



**Republic v Wainaina (Miscellaneous Criminal Application  
E029 of 2023) [2024] KEHC 10678 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 10678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS CRIMINAL APPLICATION E029 OF 2023  
DO CHEPKWONY, J  
MAY 24, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SOPHIA WANGUI WAINAINA ..... RESPONDENT**

**RULING**

1. What is before the court for determination is the Notice of Motion Application dated 15<sup>th</sup> May, 2023 filed pursuant to Article 50 (2) (q) of the [Constitution](#) and Section 354 and 348A both of the [Criminal Procedure Code](#) seeking the following orders:
  - a. That the Applicant be allowed to file Appeal out of time.
  - b. Spent.
  - c. Spent.
2. The Application is based on the following grounds as set out on its face and the Supporting Affidavit of the Prosecution’s Counsel, Ms. Hellen Ngesa on 15<sup>th</sup> May, 2023:
  - a. That the Respondent herein was charged at Kiambu law courts with the offence of causing grievous bodily harm contrary to Section 251 of the [Penal Code](#).
  - b. That the Prosecution called two (2) witnesses to testify in the matter and produced several exhibits to the court.
  - c. That the Respondent was not put to her Defence.
  - d. That the Honourable Magistrate on 16<sup>th</sup> June 2022 acquitted the Respondent of this heinous offence without considering the evidence adduced by the State.



3. It is the State's case that at the close of prosecution's case, the Respondent was acquitted under Section 215 of the *Criminal Procedure Code* for no case to answer and was set free. That the State was dissatisfied with the said decision of the trial court and wishes to appeal to this Court out of time. It attributes the delay in filing of the Appeal within the required 14 days to a delay in obtaining proceedings. It holds that it would be in the interest of justice and public good that the application be allowed since the victim of the assault continues to suffer and live with the injuries that she sustained from the attack. It also holds that it shall adhere to timelines that will be set or given by the court.
4. The Application was similarly supported by the Affidavit of Annie Munini Muasya, the mother of Irene Wanjiku Njoroge, the complainant in the case, Kiambu CMCR No. 1358 of 2016. She holds that the Accused who was charged with the offence in the matter was the Deputy Head Teacher of Kiambu Primary School in 2016.
5. She holds that the prosecution only called her evidence and that of the complainant to the exclusion of the doctor and investigating officer, who are crucial witnesses in the matter hence case was closed prematurely. She holds that she was dissatisfied with the decision of the trial court and thus urges this court to allow the application so that an appeal can be lodged out of time.
6. The Accused Person, Sophia Wangui Wainaina filed a Replying Affidavit opposing the application which was sworn on 19<sup>th</sup> July, 2023. She holds that the application is a nonstarter, devoid of merit and full of falsehood meant to mislead the court. According to the Accused, the State has not attached or provided any letter or receipts of payment for supply of proceedings, and ruling and evidence of period the request was made to confirm efforts made to obtain the same. She argues that the decision of the trial court was delivered on 16<sup>th</sup> June, 2022 and the application was filed close to one year later.
7. In response to the Supporting Affidavit of Annie Munini Muasya, the accused states that the chance to call the remaining witnesses lapsed as there had been an opportunity for them to be called but they failed to attend court. She denies harassing the said Annie Munini as alleged and states that if she had done so, then there ought to have been report made to police. She further states that Annie has not provided any medical evidence to confirm that the complainant is still sick or in poor health.
8. The Accused contends that she was lawfully acquitted on the basis that there was no medical evidence or any exhibits provided to prove the allegations of assault as the doctor and investigating officer did not testify. Therefore, the trial court, rightfully held that the allegations did not have any probative value. According to the Accused, the State had six (6) years to call all witnesses or avail all evidence required for the period the case was pending in court but they failed to do so, thus the application is only meant to take the case backwards and delay justice. She has urged the court to dismiss the application with costs.
9. On 26<sup>th</sup> September, 2023, the court directed parties to canvass the application by way of written submissions and on 30<sup>th</sup> November, 2023, both counsel for the parties confirmed compliance.

### **Determination**

10. This court has read through the application and the supporting affidavit of the Applicant, the Response by the Respondent alongside the submission filed by both parties. It finds the main issue for determination being whether the Applicant has satisfied the requirements for leave to file an appeal out of time to warrant the court allow its application.



11. It is trite law that an appeal from the subordinate court should be filed within 14 days as provided for under Section 349 of the *Criminal Procedure Code* Cap 7 Laws of Kenya which states 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.”

12. The proviso to Section 349 is that the court can admit an appeal filed out of time if it is satisfied that the delay was caused by the inability to obtain a copy of the judgment of the trial court and the proceedings within a reasonable time.

13. The Supreme Court in the case of *Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] KLR – SCK, also set out the principles to be considered by a court in exercising the discretion to extend time for filing an appeal and they are as follows: -

“(1) 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.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

(3) Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis.

(4) Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court.

(5) Whether there would be any prejudice suffered by the respondents if the extension was granted.

(6) Whether the application had been brought without undue delay and finally whether in certain cases like election petitions public interest ought to be a consideration for extending time.”

14. It is worth noting that from the statute and case law, the main factor to be considered is the issue of time, that is the period of delay and whether the same was reasonable or unreasonable.

15. In this case, the State attributes the delay in filing the Appeal to the delay in obtaining the proceedings and the Ruling from the trial court. However, as correctly stated by the Accused/Respondent, it has not adduced any evidence to show that it requested for the said proceedings to be supplied and or evidence that the same were paid for or even the dates when the proceedings were requested and/or paid for. The court also notes that the judgment in the trial court was delivered on 16<sup>th</sup> June, 2022 and the present application filed close to one year later, being 15<sup>th</sup> May, 2023. Clearly, the application was filed out of time and there having been inordinate delay of almost one year, sufficient explanation was required but the court finds none was provided for this.



16. However, since the prayer for extension of time to file an appeal is an equitable remedy, that requires the court to exercise its discretion, the court moves on to establish whether the State has laid sufficient basis and demonstrated the prejudice it is likely to suffer if the court denies it the prayer sought.
17. I have carefully read through the proceedings and ruling before the trial court and established that the case had been pending before it for a period of six (6) years, within which period the State had a duty and time to call all the required witnesses in support of its case. The record of the trial court, shows that the offence took place on 29<sup>th</sup> March, 2016 and the Accused was arraigned in court on 13<sup>th</sup> June, 2016. The trial commenced on 13<sup>th</sup> March, 2019, when the complainant testified and the same was adjourned to 3<sup>rd</sup> March, 2020 after the State sought for an adjournment to call the remaining witnesses being a Doctor and the investigating officer. This was objected by the Accused's Counsel who pointed out that the Prosecution had been granted a last adjournment on 3<sup>rd</sup> June, 2018. The trial court granted the State 'one more chance to prosecutor to avail two witnesses left' after I believe it noted that the defence had equally been granted several adjournments as was pointed out by the State.
18. This court has noted that the matter had been adjourned on several occasions for different reasons but the main reasons having been either that the investigating officer was not available or lack of the police file. On 13<sup>th</sup> January 2021 the trial court marked the adjournment as the last for both parties.
19. When the matter was placed before the trial court on 12<sup>th</sup> May, 2022, the State Counsel told the court that it did not have witnesses and the police file. Counsel then sought to withdraw the matter under Section 87 (c) of the [Criminal Procedure Code](#), which the Counsel for the Accused objected on the ground that they had been in court since 2016 when the accused, a headteacher, who has since retired was charged with the offence before court. According to the defence counsel, allowing the application to have the case withdrawn under Section 87 of the [Criminal Procedure Code](#) would be allowing the adjournment as the accused/respondent would be re-arrested. The defence counsel claimed that they were playing games as the instructions to make the application was vide a letter from the Director of Public Prosecutions after the Investigating Officer has offered good reason why the matter has never proceeded.
20. In indicating that she had considered the history of the case, the trial court ruled as follows:

‘ I reject application to withdraw under Section 87 (c) for the reason that it is clear police have lost interest in the letter (read matter)’
21. The court notes that the prosecution then closed its case and the trial court reserved a Ruling for 16<sup>th</sup> June, 2022. The trial court then delivered a ruling on this in which she noted that the prosecution had been given ample time to avail the doctor who is a crucial witness but they did not. She also noted that the matter was old, having been pending in court for six (6) years. She further noted that justice cuts both ways and litigation must come to an end. It then held that:

“The prosecution had not made a prima facie case so as to warrant the accused be placed on her defence”. She proceeded to acquit the accused under Section 210 of the [Criminal Procedure Code](#).
22. With that background of the case before the trial court, this court finds that while reluctant to preempt the merits of the appeal at this juncture the reasons given by the trial court in acquitting the Respondent were well reasoned and not erroneous under the circumstances. Indeed, it is not within the control and making of the accused person but the prosecution to ensure trial is concluded within



reasonable time, which is against the tenets of fair trial as provided for under Article 50 (2) (a) and (e) of the *Constitution*, if this is not adhered to.

Article 50 (2) (e) provides that:

“ Every accused person has the right to a fair trial, which includes the right—

e. to have the trial begin and conclude without unreasonable delay;

23. Furthermore, it will be noted that in seeking leave to appeal out of time, the complainant through her mother in her affidavit in support of the Applicant’s application stated that the complainant had sustained serious injuries from the assault for which she claims to have suffered. She however, did not avail any medical evidence to support this claim.

24. In the upshot, this court finds that the Applicant has not given substantive reason for the delay in filing an appeal or demonstrated any prejudice that they or the complainant will suffer if their prayer is denied, to warrant the court’s discretion. For these reasons, the court then proceeds to find the Notice of Motion Application dated 15<sup>th</sup> May, 2023 lacking in merit and the same is dismissed.

25. It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

Martin - Court Assistant

Mr. Gacharia Counsel for the Appellant

Mr. Gachoka Counsel for the Respondent

