



**Director of Public Prosecution v Koome (Miscellaneous Application
E028 of 2023) [2024] KEHC 6546 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 6546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E028 OF 2023**

**LW GITARI, J
APRIL 4, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPLICANT

AND

WILTON KOOME RESPONDENT

RULING

1. The subject of this ruling is a notice of motion application dated 22nd May, 2023 said to be brought pursuant to section 349 of the [Criminal Procedure Code](#) cap 75 Laws of Kenya and all other enabling provisions of the Law.
2. The applicant is seeking for the following orders-;
 1. That the intended appeal be hereby admitted out of time.
 2. That the honourable Court do make any other orders it deems fit in the circumstances
3. The application is premised on the grounds thereon and supported by the affidavit of N. NJERU, the applicant, sworn on 22nd May, 2023. The applicant aver that he is the prosecution counsel attached at ODPP Meru County thus properly seized of the facts in this matter. That the respondent was originally charged with the offence of assault contrary to section 251 of the penal code at the Chief Magistrates court at Maua.
4. The Applicant avers that being dissatisfied with the judgement dated 13th April 2023 whereby the respondent was acquitted under section 215 of the Criminal Procedure code, the complainant wrote a letter dated 18th April 2023 to their office requesting as to call for the proceedings and advice on the way forward and the letter is marked NN1. That the certified copies of the proceedings and judgement were however not supplied within the stipulated period to enable them lodge an appeal within 14 days period stipulated by the law.



5. The Applicant avers that upon the receipt of the copies of the proceedings and judgment received instructions from the county head to expeditiously file an appeal and attached herein a draft petition of appeal marked NN2.
6. The Applicant states that the delay in filing an appeal was not intentional and the delay is not inordinate. That the intended appeal has overwhelming chances of success and further no party will suffer prejudice in the event the orders sought are granted by the court.
7. The Applicant avers that it is in the interest of justice and within the discretion of the court to grant the orders sought.
8. In opposing the application, the respondent filed a replying affidavit sworn on 17th July 2023 by Wilton Koome wherein he states inter alia that the application is an afterthought and an abuse of the court process. That the applicant has not tendered any plausible cause for the failure to lodge the intended appeal within the stipulated time.
9. The respondent avers that the judgement was delivered in the presence of the applicant's representative who is an advocate of the High court of Kenya. That the statutory period for filing an application was well within the applicant's knowledge. That the delay is therefore unreasonable and without any satisfactory explanation.
10. The respondent further avers that it is clear from paragraph 3 of the supporting affidavit that the applicant has no bonafide intention of lodging the appeal. That the applicant did not take any step including applying for the copies of the proceedings and judgement within the period provided for the appeal. That contrary to the allegations by the applicant the court made its judgement upon due consideration of all the evidence placed on record.
11. The respondent states that the court properly and rightfully arrived at an acquittal for the failure by the prosecution to discharge its duty to prove the charges against him on the required standards. That the draft petition of appeal does not disclose an appeal with any chances of success.
12. The respondent avers that he was lawfully and procedurally prosecuted and acquitted and he stands to suffer great prejudice if the orders sought are granted. That the applicant deliberately failed to exercise the right to appeal within the mandatory stipulated period. That the applicant has not demonstrated any sufficient reasons for the court to exercise its discretion in favour of the applicant.

The Law, Analysis and Determinations

13. I have considered the application, the grounds in support and submissions of Counsel. The single question sought to be answered is whether the Court ought to enlarge the time within which the Appeal may be filed
14. For the first issue, the operative law is Section 349 of the [Criminal Procedure Code](#) Cap 7 Laws of Kenya which provides that:

“ 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.”

15. Per Section 349, the court is clothed with discretionary powers to be exercised for the interest of justice to the parties in a litigation. Illustrative principles that the Court ought to keep in mind in the exercise of its discretion may be drawn from *Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. 255 of 1997 UR where the Court stated:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay.

Secondly, the reason for the delay;

Thirdly possibly the chances of the appeal succeeding if the application is granted; and

Fourthly the degree of prejudice to the respondent if the application is granted.”

16. Drawing from comparative jurisprudence on the matter of enlargement of time pending appeal, the Supreme Court of Appeal of South Africa in the case of *S.V Smith* [2012] 1SACR 567 elaborated the test to be applied on applications for leave to appeal in the following manner:

What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicants must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for the conclusion that there are prospects of success on appeal.

17. Juxtaposing the Applicant’s Motion against the foregoing principles, my conclusion is that the Applicant has satisfactorily expressed herself within the provision of section 349 of the [Criminal Procedure Code](#). The court is satisfied that the delay in filing the appeal was not inordinate. In any case, it was occasioned by not having the proceedings and judgement supplied within the stipulated period stipulated by law.

18. This Court would be remiss to deny the Applicant their right to appeal in the circumstances.

19. In the result, the Application dated 22nd May, 2023 is allowed with cost in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF APRIL, 2024

In the presence of

Court Assistant-

LUCY GITARI

H.C JUDGE

