



**Republic v Maiyo (Miscellaneous Criminal Application
E119 of 2024) [2025] KEHC 8606 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E119 OF 2024**

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

REPUBLIC APPLICANT

AND

GEOFREY KIPNGETICH MAIYO RESPONDENT

(Application for leave to appeal out of time against the Judgment dated 16/09/2024, delivered by Hon. P.N Areri-SPM in Eldoret Chief Magistrate’s Court Sexual Offences Case No. E059 of 2022)

RULING

1. This Ruling is in respect to the Applicant’s Notice of Motion dated 14/10/2024 filed by through the Office of the Director of Public Prosecutions (ODPP). The order sought is for grant of leave to the Applicant to appeal out of time against the Judgment delivered in the criminal case referred to above whereof the Respondent was acquitted.
2. The Application is supported by the Affidavit sworn by Senior Principal Prosecution Counsel, David Anthony Fedha. He deponed that the Respondent was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act in the said criminal case, that on 16/09/2024, the trial Court delivered its Judgment and acquitted the Respondent under Section 215 of the Criminal Procedure Code, and that the Applicant has requested for certified copies of proceedings and Judgment but is yet to be supplied with the same. He deponed further that the Applicant has attached the Petition of Appeal which demonstrates that the Appeal has high chances of success, but that time for appeal has run out rendering this Application necessary.
3. The Application is opposed by the Respondent through the “Reply” filed through Messrs Seneti & Oburu Associates Advocates. The grounds put forward are that the matter was fully heard with both sides represented, and that the Judgment has merit as the Respondent was acquitted for lack of enough evidence. It was further stated that as an afterthought, the Applicant made the decision to file this



Application one month after the required period and that if the Applicant is allowed, the Respondent's right stand being breached.

4. Prosecution Counsel Mr. Leonard Okaka appeared for the State, Mr. Ayieko appeared for the Respondent, and Ms. Moronge appeared as Counsel watching brief for the family of the complainant.
5. The issue for determination is "whether this Court should grant to the DPP leave to Appeal out of time against the acquittal of the Respondent by the Magistrate's Court.
6. The Application is governed by Section 349 of the *Criminal Procedure Code*, which 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 applicant 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.

7. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, although a civil case but which is aptly applicable herein, stated as follows;

"Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

8. The Supreme Court, in the same case, then set out the conditions to be met by an Applicant for extension of time to file an appeal, as follows; (i) extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; (ii) a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court (iii) whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; (iv) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; (v) whether there will be any prejudice suffered by the respondents if the extension is granted; (vi) whether the application has been brought without undue delay; and (vii) whether in certain cases, like election petitions, public interest should be a consideration for extending time.
9. The Supreme Court, further in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, guided as follows:

"the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

10. It is therefore clear that grant of leave to file an appeal out of time is a discretionary power and not a matter of course. The Applicant is therefore required to satisfactorily demonstrate to the Court that there was good cause why the Appeal was not filed in time. Such good cause must be demonstrated



and established by the Applicant and it is not the Court's initiative to try to infer or imply such good cause. It is entirely the Applicant's duty to satisfy the Court.

11. In the present case, the delay is for 1 month. The Applicant has attributed the delay to not being furnished with certified copies of proceedings and the Judgment by the trial Court. In fact, the Supporting Affidavit expressly states that such proceedings and Judgment were yet to be supplied. Strangely, however, the Applicant has exhibited the same proceedings and Judgment in the same Supporting Affidavit. Which is which now? If the proceedings and Judgment are yet to be supplied, what are these that have been exhibited?
12. Further, the letter applying for the proceedings and Judgment, if any, is itself not even exhibited. The Court cannot therefore tell when the proceedings and Judgment were applied for, if at all. How then will the Court make a determination whether the Applicant sought the typed proceedings and Judgment within a reasonable period of time? In other words, in the absence of the letter, how is the Court expected to satisfy itself that the threshold set under Section 349 of the *Criminal Procedure Code* has been met?
13. On this point, I cite Gikonyo J in the case of *Republic v Mwiraria & 6 others* (Civil Appeal E004 of 2023) [2024] KEHC 6773 (KLR) (Civ) (3 June 2024) (Ruling), in which he found as follows:

“ 12. In this case, the applicant must satisfy the court that the failure to enter the appeal within the prescribed period has been caused by the inability of the applicant 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.

13. In Section 349 of the *CPC* there is a deliberate twinning of; ‘inability of the appellant to obtain’ the judgment or order appealed against; and ‘within reasonable time of applying to the court’, making the time when the judgment or order appealed against, was applied for, a relevant consideration in an application for leave to file appeal out of time.

14. According to the respondents, it is expected that a party wishing to appeal a decision should apply for certified copy of the decision and proceedings immediately upon delivery of the decision or soon thereafter.

15. The respondents claim that, the applicant was present during the delivery of the ruling, yet, applied for the ruling on 25th July, 2023 which was a day or two to the expiration of the statutory period of filing appeal.

16. In the view of the respondents, it appears from the conduct of the applicant that, the decision to appeal was an afterthought.

17. The 3rd and 4th respondents were more specific that, curiously, the applicant has annexed a copy of the ruling sought to be appealed from as exhibit E01 to the supporting affidavit, but the applicant did not disclose how and when the annexed copy of the ruling was obtained. These are important details.

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19. The applicant claims in the said letter dated 25th July, 2023 that: -‘We have followed up on the said Ruling by making several phone calls and visits to the registry with no avail’.



20. There is nothing to show any formal application for a certified copy of the ruling was made before 25th July, 2023, which brings to question; to which application were the follow-ups and the ‘several phone calls and visits to the registry’, made. The applicant did not even provide details of the said ‘follow-ups’, ‘phone calls’ and ‘visits to the registry’. Without these details, it is safe to conclude that, these claims were contrived merely to portray, and to make the court believe that, the applicant acted diligently and swiftly in pursuit of the ruling.

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24. Of these concerns also is, whether the DPP acted diligently in applying for certified copy of the ruling so late, and whether this delay has been explained?

25. The office of the DPP is a professional office run by professional personnel completely aware of the importance of their mandate and the need to comply with timelines prescribed in law.

26. The party applying for leave to file appeal out of time should also show that it applied promptly for certified copy of the decision to be appealed from.

27. The applicant did not apply promptly for the ruling; it applied for the ruling towards the last day or two of the expiration of the time prescribed for filing appeal. The delay was not explained which may be responsible for the respondents’ argument that the decision to appeal is an afterthought. A party should not go to slumber, only to wake up the last day of or after expiry of the time prescribed for filing appeal, and expect the court not to ask for explanations of the inertia. The law will demand of such plausible and satisfactory explanation for the delay and inertia.

28. Although the applicant claims that the ruling was supplied on 29th August, 2023, there is nothing to show when the ruling was obtained, certified or supplied by the court.

29. The respondents have raised concern that the applicant did not disclose when it received the ruling annexed to the application or when it was certified. The applicant did not respond to these concerns, leaving quite obscure their severely economical explanations on relevant events or steps purportedly taken herein by them.

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31. Given the reason by the applicant which is said to be responsible for not filing the appeal in time, details as to when the copy was obtained or certified, are important so as to give the ground the power and punch required for purposes of satisfying the court of the applicant’s inability to obtain the ruling within reasonable time of applying for it.”

14. The facts set out by Gikonyo J above seem to be on all fours with facts in this instant case, and I wholly adopt the reasoning put forward therein.

15. The Applicant has also argued that the draft Petition of Appeal demonstrates that the intended Appeal has high chances of success. However, the Applicant, apart from merely referring the Court to the



draft Petition, has made no effort whatsoever to demonstrate the alleged “high chances of success”. Of course, the Applicant is not expected, in this instance, to argue the entire merit of the intended Appeal, but it ought to at least lay out a firm summarised basis of what exact error of law or fact that the trial Magistrate is being faulted for. Simply throwing a generalized draft Petition of Appeal at the Court and doing nothing to demonstrate the believed strength of the Appeal, in my view, falls short of the threshold contemplated under Section 349 above.

16. On this point, I cite Kimaru J (as he then was) in the case of *R v Harpeet Singh Lotay* [2014] eKLR, in which he held as follows:

It is a requirement under section 348A of the *Criminal Procedure Code* for the State to establish that there exists a matter of law which forms the basis of the appeal. In an application where the State seeks to be granted leave to file appeal out of time, it must establish that its draft petition of appeal raises a matter of law which ought to be considered by the High Court’

17. Facing of a criminal case is a situation which no person enjoys to be under. It brings with it uncertainty on the future, psychological instability, deprives one of a lot of time, and also depletes resources. Where an accused person has therefore been acquitted of a criminal offence charge and the Prosecution intends to appeal against such acquittal, steps to file such Appeal must be firm, fast and swift so as to avoid placing such acquitted accused in a state of constant or perpetual uncertainty. Unlike in other areas of law, the burden placed upon the Prosecution in a criminal case cannot be treated casually, as it is much heavier than ordinary, and must therefore be satisfactorily discharged.
18. In view of the foregoing, my finding is that apart from failure to explain the delay in filing the Appeal in time, the Applicant has also failed to lay a basis for this Court to assess the strength of the intended Appeal.

Final Order

19. The upshot of the above is that the Application dated 14/10/2024 is dismissed, with the following consequences:
- i. The prayer for leave to Appeal out of time against the Judgment delivered on 16/09/2024 in Eldoret Chief Magistrate’s Court Sexual Offences Criminal Case No E059 of 2022 by Hon. P.N Areri-SPM is hereby declined.
 - ii. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Muriithi for the State-Applicant

The Respondent

Ms. Moronge watching brief for the complainant

C/A: Edwin Lotieng

