



REPUBLIC OF KENYA



**Republic v Kariuki (Miscellaneous Criminal Application E026 of 2022)
[2022] KEHC 15999 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E026 OF 2022
LM NJUGUNA, J
NOVEMBER 30, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

THOMAS MUGAMBI KARIUKI RESPONDENT

RULING

1. Before this court is a notice of motion brought under Articles 50(1), 159 (2) (b) & (d) of *the Constitution*, Sections 348A and 349 of the *Criminal Procedure Code* and dated June 29, 2022 seeking the following orders that:
 - i. The applicant be granted leave to file an appeal out of time.
 - ii. The Honourable court be pleased to order that the petition of appeal annexed to the application be deemed to have been duly filed.
 - iii. The Honourable court be pleased to issue any other order it may deem fit to grant.
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 hinged on the fact that the respondent herein was charged in Embu Criminal Case No. 704 of 2020 with the offence of threatening to kill contrary to Section 223(1) of the *Penal Code*. That the trial court acquitted the respondent for the reasons that the prosecution's case was doubtful when the same was strong, credible and corroborated in all material particulars. That the learned trial magistrate erred in law and fact by failing to find that the prosecution had proved its case beyond reasonable doubt. It was the applicant's case that the trial magistrate misdirected himself by improperly analyzing the evidence before him thus acquitting the respondent. The applicant thus urged this court to allow the application herein.



3. The respondent opposed the application for the reason that the court after hearing both parties reached a determination that the case was not proved beyond reasonable doubt. He contended that the evidence adduced by the prosecution was marred with hearsay and as such, it was proper for the trial magistrate to acquit him. He faulted the applicant for having failed to do proper investigations to support its case and as such, prayed that the application be dismissed.
4. Directions were given that the application be canvassed by way of written submissions which directions, the applicant complied with but the respondent did not.
5. The applicant submitted that the delay in filing the appeal was not intentional and was caused by its inability to get certified copies of the proceedings and judgment on time.
6. It was also submitted that the appeal raises substantial issues of law and therefore it is only just and fair that the same be allowed. That Section 349 of the CPC provides that an appeal should be filed within 14 days of the sentence or order appealed against. It was its contention that the law permits the appellate court to take into account a request for filing an appeal outside the prescribed time if the applicant can demonstrate that the failure was brought about by a delay in securing the judgment or order being contested. The applicant further stated that the respondent was on April 26, 2022 acquitted in Embu Criminal Case No. 704 of 2020 for the offence of threatening to kill contrary to Section 223(1) of the *Penal Code*. That the complainant felt aggrieved by the decision of the trial court hence the application herein. It was submitted that upon receiving the complaint, it requested for copies of proceedings and judgment and the same were received on May 26, 2022. That thereafter, it requested the initial police file and on perusal, it formed the opinion that there was an arguable case. It was its case that, should leave be denied, the complainant will suffer prejudice as he will have been denied an opportunity to be heard on appeal. It was thus prayed that the application be allowed.
7. I have considered the application and the submissions by the applicant 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 its appeal.
8. 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 an aggrieved party 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.”
9. Section 349, clothes this court with discretionary powers which should be exercised in 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.”

10. Similarly, drawing from comparative jurisprudence on the matter of enlargement of time pending appeal, the Supreme Court of Appeal of South Africa in the case of *S v Smith* [2012] 1SACR 567 elaborated the test to be applied on applications for leave to appeal in the following manner:

What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion difference to that of the trial court. In order to succeed, therefore the applicants must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for the conclusion that there are prospects of success on appeal.

11. 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.
12. The question therefore is whether the applicant has met the above conditions.
13. As for the length of the delay, it is not in dispute that the judgement herein was delivered on April 26, 2022 and the application herein was filed on June 30, 2022 which is roughly two months from the date of the said ruling. In the case of *Jaber Mohsen Ali & Another v Priscillah Boit & Another* E & L No. 200 of 2012 {2014} eKLR the Court stated that what is unreasonable delay is dependent on the circumstances of each case. Even one day after Judgment/Ruling could be unreasonable delay depending on the Judgment/Ruling of the Court and any order given thereafter.
14. 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 received by the applicant on June 26, 2022 after the time had elapsed. [See *Richard Nchapi v IEBC & 2 others* (*supra*) and further, in *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.
15. 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*].
16. 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.



17. As for the chances of the intended appeal succeeding, I have perused the draft petition of appeal and 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 *Commissioner of Customs v Anil Doshi*, {2017} eKLR; *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008].
18. I have perused the notice of motion by the applicant, the grounds thereon and further, the grounds on the draft petition of appeal dated June 29, 2022. The applicant has urged this court to consider the fact that the trial court dismissed the applicant's case for the reasons that the prosecution's case was doubtful when the same was strong, credible and corroborated in all material particulars. That the learned trial magistrate erred in law and fact by failing to find that the prosecution had proved its case beyond reasonable doubt. It was the applicant's case that the trial magistrate misdirected himself by improperly analyzing the evidence before him thus acquitting the respondent. 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.
19. As for the prejudice which the respondent stands to suffer should leave be granted, from the respondent's replying affidavit, I did not come across any credible evidence to indicate any prejudice that would outweigh the grant of the orders sought. I say so for the reason that the appeal herein shall be heard and determined on its own merits and further, the respondent shall have an opportunity to present his case.
20. 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 it to do so.
21. 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 to be filed within fourteen (14) days from today.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2022.

L. NJUGUNA

JUDGE

..... for the Applicant

.....for the Respondent

