



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gichohi & another v Director of Public Prosecution (Criminal Appeal  
E065 of 2025) [2025] KEHC 12529 (KLR) (12 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E065 OF 2025  
DKN MAGARE, J  
SEPTEMBER 12, 2025**

**BETWEEN**

**PETER KIAI GICHOHI ..... 1<sup>ST</sup> APPELLANT**

**LILIAN WANJIRU KIAI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Appeal from the decision of the Senior Resident Magistrate, in Chief  
Magistrate's Court, Nyeri (Hon. Senior Resident Magistrate- Mary Gituma)  
delivered on the 29th day of July, 2025 in Criminal Case No. E600 of 2025)*

**RULING**

1. This is a ruling in respect of an appeal and application dated 09.09.2025 filed under certificate of urgency. The appeal results from a ruling delivered on 29.07.2025. by Hon. Mary Gituma, SRM in Nyeri CMCC E600 of 2025. The same was filed on 26.08.2025, to begin with this was filed after 28 days. Section 249 of the criminal procedure 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.



2. Thus, the Appeal herein was filed out of time. An appeal from criminal matters must be filed within 14 days from the date of judgment and conviction. This alone is enough to have the appeal summarily rejected.
3. Secondly, it is filed in a manner of a strange document known as a memorandum of appeal, a document unknown in High Court Appeal nomenclature.
4. Be it as it may, filing of appeals in criminal matters is limited to conviction and sentence under section 348 of the criminal procedure code, which provides as follows:

(1) Save as is 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; and

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

5. The nature of the question before the court does not touch on conviction or sentence. It is a question of replacement of the investigating officer. Consequently, there is not automatic right of appeal. In the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] KECA 319 (KLR), the Court of Appeal, while addressing the import of section 279, which is *pari materia* with section 248, of the Criminal Procedure Code, posited as follows regarding interlocutory Appeals:

We must now deal with the reasons why we ruled that the appeal before us was competent and that we had jurisdiction to deal with it. 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.

6. This is further settled by the Supreme Court in the case of *Waswa v Republic* [2020] KESC 23 (KLR) where they stated as follows:

There was no provision in both *the Constitution* and the Criminal Procedure Code (CPC) for interlocutory criminal appeals. *The Constitution* under article 50(2)(q) provided that every accused person had 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 allowed appeals by persons who had been convicted of an offence.

The delay of over six years defeated the intention of the framers of *the Constitution* and of Parliament to have criminal trials concluded expeditiously. The guarantee to have a criminal trial conducted without undue delay related not only to the time by which a trial should commence but also the time by which it should end, judgment rendered and any applicable appeals or reviews completed. Therefore, although criminal trials were not time bound like election petitions, there was need to have them determined expeditiously in line with the constitutional prescriptions.

The right of appeal against interlocutory decisions was 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 had to file the intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances could exist where an appeal on an interlocutory decision could be sparingly allowed, these included:

- a. where the decision concerned the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;



- b. when the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
7. The appeal and application filed being interlocutory in nature, are without basis in law. When a matter has no basis in law, it is a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

8. What then is the remit of this court? Does the court deal with a matter it has no jurisdiction to deal with? The court cannot deal with matters it has no jurisdiction by craft or innovation. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

9. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The instructions on what to do were laid down in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”



10. Having found that there is no basis for filing of this appeal, the same is summarily rejected. The appeal is equally struck out for being filed out of time.

**Order**

11. In the circumstances the court makes the following orders: -
  - a. The Appeal is summarily rejected. The same is struck out
  - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF SEPTEMBER 2025. RULING DELIVERED EX TEMPORE THROUGH THE CTS**

**KIZITO MAGARE**

**JUDGE**

Delivered ex parte and ex tempore

