



Republic v Mwangi & 2 others (Criminal Miscellaneous Application E035 of 2022) [2022] KEHC 16445 (KLR) (Crim) (19 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E035 OF 2022
K KIMONDO, J
DECEMBER 19, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

LUCY WAITHIRA MWANGI 1ST RESPONDENT

JULIUS KARIUKI MWANGI 2ND RESPONDENT

JOHN IRUNGU GITHINJI 3RD RESPONDENT

RULING

1. The republic through the Director of Public Prosecutions (hereafter the DPP) seeks leave to lodge an appeal out of time. The intended appeal is against an acquittal of the three respondents in Nairobi Chief Magistrates Court Criminal Case Number 1967 of 2013, Republic v Lucy Waithira Mwangi & 2 others (hereafter the criminal case).
2. The impugned decision was rendered on January 10, 2022. The applicant did not present an appeal within the statutory period of 14 days. In the notice of motion dated February 7, 2022, it blames the delay on failure to “obtain typed proceedings”. A letter dated January 12, 2022 to the court requesting for proceedings is annexed to the supporting affidavit marked MA1.
3. Of note is that the letter emanated from the complainant’s counsel. The complainants in the criminal case also authored a letter dated January 25, 2022 to the DPP prodding his office to consider an appeal.
4. That partly explains the strenuous opposition by the respondents who contend that the DPP was disinterested in the appeal; and, that the office is being directed by the complainants contrary to article 157 of the Constitution. The second limb of the objection is that the typed proceedings were not



required in filing the petition of appeal. Thirdly, it is submitted that the delay from January 10, 2022 is lengthy and ill-explained.

5. Those objections are buttressed by the affidavit of the 1st respondent sworn on July 27, 2022.
6. The applicants filed skeleton submissions on April 8, 2021. The respondents relied on their submissions dated October 28, 2022.
7. On December 7, 2022, I heard further arguments from learned counsel for the DPP and for the respondents.
8. I take the following view of the matter. Under section 348A of the Criminal Procedure Code (hereafter the Code), the DPP has an undoubted right of appeal to the High Court against an acquittal by the subordinate court. But he failed to do so within the requisite time.
9. I agree with the respondents that the complainants largely moved the DPP to act vide their letter of January 25, 2022. Needless to say, the intended appeal against their acquittal is prejudicial. But I remain alive that in criminal proceedings, the DPP acts on behalf of the public through complainants.
10. In view of the orders that I propose to make, I do not wish to comment on the merits of the intended appeal; or, whether, in this particular case, the DPP's independence and power under the Constitution was compromised.
11. What is clear is that the motion for leave was presented to court on February 10, 2022, a delay of about 28 days. Section 349 of the Code provides 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 therefor. [underlining added].

12. I do not fully agree with the respondents that copies of proceedings are unnecessary in presenting a petition of appeal. In this case, it appears a typed judgment was available immediately after delivery of the judgment. Two days later on January 12, 2022, the complainants' counsel applied for typed proceedings. I thus readily find that the application here falls squarely within the proviso to section 349 of the Code highlighted above. The upshot is that I am satisfied that the applicant is deserving of leave.
13. My final orders are thus as follows-
 - a. That leave be and is hereby granted to the DPP to lodge an appeal out of time.
 - b. That the petition of appeal must now be filed and served within 7 days of today's date.
 - c. That in default, the leave granted shall automatically abate.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2022.

KANYI KIMONDO

JUDGE



Ruling read virtually on Microsoft Teams in the presence of-

Ms. Kigira holding brief for Ms. Chege for the applicant instructed by the Office of the Director of Public Prosecutions.

Mr. Wangalwa for the respondents instructed by Wangalwa Oundo & Company Advocates.

Mr. Edwin Ombuna, Court Assistant.

