



REPUBLIC OF KENYA



KENYA LAW
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**Opwondo & 2 others v Republic (Criminal Appeal E007 of 2025)
[2025] KEHC 4442 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E007 OF 2025**

S MBUNGI, J

APRIL 7, 2025

BETWEEN

GODFREY ANAKUTA OPWONDO 1ST APPELLANT

STANELY IMBIAKHA 2ND APPELLANT

KEVIN WAKHANU IMBIAKHA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicants filed a notice of motion dated 24th January 2025 seeking a stay of the proceedings in Kakamega CMCR No. E065 of 2020.
2. The application is supported by an affidavit sworn by the applicant's counsel, who contents that the trial court erroneously admitted the witness statements of the deceased persons Peter Ndege Opwondo, Fredrick Opwondo, and Calitus Weremba Ndege as exhibits 3,4,5 an act which prejudiced the accused persons case for they will not have the opportunity to cross-examine the accusers (dead persons) thus infringing their rights to fair hearing as guaranteed under Article 50 (2)(k) of the *constitution* of Kenya.
3. He further stated that the 3 persons' statements were not death declarations and do not fall under any hearsay exception under section 33 of the *Evidence Act*.
4. He submitted that the prejudice and injustice the accused persons are likely to face with the admission of the deceased person's statement as exhibits would outweigh the value that the dead person's statement would add to the trial.
5. The respondent opposed the Application and filed grounds of opposition in summary stated that



- I. The Applicant should have filed Revision but not an Appeal against the trial court orders of admitting the statements of the dead persons in line with Section 347, 348, 348A of the Criminal procedure code.
 - II. That under Article 50 (2)(q) of the constitution an Appeal can only lie against a conviction.
 - III. In this matter the Applicants are yet to be convicted, by filing this Appeal the Applicant's are locking out themselves from filing a second appeal to the same high court should they be convicted.
 - IV. That the matter is pending judgment and this Appeal is a backdoor attempt to muzzle the trial court from exercising its Judicial discretion on conviction and/or an acquittal against the appellants herein.
 - V. That the supervisory jurisdiction of appeal should not be used where the option of revision is appropriate and in the converse the supervisory jurisdiction of revision should not be used as a short cut for an appeal where circumstances for appeal clearly pertained and are more appropriate.
6. The Court directed that the application be disposed off by way of written submissions, the appellants filed submissions on a purported preliminary objection which the prosecution raised orally and the court directed that a formal preliminary objection be filed and served but this was not done which prompted the court on 24.2.2025 to direct that the parties to file submissions to dispose off the application for the preliminary objection was deemed as abandoned when the prosecution failed to file a formal preliminary objection as directed by the court.
 7. So, as I write this ruling there are no submissions filed by either side to dispose off the application, thus the court will solely rely on the pleadings and on the Law as it is.
 8. I have looked at the application dated 24.1.2025 , supporting affidavit and also the un-dated grounds of opposition.
 9. The issues for determination are whether
 - i. A interlocutory criminal appeal can be filed against a decision of a trial court like in this case
 - ii. Whether the court has powers to order a stay of proceedings +-pending the hearing and determination of interlocutory criminal appeal like in this instant case and if so
 - iii. Has the applicant made a case to warrant this court to stay the proceedings in Kakamega CMCR No. E065 of 2020.

Determination

10. On the issue whether interlocutory criminal appeals can be filed the constitution and the criminal procedure code are silent on this.
11. The constitution under Article 50 (q) provides that every accused person has the right 'if convicted to appeal, or apply for review by, a higher court as prescribed by law' Similarly, the Criminal procedure code under section 347 and 379 (1) only allows appeals by persons who have been convicted of an offence...
12. Section 354 (3) (d) of the criminal procedure code states: in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.



13. The supreme court in the case of Joseph Lendrix Waswa versus Republic , (2020) EKLR , in part held in Paragraph 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 courts judgment.

However, exceptional circumstances may exists 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 at interlocutory appeal;
 - c. Where the decision entails the recusal of the trial court to.
14. From the above analysis it is clear that interlocutory criminal appeals can be filed for determination by an appellate court where it revolves around the exceptions set out by the supreme court in the case of Joseph Lendrix Waswa versus Republic , (2020) EKLR ,
15. The Applicants case falls squarely within the exceptions for it is challenging the trial courts decision to admit witness statements of three persons, Peter Ndege Opwondo, Fredrick Opwondo, and Calitus Weremba Ndege as exhibits 3,4,5 yet they are not available for cross examination for they are already deceased.
16. On the second issue as to whether the court has powers to stay criminal proceedings. The law as regards the principles that guide the Court in a stay of proceedings application is well settled. It is not in doubt that this Court has the power to issue a stay of criminal proceedings at any stage of those proceedings. Therefore, nothing bars the Court, in appropriate cases, from staying criminal proceedings even in instances where the matter is pending sentencing.
17. The Court exercises unfettered discretion, which must be exercised judicially. The applicant needs to satisfy the Court, firstly, that the appeal, or intended appeal, is not frivolous, that is to say, it is an arguable appeal. Secondly, the Court must also be persuaded that if it were to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory.
18. An order staying criminal proceedings should be granted only in the most exceptional of circumstances. In the case of Goddy Mwakio & Another vs. Republic [2011] eKLR, this court stated that:
- “ An order for stay of proceedings, particularly stay of criminal proceedings, is made sparingly and only in exceptional circumstances’.
19. In the case of Kenya Wildlife Service –vs- James Mutembei [2019] eKLR Gikonyo J stated that: -
- “Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, the right to be heard without delay and overall, the right to a fair trial. Therefore, the test for stay of proceedings is high and stringent. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases... Stay of proceedings is a grave judicial



action which seriously interferes with the right of a litigant to conduct his litigation...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is no cause of action in law or equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed based on the pleading and the facts of the case.”

20. I have looked at the memorandum of appeal annexed to the application. The Appellants claim that their constitutional right to a fair hearing would be violated if the case was to proceed as they would not have a chance to cross-examine the dead witnesses whose statements were admitted as evidence.
21. I am therefore satisfied that the applicants have demonstrated that they have arguable appeal sufficient to invite the respondent’s response and the Court’s consideration.
22. The principle of cross examination of witnesses in any trial is cardinal, it affords a rival party a chance to test the truthfulness, credibility, accuracy and reliability of the evidence of the other party/witnesses therefore it cannot be wished away.
23. the constitution Article 50 (k) confers a right to an accused person to adduce and challenge evidence during a trial.
24. Section 302 of Criminal Procedure Code CAP 75 states that “ The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution”.
25. From the foregoing, I find merit in the application. I therefore exercise my discretion in favour of the applicants. And accordingly allow the application and order that, an order staying of proceedings in Kakamega criminal case No. E065 of 2020 do issue and will remain in force until the intended appeal is heard and determined.
26. The applicants to serve the record of appeal within the next 30 days from the date of this ruling, failure of which this order of stay proceedings will automatically lapse.
27. It is so ordered.
28. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF APRIL, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

