



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CRIMINAL APPLN. NO. E102 OF 2021**

**PHILIP OKEYO OBURE.....APPLICANT**

**VERSUS**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**

**SIMEON SAGANA KANANI.....2<sup>ND</sup> RESPONDENT**

**LUCAS MATIVO CHACHA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The background against which the application subject of this ruling was filed is that the applicant, *Philip Okeyo Obure*, was jointly charged with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in *Milimani Criminal Case No. 987 of 2011* in four counts with the offences of stealing contrary to *Section 275 of the Penal Code*; conspiracy to defraud contrary to *Section 317 of the Penal Code* and fraudulent accounting contrary to *Section 328 (b) of the Penal Code*.

2. The lower court's record reveals that on 14<sup>th</sup> December 2020, the applicant through his learned counsel *Prof. P.L.O. Lumumba* made an application before the trial court seeking to have the trial start *de novo* after the prosecution had closed its case and the applicant and his co-accused had been placed on their defence. The application was heard and dismissed by the learned trial magistrate *Hon. S.A. Opande (Mr.) (SRM)*.

3. The applicant was aggrieved by the trial court's decision and this is what triggered the filing of the Notice of Motion dated 30<sup>th</sup> March 2021.

In the motion, the applicant sought the following three substantive orders:

i. That the applicant be granted leave to lodge his appeal against the ruling and order of *Hon. S.A. Opande (SRM)* in *Criminal Case no. 987 of 2011: Republic v Simeon Sagana Kanani & 2 others* delivered on 1<sup>st</sup> February 2021 at Nairobi out of time.

ii. That the petition of appeal annexed to the application be deemed as duly filed.

iii. That the court be pleased to order that pending the hearing and determination of the intended appeal, there be a stay of the defence hearing scheduled for 28<sup>th</sup> April 2021 and or any other proceedings in the matter before the trial court.

4. The application is supported by the grounds stated on its face which are reproduced in the depositions made in the supporting affidavit sworn by *Prof. P.L.O. Lumumba*.

The applicant contends that he is aggrieved by the trial court's decision and desires to lodge an appeal against it but as time to do so has expired, he needs this court's leave to file his intended appeal out of time.

5. *Prof. P.L.O. Lumumba* deposed that he applied for a certified copy of the ruling, order and typed proceedings of the trial court vide letter dated 18<sup>th</sup> February 2021 and received a copy of the court's undated ruling on 22<sup>nd</sup> March 2021; that the delay of two months in instituting the applicant's intended appeal was largely occasioned by the delay in obtaining copies of the ruling and or order of the trial court which under *Section 350 (1) of the Criminal Procedure Code (CPC)* should accompany a petition of appeal.

6. Counsel further averred that under the proviso to *Section 349 of the CPC*, this court has power and discretion to admit an appeal out of time if it was satisfied that failure to file the intended appeal within time was caused by the appellant or his advocate's inability to obtain a copy of the judgment or order appealed against and a copy of the record within a reasonable time.

7. The application is opposed by all the respondents. The 1<sup>st</sup> respondent opposed the motion through grounds of opposition dated 19<sup>th</sup> April 2021 and further grounds of opposition dated 6<sup>th</sup> May, 2021. The 1<sup>st</sup> respondent mainly challenged the application on grounds that it offends the provisions of *Article 50 (2) (e)* of the *Constitution* which enjoins the courts and all litigants to proceed expeditiously in all trials; that both the *Constitution* under *Article 50 (1) (q)* and the CPC under *Section 347 (1) (a)* gives an accused person a right of appeal only against conviction; that this is not an exceptional case that would warrant entertainment of an interlocutory appeal since there is no demonstration of existence of any threat to the applicant's rights.

8. The 1<sup>st</sup> respondent advanced the view that the application was a delaying tactic aimed at frustrating the expeditious disposal of the criminal trial and urged me to dismiss it for lack of merit.

9. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents also filed grounds of opposition dated 14<sup>th</sup> April 2021 in which they attacked the application on the following grounds:

i. That the applicant is guilty of laches having brought the application two months after the impugned ruling and without any credible explanation for the delay.

ii. That the application does not satisfy the criteria and principles for stay of proceedings as established in our jurisprudence.

iii. That the application's net effect, if granted, will be to further delay conclusion of CM Cr Case No. 987 of 2011, a matter that has been in court for a decade now.

iv. That the applicant, in any event, does not have an arguable appeal with any chance of success.

v. The balance of convenience lies in dismissing the application.

10. At the hearing, learned counsel appearing for each of the parties, namely, *Prof. Lumumba* for the applicant, learned prosecuting counsel *Ms Ndombi* for the 1<sup>st</sup> respondent and *Mr. Ongoya* for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents told the court that they wished to entirely rely on the material they had placed before the court in support and in opposition to the motion.

On behalf of the applicant, reliance was placed on skeleton written submissions filed on 23<sup>rd</sup> November 2021 while the 1<sup>st</sup> respondent relied on the two sets of grounds of opposition referenced earlier and written submissions filed on 31<sup>st</sup> May, 2021. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents relied on their grounds of opposition dated 14<sup>th</sup> April 2021.

11. In their submissions, *Prof. Lumumba* and *Ms Ndombi* basically reiterated and expounded on the position taken by their respective clients in support and in opposition to the motion.

In addition, *Prof. Lumumba* relied on the authorities of *Republic V Devraj Manji Sergani & 3 Others, [2018] eKLR*; *Silas Okumu Diang'a/ODPP V George Onyona Arek, [2020] eKLR*, to reinforce his submissions that this court has jurisdiction to admit an intended criminal appeal out of time. Reliance was also placed on *Ian Gakoi Maina & 3 Others V Republic & Another, [2020] eKLR* and *Reliance Bank Ltd V Norlake Investments Ltd, [2002] EA 227*, in urging me to stay the proceedings before the trial court pending conclusion of the intended appeal.

12. Besides restating the points taken in its grounds of opposition, the 1<sup>st</sup> respondent in its submissions invited the court to dismiss the application for being incompetent and an abuse of the court process.

13. I have carefully considered the application, the grounds of opposition filed by the respondents and the rival written submissions filed on behalf of the applicant and 1<sup>st</sup> respondent. I have also perused the trial court's original record. Having done so, I find that the only issue which crystallizes for my determination is whether the prayers sought in the motion should be granted.

14. I wish to start by observing that it is common ground, and this is confirmed by the trial court's record, that the criminal case involving the applicant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is still pending conclusion and is currently at the defence hearing stage. This means that what the applicant intends to file out of time if granted leave, is an interlocutory appeal against a ruling delivered by the trial court in the course of the trial.

15. What then does the law say about the right of appeal in criminal proceedings?

*Article 50 (q)* of the *Constitution* and *Section 347* of the *CPC* are relevant.

*Article 50 (q)* of the *Constitution* which is part of the body of rights meant to guarantee accused persons a fair trial provides that an accused person has a right to:

***“if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”***

*Section 347* which deals with appeals to the High Court states as follows in *subsection 1 (a)*:

***“Save as in this Part provided –***

*(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; ....”*

16. The Court of Appeal in *Martin Makhakha V Republic, [2019] eKLR* when interpreting Section 347 (1) (a) of the CPC expressed itself as follows:

*“Under section 347(1)(a) of the Criminal Procedure Code, a right of appeal from a subordinate court to the High Court only arises where an accused person has been convicted. Therefore, the appellant had no right of appeal against the interlocutory ruling made by the trial magistrate. His appeal before the High Court was therefore incompetent.”*

17. This court in the case of *John Njenga Kamau V Republic, [2014] eKLR* when considering whether an accused person has a right to file an appeal against an interlocutory ruling passed by a trial court in criminal proceedings stated thus:

*“The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court’s considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case. This position is supported by the finding made by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley –vs- Republic [2008] eKLR*. At page 19 of its judgment, the court had this to say:*

*“In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379(1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand, the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;... the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental rights, falls by the way side and causes no harm to such an accused person.”*

18. The above notwithstanding, I am aware of the Supreme Court’s decision in *Joseph Lendrix Waswa V Republic, [2020] eKLR* which opened a window for filing of interlocutory appeals in criminal matters but only in exceptional circumstances. The Supreme Court stated as follows:

*“86. There is no provision in both the Constitution and the CPC for interlocutory criminal appeals. The Constitution under Article 50 (q) provides that every accused person has the right, ‘if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law.’ Similarly, the CPC under sections 347 and 379 (1) only allows appeals by persons who have been convicted of an offence.*

...

*94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial Court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the trial Court’s judgment.*

*However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:*

- a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;*
- b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;*
- c. Where the decision entails the recusal of the trial Court to hear the cause.”*

19. In this case, given the nature of the ruling sought to be appealed against, I am not persuaded to find that it falls under any of the exceptions the Supreme Court envisaged in the above decision.

In my view, the decision sought to be appealed against does not threaten the rights of the applicant to a fair trial and does not have much significance to the trial as to justify an interlocutory appeal especially when one considers that the trial court had previously complied with Section 200 of the CPC and the applicant had made an election to have the hearing continue from where *Hon. Opande’s* predecessor had stopped.

20. Besides, the record shows that the trial is nearing completion and in the event that its outcome will adversely affect the applicant, he will have a right of appeal to the High Court and he will be at liberty to challenge any decision made by the trial court in the course of the proceedings including the impugned ruling.

Having found as I have above, it automatically follows that it is my view that the applicant is not deserving of any of the orders sought in the application.

21. In the result, I find that the application is devoid of merit and it is hereby dismissed.

I consequently direct that the trial court's original record be returned to the lower court for continuation of the trial.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2021.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms. Ogema holding brief for Prof. P.L.O Lumumba for the applicant

Ms. Akunja for the respondents

Ms Karwitha: Court Assistant