31, 2022**

BETWEEN

REPUBLIC APPELLANT

AND

RONALD KANANA JEFWA RESPONDENT

(Appeal from the original acquittal in Kaloleni S.O. Case No.4 of 2020 at Principal Magistrate's Court at Kaloleni, Hon. L.N.Wasige – PM dated 9th August, 2021)

RULING

1. For determination is the Respondent's Notice of Preliminary Objection dated December 2, 2021 raised on the following grounds;
 1. That the Court lacks the jurisdiction to hear and determine this appeal having been filed outside the statutory period or within the enlarged period of time with leave of court.
 2. The appeal filed herein is bad, irregular and unknown in law and is contrary to section 349 of the *Criminal Procedure Code* Cap 75 Laws of Kenya.
 3. The appeal herein is an abuse of court process; an afterthought and in the circumstances should be struck out with costs. (sic).

The Respondent's Submissions

2. The respondent submitted that the appeal was made out of time without leave of the court to enlarge time thus the appeal is bad in law and incurably defective contrary to the provisions of Section 349 of the Criminal Procedure Code. Further that the Appellant has failed to demonstrate that the delay to lodge the Appeal out of time was caused by inability to obtain court proceedings. They relied on the



authority of *Michael Onyango Owalo v Republic [2018] eKLR* and *Samson Owiti Otambo v Republic [2018] eKLR*.

Appellant's Submissions

3. The Appellant submitted that the appeal should not be determined on a technicality as a procedural technicality is curable by Article 159 (1) (d) of the *Constitution*. Furthermore, there would be no prejudice on the Respondent as the delay in filing the appeal is not inordinate.

Analysis and Determination

The issues that arise for determination are;

- a. What is the period that a criminal appeal should be filed and how is that period computed.
- b. Does the court have discretion to admit an appeal filed out of time without leave?
- c. Whether the Preliminary Objection is meritorious.
4. The timelines within which a criminal appeal should be filed is statutorily provided under Section 349 of the Criminal Procedure Code which provides:

' 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.'

5. Therefore; the section is clear that an appeal 'shall be entered within 14 days of the date of order or sentence appealed against.' In other words, an appeal shall be filed within 14 days from the date of the Order or sentence appealed against.

Section 57 of Cap 2 provides:

' In computing time for the purpose of a written law, unless the contrary intention appears-

- a) A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which that event happens or the act or thing is done,
- b) If the last day of the period is Sunday, or a public holiday or all official non-working days (which days are in this Section referred to as excluded days), the period shall include the next following day not being an excluded day.
- c) Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done on the next day afterwards, not being an excluded day.
- d) Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time.'



6. Section 57 (a) of Cap 2 excludes the day the order or sentence was pronounced in the computation of time. Section 57 (b) excludes holidays and allows an appeal whose last day of filing falls on a public holiday be filed the next day which is not excluded. Section 57 (d) is to the effect that weekends are not excluded in computation of time save for Sunday.

The second issue for determination is whether the Court has discretion to admit an appeal filed out of time without leave of the court. Section 349 of the Criminal Procedure Code provides that the court may admit an appeal after the period of 14 days. Section 349 of the Criminal Procedure Code use of that word 'admit', in my view, implies that the court can only admit an appeal that is already filed. In other words, that Section empowers the court to validate an appeal filed outside the 14 days' period. That means that under Section 349 of the Criminal Procedure Code, the court can validate or allow an appeal filed outside the 14 days period. Unless validated, the appeal filed outside the 14 days is incompetent. It is made competent by the validation or when it is admitted under Section 349 of the Criminal Procedure Code.

7. Can the court admit an incompetent appeal filed outside the 14 days' period? The answer is in affirmative, but such an admission can only be out of an application by the Appellant. The court as suggested by the state, can only admit an appeal under Section 349 of the Criminal Procedure Code, if such a prayer has been sought and allowed. If the court was to deal otherwise, it would have to ascertain on it's own on the cause for the delay and whether the delay is inordinate.

I am guided by the holding of the Supreme Court in the case of *Moses Mwicigi and 14 Others -vs- Independent Electoral and Boundaries Commission and 5 Others Supreme Court Petition No 1 of 2015*:

' This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.'

8. Section 349 of the Criminal Procedure Code is clear that the court can admit an appeal filed out of time but the court must be moved by way of an application. It is perhaps on being successfully moved that the court can exercise substantive justice.

On whether the Preliminary objection is meritorious, In *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd 1969) EA 696*, the locus classicus on preliminary objections in this region, Law JA stated:

' So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'

2. 'For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is



the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.'

9. It's not in dispute that the Court pronounced itself on August 9, 2021 and the Appeal herein was filed on August 25, 2021 which is outside the 14 days period allowed to lodge an Appeal. The Appellant have not sought leave to appeal out of time. This being the case, it's vivid that the said appeal is incompetent, bad in law and incurably defective. The Preliminary Objection therefore succeeds. The Appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31st DAY OF OCTOBER, 2022

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S.M. GITHINJI

JUDGE

In the absence of; -

The Respondent

In the present of Ms Mutua for the State

Ruling be served upon the Respondent.

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S.M. GITHINJI

JUDGE

