



Republic v Mukadi & another (Miscellaneous Criminal Application E010 of 2024) [2024] KEHC 4989 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CRIMINAL APPLICATION E010 OF 2024**

WM MUSYOKA, J

MAY 16, 2024

BETWEEN

REPUBLIC APPLICANT

AND

JOHN MUSIKE MUKADI 1ST RESPONDENT

SHARON ANYANGO WABALA 2ND RESPONDENT

RULING

1. I am tasked with deciding an application, by way of Motion, dated 14th March 2024, which seeks leave to appeal out of time, and admission of the appeal, upon grant of leave, out of time. The applicant is the Republic, through the Director of Public Prosecutions. The order, sought to be appealed against, was made in Busia CMCCRC No. 807 of 2020, on 12th April 2023.
2. The affidavit in support is sworn by Ms. Shirley Chepkonga, prosecution counsel. The respondents had been acquitted under section 215 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, by the orders sought to be appealed against. They had been charged with the offence of conspiracy to defraud. The applicant wrote to the trial court, by a letter dated 15th March 2023, for certified copies of the proceedings and judgement, and the said proceedings and judgement were not made available until 15th March 2024. It is argued that the delay was not caused by the applicant. It is further argued that there was a case for appeal, with good chances of success.
3. The application was opposed. The affidavit in opposition is sworn by the Advocate for the respondents, Mr. Ipapu Philip Jackah. He argues that the instant application is designed to scuttle pending criminal proceedings, in Busia CMCCC No. E032 of 2024, between the respondents and the complainant in Busia CMCCRC No. 807 of 2020, and the Attorney-General. It is further argued that the said application was also brought after inordinate delay, for the acquittal happened a year ago. It is submitted that the judgement of the trial court was typed, and that was adequate for the purpose of



- drawing grounds of appeal. It is also submitted that the matter did not get to defence hearing, and, therefore, the issue of a defence not being considered, or even a judgement being delivered did not arise.
4. The application was placed before me, under certificate of urgency. I directed that it be served, for inter partes hearing on 17th April 2024. It was argued orally, on 17th April 2024, by Ms. Chepkonga, for the applicant, and Mr. Ipapu, for the respondents. Both breathed life to the filings of the respective parties, who they represented.
 5. Extension of time to file a criminal appeal is provided for in section 349 of the *Criminal Procedure Code*, on only one ground, the inability of the applicant or his Advocate to get a copy of the proceedings and judgement in time to file appeal. See *Michael Mukhwana Wanyonyi v Republic* [2021] eKLR (Bwonong'a, J).
 6. The question would then be whether the applicant herein was unable to obtain the proceedings and judgement in good time to file appeal within the 14 days allowed in law. The judgement was pronounced on 12th April 2023. The 14 working days expired on 3rd May 2023. The appeal ought to have been filed on or by 3rd May 2023. I have seen that the applicant wrote to the court a letter dated 26th April 2023, asking for the typed judgement and proceedings. It is said that the same were not provided until 15th March 2024. The trial court file has been availed, and I have seen the typed proceedings. There is no communication in that file as to when the process of typing was completed. The typed proceedings and judgement are not certified, and so I cannot tell, from their face, when the exercise of typing was finalised.
 7. The respondents oppose the extension of time to appeal, pointing at the delay. They opine that the application is designed to defeat their civil suit against the complainant. Unfortunately, the respondents have not addressed the question as to the inability of the applicant to get the proceedings and judgement timeously to facilitate filing of the appeal. They have not provided any indication as to when the applicant came to have access to the proceedings and judgement.
 8. The other point raised by the respondents is that the judgement was already typed, as at 12th April 2023, when it was delivered, and suggested that the applicant should have used that to frame the grounds of appeal. That could be so, but appeals do not turn only on the substance of the judgement, they could be on the process, in terms of how the evidence was recorded, or how the witnesses and their testimonies were handled, and whether the recorded evidence was properly handled in the judgement. Framing a petition of appeal without both the judgement and the proceedings may not give the applicant a proper appreciation of the thought process behind the content of the judgement, and might not assist in properly identifying the issues that ought to go into the petition.
 9. As there is no indication as to when the typed proceedings and judgement were availed to the applicant, I am inclined to give the applicant the benefit of the doubt, and presume that 15th March 2024 is when the documents became available. Secondly, and going by *Michael Mukhwana Wanyonyi v Republic* [2021] eKLR (Bwonong'a, J), the *Constitution*, 2010, by its Articles 50(2)(g) and 159(2)(d), does give the court a wider or broader discretion, to do substantive justice, beyond what section 349 of the *Criminal Procedure Code* offers. In view of that, the applicant would be entitled to get the opinion of a higher court, on the matters that it proposes to raise on appeal.
 10. Of course, that does raise the issue of whether there are arguable points of law to be placed before the appellate court. I doubt that I should get into that debate, seeing that section 349 of the *Criminal Procedure Code* limits itself to inability to obtain the proceedings and judgement. It does not introduce any other aspect into the matter. Whether the appeal to be filed has any merits would be a matter for canvassing at the appeal itself.



11. In view of everything said above, I will, accordingly, allow the application. Let the appeal be filed within 14 days.

DELIVERED BY EMAIL, AND DATED AND SIGNED IN CHAMBERS AT BUSIA THIS 16TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the applicant.

Mr. Ipapu, instructed by Ipapu P Jackah & Company, Advocates for the respondents.

