



Onyango & 2 others v Republic of Kenya (Anti-corruption and Economic Crimes Miscellaneous E003, E004 & E005 of 2025 (Consolidated)) [2025] KEHC 4867 (KLR) (Anti-Corruption and Economic Crimes) (23 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS E003, E004 & E005 OF 2025 (CONSOLIDATED)**

LM NJUGUNA, J

APRIL 23, 2025

BETWEEN

STEPHEN ANJAWA ONYANGO 1ST APPLICANT

ONESMUS CHERUIYOT KIRUI 2ND APPLICANT

JANE MUCHINA WAMARWA 3RD APPLICANT

AND

REPUBLIC OF KENYA RESPONDENT

RULING

1. Before the court are the Applicants' applications all dated the 5th January 2025, brought under Sections 347, 349, 350 and 354 of the *Criminal Procedure Code* and Article 50(2) of the *Constitution*. The applications are premised on the grounds set out on their body and are supported by the annexed affidavits sworn by the respective applicants.
2. The applications seek common prayers as follows:-
 - 1) That this application be certified as urgent, be heard ex parte in the first instance and service hereof be dispensed with.
 - 2) That this Honourable Court be pleased to grant leave to the applicants herein to file appeals out of time against the judgment delivered by Hon. Isabellah Barasa in Milimani MCAC Suit No. E011 of 2021 on the 6th December 2024 and published on 13th December 2024.
 - 3) That costs of this application be provided for.



3. In their respective grounds and the supporting affidavits, the Applicants aver that they were jointly charged in various counts in Milimani MCAC E011 of 2021 as follows: -
 - i. Count I – conspiracy to commit an offence of corruption contrary to Section 47(A)(3) as read with Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003.
 - ii. Count II – receiving a bribe contrary to Section 6 (1) (a) as read with Section 18(1) of the [Bribery Act](#) No. 47 of 2016.
 - iii. Count III – receiving a bribe contrary to Section 6(1) (a) as read with Section 18(1) of the [Bribery Act](#) No. 47 of 2016.
 - iv. Count IV – receiving a bribe contrary to Section 6(1) (a) as read with Section 18(1) of the [Bribery Act](#) No. 47 of 2016.
4. That they were all convicted and sentenced as follows: -
 - “1) The prosecution has established beyond reasonable doubt the charge in Count I against the 1st accused person Cisilia Samba Mwashighadi, 3rd accused person Onesmus Kirui Cheruiyot and 4th accused person Jane Muchina Wamarwa. Accordingly, I find the 1st, 3rd and 4th accused persons guilty and convict them in accordance with Section 215 of the [Criminal Procedure Code](#), Cap 75 of the Laws of Kenya.
 - 2) The prosecution has established beyond reasonable doubt the charge in Count II against the 1st accused person Cisilia Samba Mwashighadi, 3rd accused person Onesmus Kirui Cheruiyot and 4th accused person Jane Muchina Wamarwa. Accordingly, I find the 1st, 3rd and 4th accused persons guilty and convict them in accordance with Section 215 of the [Criminal Procedure Code](#), Cap 75 of the Laws of Kenya.
 - 3) The prosecution has established beyond reasonable doubt the charge in Count III against the 2nd accused person Stephen Anjawa Onyango and the 3rd accused person Onesmus Kirui Cheruiyot. Accordingly, I find the 2nd and 3rd accused persons guilty and convict them in accordance with Section 215 of the [Criminal Procedure Code](#), Cap 75 of the Laws of Kenya.
 - 4) The prosecution has established beyond reasonable doubt the charge in Count IV against the 1st accused person Cisilia Samba Mwashighadi. Accordingly, I find the 1st accused person guilty and convict her in accordance with Section 215 of the [Criminal Procedure Code](#) Cao. 75 of the Laws of Kenya.”
5. They have averred that they were not aware that the limitation of time for filing of appeal was 14 days and that they were not able to access the judgment delivered by the court until the time to appeal had lapsed. Further, that they were not able to get proceedings and the record of appeal in the intended appeal.
6. It is also their contention that, coupled with the foregoing, their Advocate on record was sickly for a long period of time and he was not in a position to advise them on the way forward in filing of the appeal, and that, when they engaged their current Advocate on record, time had already lapsed for filing of the appeal.



7. It is the Applicants' case that they have arguable appeals with high chances of success and thus they should be allowed to prosecute their intended appeals to their logical conclusion.
8. The Respondent opposed the applications vide common Grounds of Opposition dated the 16th March 2025 as follows: -
 1. The application lacks merit, is misconceived and unsubstantiated.
 2. It has not been shown by way of demonstration that the Applicant has an arguable appeal with high chance of success.
 3. That the statutory limitation period for filing the intended appeal has since elapsed and the facts and circumstances elicited by the applicant in his application together with supporting affidavit does not meet the criteria set out by the provisions of Section 349 of the *Criminal Procedure Code* read with Article 50(2) (q) of the *Constitution* of Kenya 2010.
 4. On the face of the provisions of Section 349 of the *Criminal Procedure Code* the court is vested with discretionary powers to decide whether or not to grant leave to appeal out of time, based on facts and circumstances of each particular case.
 5. The application lacks merit and same should be dismissed entirely.”
9. The applications were disposed of by way of written submissions.

Applicant's Submissions

10. The Applicants submitted on leave to appeal out of time and relied on the case of Michael Mukhwana Wanyonyi Vs Republic (2021) eKLR on the statutory limitation within which to file an appeal which is a period of 14 days, provided that, the court to which the appeal is made may for good cause admit an appeal outside the 14 days, if it is satisfied that failure to enter appeal within the stipulated period was caused by 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.
11. The Applicants aver that the basis of their applications is not that they did not obtain the judgment and proceedings in time, but that they were sickly and the corona pandemic disabled them from prosecuting their appeals timeously and that they were confused following their conviction and sentence.
12. Further, that the Applicants' appeals raise substantial points of law and that the court should allow them to exercise their right of appeal as provided for in Article 50(2) (q) of the *Constitution*. They have also relied on Article 159(2)(d) of the *Constitution* that mandates this court to administer substantive justice without undue regard to procedural technicalities.
13. The Applicants have submitted that all the grounds in support of their respective applications are not recognized under Section 349 of the *Criminal Procedure Code* as the section only recognizes the ground of delay in obtaining the judgment and the proceedings within 14 days and thus, have relied on the provisions in the *Constitution*.



Respondent's Submissions

14. The Respondent submitted on Section 349 of the [Criminal Procedure Code](#) and identified four (4) issues for determination as follows: -
- “ 1) Whether the Applicants have tenable grounds warranting orders for leave to file appeal out of time in line with the provisions of Section 349 of the Criminal Procedure Act Cap 75 Laws of Kenya read with Article 50(2)(q) of the [Constitution](#) of Kenya.
 - 2) Whether the Applicants have arguable appeals with high chance of success.
 - 3) Whether any amount of prejudice shall be occasioned to any of the parties herein in the event that the application is either allowed or rejected.
 - 4) Whether it is in the interest of justice that the applications be allowed.”
15. It was submitted that the Applicants were informed of their right of appeal and the time within which to do so. Reliance was placed on the case of Justin Kibet Vs Director of Public Prosecutions (Petition No. 3 of 2019) in which the court found that the Appellant did not provide evidence of any follow-up with the court of his documents or that the said documents were filed in the first place.
16. That in the instant applications, there is no evidence that any efforts were made by the Applicants to obtain the proceedings with a view to filing appeals against the judgment. That the Applicants have not shown by way of demonstration that they have arguable appeals with high chances of success which is an essential criteria for granting leave to appeal out of time.
17. The Respondent further submitted that, the fact that the Applicants were not aware of their rights to file appeals within 14 days from the date of delivery of the judgment is not a good ground as ignorance of the law is not a defence. That from the record, the Applicants aimlessly sat back, watched and waited for the statutory limitation to elapse and that the decision to file their applications was an afterthought. Further, that the Applicants have not annexed a draft petition of appeal from which the court may be able to discern whether they have arguable appeals with high chances of success.
18. The court has considered the applications, the supporting affidavits, the Grounds of Opposition and the submissions filed herein by the Applicants and the Respondent.
19. In my view, there are two issues for determination: -
1. Whether the Applicants have tenable grounds warranting the orders for leave to file appeals out of time.
 2. Whether the Applicants have arguable appeals with high chances of success.

Whether the Applicants have tenable grounds warranting the orders for leave to file appeals out of time.

20. The Applicants have brought their applications mainly 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 therefor.”

21. For the Applicants to succeed in their applications, they have to satisfy the court that they have good grounds to bring them within the exception to that provision. The only grounds under that section are that the delay was caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against or a copy of the record within a reasonable time of applying to the court.
22. The reasons given by the Applicants for failure to file their appeals within the stipulated period was that their advocate got sick and was therefore not in a position to advise them on the way forward in filing of the appeals. The Applicants further state that they were unable to access the judgment and the proceedings until the time within which to appeal had lapsed. They have also stated that they were not aware of the limitation period within which to file the appeals.
23. In their own submissions, they have submitted that the basis of the applications is not that the Applicants did not obtain the judgment and proceedings on time to enable them appeal, but the fact that they were sickly and the corona-pandemic disabled them from prosecuting the appeals timeously and further, that they were confused after their conviction and sentence.
24. From the submissions and the supporting affidavits, it is not clear why the appeals were not filed on time. The reasons given in the supporting affidavit and those stated in the submissions are very different and the court is at a loss on what exactly are the reasons for the delay. In the grounds on which the applications are premised, the Applicants stated that it is their advocate who was sickly but in the submissions, it is stated that it is the Applicants who were unwell. This is a confusing state of affairs from which this court is unable to decipher the real reason for the delay and therefore unable to exercise its discretion in that regard.

On whether the Applicants have arguable appeals with high chances of success.

25. In support of this contention, the Applicants have submitted that their appeals raise serious questions of law as to the conviction and the sentences. The court was referred to a draft petition of appeal.
26. In its submissions the respondent clearly pointed out that the Applicants have not annexed a draft petition of appeal from which, the court may discern whether they have arguable appeals with high chances of success.
27. From the record, the court can confirm that no draft petition of appeal was annexed to the affidavit. The court is therefore not able to discern if the appeals are arguable or not. In any event, no point of law was espoused by the Applicants.
28. In the premises, I find that the applications have no merit and they are hereby dismissed.
29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF APRIL 2025.

.....

L.M. NJUGUNA



JUDGE

In the presence of :-

Mr. Mwashofi for the all the three Applicants

Mr. Momanyi for the Respondents

Court assistant – Adan

