



**Director of Public Prosecutions v Ngari (Miscellaneous Criminal Application
E002 of 2022) [2022] KEHC 12250 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 12250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2022
LM NJUGUNA, J
JUNE 29, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

JOHN KARIUKI NGARI RESPONDENT

RULING

1. Before this court is a notice of motion brought under sections 348A and 349 of the [Criminal Procedure Code](#) dated January 192022 seeking the following orders from this court.
 - i. An order for leave to file appeal out of time.
 - ii. An order that the petition of appeal annexed hereto be deemed to have been duly filed.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant. The applicant's case is that the respondent herein was acquitted of the offence of attempted rape by the trial court at Siakago Law Courts in Sexual Offences Case no 26 of 2020 for the reasons that there were inconsistencies in the witness testimonies and further that, the record did not support the alleged offence. That the trial court failed to consider the evidence adduced by the prosecution witnesses and only concentrated on the evidence by the defence thus totally disregarding the evidence by the prosecution. It was her case that the ends of justice shall not be met if this appeal is not filed because the complainant continues to feel prejudiced by the said acquittal. In the end, this court was urged to allow this application.
3. The respondent opposed the application on the grounds that the same is misconceived and lacks merit; that the right of appeal is only fourteen days from the date of judgment and further that, there is no demonstration that the applicant had sought for typed proceedings and a decree/judgment. It was



further the respondent's case that the delay by the applicant has not been explained given that it was more than two months since the trial court acquitted the respondent herein. In the end, this court was urged to dismiss the application herein for the reason that the annexed petition of appeal does not demonstrate that the orders sought herein are deserved.

4. Directions were given that the application be canvassed by way of written submissions which the respondent complied with but the applicant did not. The respondent urged the court to dismiss the application as the applicant has not met the legal requirements for this court to exercise its discretion to allow extension of time for the applicant to file its appeal out of time. Reliance was placed on the case of *Director of Public Prosecution v Peter Mcharo Kombo & Another* [2018] eKLR.
5. I have considered the application, grounds of opposition and the submissions by the respondent and I find that the issue that I have to determine is whether the applicant has made out a case for the grant of an order for extension of time within which to file his appeal.
6. A party who is desirous of appealing against an order/sentence to the High Court has to do so within 14 days, following the delivery of the judgement/ruling sought to be appealed against. However, the High Court may for good cause extend time within which the convicted person may appeal. This is clear from the provisions of section 349 of the *Criminal Procedure Code* (cap 75) Laws of Kenya, which read as follows;

“ 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 therefore.”

7. Section 349, clothes this court with discretionary powers to be exercised for the interest of justice to the parties. Illuminative principles that the Court ought to keep in mind in the exercise of its discretion may be drawn from *Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application no 255 of 1997 UR where the Court stated:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay.

Secondly, the reason for the delay;

Thirdly possibly the chances of the appeal succeeding if the application is granted; and

Fourthly the degree of prejudice to the respondent if the application is granted.”

8. Similarly, in *Republic v William Macharia Murathe* [2016] eKLR, Mativo J held: -

“The issues that fall for determination in this application are (a) whether the applicant has disclosed a good cause as provided in the above proviso to warrant this court to allow the application under consideration. In other words, has the applicant demonstrated a bona fide intention to appeal within the prescribed appeal period but could not file the appeal due to failure to obtain the proceedings; or has the applicant accounted for or explained the



delay in initiating the appeal; (b) Did the DPP act independently in preferring the intended appeal and (c) does the proposed appeal have merits.”

9. As such, extension of time within which to appeal is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
10. The question therefore is whether the applicant has met the above conditions.
11. As for the length of the delay, it is not in dispute that the judgement herein was delivered on November 23, 2021 and the application herein was filed on January 21, 2022 which is roughly two months from the date of the said judgment. In the case of *Michael Mukhwana Wanyonyi v Republic* [2021] eKLR the court stated that what is unreasonable delay is dependent on the circumstances of each case. It therefore followed that the delay of about 6 months in filing the application was found not to be unreasonable.
12. In the case herein, the applicant has provided reasons for the delay and which she has urged this court to consider when determining the application herein. From the records, the judgment which the applicant seeks to appeal against has not been attached and likewise the proceedings; and in reference to that, I am in agreement with the respondent that such piece/s of evidence would have been proper to prove that indeed, the applicant has applied for typed proceedings before the trial court to enable her file the intended appeal. [See *Abdulla Lule v R* (1960) EA 21].
13. The applicant submitted that upon delivery of the judgment, she sought to obtain the typed proceedings and judgment before time lapsed but the same was not possible given that the same were obtained almost one month after the time had elapsed.[See *Abdulla Lule v R* (1960) EA 21], the applicant’s application to appeal out of time was allowed because he did not obtain the judgement and proceedings of the lower within 14 days to enable him to appeal.
14. The right to be heard is not only constitutionally entrenched but it is also the corner stone of the rule of law; a valued right; and is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice. [See article 50 of the *Constitution*].
15. In the same breadth, article 159 (2) (d) of the 2010 *Constitution of Kenya* mandates this court to administer substantive justice without undue regard to procedural technicalities.
16. As for the chances of the intended appeal succeeding, I have perused the draft petition of appeal. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. For the intended appeal to be termed as arguable, all that is needed in Law is that there be even one arguable point and that will suffice [See *Samson Owiti Otambo v Republic* [2018] eKLR].
17. I have perused the notice of motion by the applicant, the grounds thereon and further, the grounds on the draft petition of appeal dated January 19, 2022. The applicant has urged this court to consider the fact that the law in regards to corroboration of a minor’s testimony in sexual offences was allegedly misinterpreted by the trial court and as such, the appeal herein should be allowed. In my view, the issues raised by the applicant are arguable; however it is essential to note that an arguable appeal does not necessarily mean an appeal that will or must succeed.
18. As for the prejudice which the respondent stands to suffer should leave be granted, from the respondent’s grounds of opposition, I did not come across any credible evidence to indicate any prejudice that would outweigh the granting of the orders sought. This is buttressed by the fact that the



appeal herein is bound to be heard and determined on its own merits; and further, the respondent will equally be granted an opportunity to present his case.

19. Considering that the extension of time to file appeal is a matter of exercise of judicial discretion, where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in her favour and especially where the delay in filing the appeal has been satisfactorily explained. However, discretion of the court must always be exercised judiciously and that the applicant having expressed her intentions to be heard by this court on appeal, it is my considered view that an opportunity should be availed to her to ventilate her issues.

20. In the end, the application is hereby allowed and the following orders are made;

- i. That leave be and is hereby granted to the applicant to file an appeal out of time.
- ii. The petition of appeal dated January 19, 2022 is deemed as filed.
- iii. That the applicant to file and serve the record of Appeal within 30 days from the date of this ruling.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2022.

L NJUGUNA

JUDGE

.....for the appellant

.....for the respondent

