



**Muchiri v Republic (Criminal Appeal E119 of 2023)
[2024] KEHC 7426 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E119 OF 2023
RC RUTTO, J
JUNE 14, 2024**

BETWEEN

MICHAEL MAINA MUCHIRI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant filed a Memorandum of Appeal dated 4th October, 2023 seeking to appeal against the decision of trial court dated 29th June 2023. In this impugned ruling, the trial court dismissed the appellant’s application dated 24th March 2023 seeking that the court recuses itself in the matter.
2. Thereafter, on, the 23rd January 2024, the applicant moved this Court by way of a Notice of Motion application under certificate of urgency dated 23rd January 2024 in which the appellant /applicant sought the following orders:
 - a. That service be dispensed with in the first instance. (Spent)
 - b. That pending the hearing and determination of this application, there be a stay of proceedings in Gatundu Case E042 of 2022 Republic v Michael Maina Muchiri scheduled for 29th January 2024 before Hon R.N Ng’ang’a. (Spent)
 - c. That there be a stay of proceedings pending the hearing and determination of this appeal.
 - d. That the costs be in the cause.
3. The application is supported by the undated and un-commissioned ‘affidavit’ of Michael Maina Muchiri in which it is deponed that:
 - a. He is aggrieved by the decision of the court in which the court declined to recuse itself.



- b. The court erred in law and fact by finding that the accused person has a case to answer without giving reasons.
4. This application was opposed by the Respondent through the Replying affidavit sworn by Esther C. Torosi, a Prosecution Counsel, on 19/3/2024 in which it is deponed that the;
 - a. applicant will not suffer any prejudice by being put on his defence.
 - b. application is premature and intend to further delay the case.
 - c. grounds cited for appeal in the Memorandum of Appeal should be preserved for the main appeal, should the applicant be convicted.
 - d. application has not been brought in good faith.
5. A perusal of the court record shows that on the 26/1/2024 when this matter came before court for the first time, the Court granted interim stay of proceedings in the Gatundu Criminal case No. E042 of 2022 pending the inter-parte hearing of this application.
6. The application came before court for hearing on the 15/4/2024 and 15/5/2024 but the applicant had not filed his submissions. Consequently, on the 5th June, 2024 this matter was listed for directions and the parties agreed to submit orally. Noting the above and in the interest of time, the application proceeded on the basis of oral submissions as follows:

Applicant's submission.

7. The applicant submitted that he has appealed against the ruling of the trial court in Gatundu Criminal Case No. E042 of 2022 Republic v Michael Maina Muchiri dated 29th January 2024 on two grounds namely, that the court refused to recuse itself yet it had failed to correctly record the court's proceedings. A fact that he came to know about when he requested for the proceedings to put in his submissions after the prosecution closed its case. Further, that the court was compromised during a site visit when they spent time at a police station to the exclusion of the applicant and hence he had lost faith in the presiding court and wanted this matter to be heard before a different court.
8. Secondly, he submitted that he had been given 3 sets of different proceedings and did not know which proceedings to rely on hence he was wrongly put on his defence. The applicant further stated that the complainant Mr. Karanja Kimani Gathige be ordered not to damage any more of his property. He asked the court to grant his application.

Respondent's submissions

9. Counsel for the respondent submitted and urged the court to dismiss this application for it was frivolous as the applicant had not raised any sufficient ground to warrant the grant of the prayers sought.
10. With regard to allegation that the court spent at the police station after the site visit, counsel informed court that the applicant never raised the objection at that time and five other prosecution witness had proceeded to testified after that visit. Accordingly, she submitted that this application was filed as an after thought after the applicant was placed on his defence.
11. Counsel relied on Article 50 of *the Constitution* and urged this court to dispense with this application since the rights of the complainant have been curtailed. It was counsel for the respondent's submission that this application is pre-mature since it is not founded on legal and factual foundation since before the applicant being placed on his defence, he was given a chance to defend himself. Further, that in



the ruling dated 29/6/2023 the trial court gave reasons for putting the applicant on his defence and hence the applicant should not use this as a ground to appeal. Counsel urged the court to dismiss this application in its entirety.

Issue for Determination

12. Having heard parties' submissions, the issue for determination is whether the application dated 26/2/2024 raises arguable grounds to warrant grant of the stay orders.
13. In the application, the applicant seeks stay of the criminal proceedings in Gatundu Criminal Case No. E42 of 2022 before the lower court on the grounds that he was aggrieved by the court Ruling delivered on 29th June 2023 and that he has lodged an appeal.
14. In that ruling the trial court made a determination on two issues: firstly on the applicant's application dated 24/3/2020 which was seeking that the court recuses itself from further hearing Gatundu Criminal case No E042 of 2022; and secondly, whether the accused person had a case to answer.
15. Outrightly, it is worth stating that the applicant in filing his appeal to this Court, seeks to stay and appeal against an interlocutory decision in an on going trial. The Supreme Court has advised that as a matter of good practice, interlocutory appeals should not be allowed so as not to prejudice the expeditious disposal of trials. This was well stated in *Waswa v Republic (Petition 23 of 2019)* [2020] KESC 23 (KLR) (4 September 2020) (Judgment) where the Supreme Court stated as follows:

“ 84. The benefits of an expeditious trial cannot be gainsaid. A speedy trial ensures that the rights of the accused person are secured; it minimizes the anxiety and concern of the accused; it prevents oppressive incarceration; and it protects the reputation, social and economic interests of the accused from the damage which flows from a pending charge. It also protects the interests of the public, including victims and witnesses, and ensures the effective utilization of resources. Additionally, it lessens the length of the periods of anxiety for victims, witnesses, and their families and increases public trust and confidence in the justice system.

85. Therefore, in conformity with *the Constitution*, Courts should shun situations where an accused's right to a fair trial is prejudiced by virtue of undue delay. Courts possess the power to take appropriate action to prevent injustice. This power is derived from the public interest that trials are conducted fairly and that as far as possible the accused is tried without unreasonable delay the end goal being to achieve prompt justice in criminal cases.

86. The question then arises, what happens when a legal or constitutional issue, as in the instant case, arises within a criminal trial? Should the trial Court reserve the issue for determination by an appellate Court? Or should the trial Court determine the interlocutory issue and should any of the parties be aggrieved by such a decision reserve the right of appeal pending final judgment? Or should parties proceed with the interlocutory appeal?

...

92. Therefore, although criminal trials are not timebound like election petitions, there is need to have them determined expeditiously in line with the constitutional prescriptions. In the election petition of *Nicholas Kiptoo Arap*



Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC. Application No. 16 of 2014; [2014] eKLR (Nick Salat Case), we affirmed the significance of time as a component in the dispensation of justice, hence the maxim: Justice delayed is justice denied. We emphasized that it is a litigant's legitimate expectation that when they seek justice that the same will be dispensed timeously.

93. We have also stated that the right of appeal against interlocutory decisions is available to a party at a later date when the final decision of an election Court has been delivered. In *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others*, Petition No. 18 as consolidated with Petition No. 20 of 2018; [2019] eKLR, (the Loitiptip case) we held that while there is a right to appeal an interlocutory decision, this right is delayed for good order and in keeping with timelines of election petition matters. We concluded that a person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the decision, in line with Rule 75 of the Court of Appeal Rules.
 94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is 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 must file their intended Notice of Appeal within 14 days of the trial Court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:
 - a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
 - b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;
 - c. Where the decision entails the recusal of the trial Court to hear the cause.”
16. Guided by the above, I have perused the Memorandum of Appeal dated 4th October 2024. A cursory look at it shows that the applicant is appealing a ruling that made determination on the issue of recusal of the trial court. Without going into the merits, this falls within the exceptional instances when an appeal could be entertained pending the conclusion of a trial.
 17. This therefore, requires that stay orders be granted to safeguard the substratum of the appeal. I find that the application dated 23rd January 2024 is merited and is allowed in the following terms that: a stay of the proceedings in Gatundu Criminal Case No E042 of 2022 Republic v Michael Maina Muchiri is granted pending hearing and determination of the substantive appeal.
 18. In the interest of the justice and flowing from the above Supreme Court's guidance that a trial process should not be delayed by interlocutory matters, I further direct as follows:
 - a. The appeal be heard by way of submissions.
 - b. The applicant/appellant is granted 7 days within which to file and serve their submissions on the appeal. In default, this appeal will be deemed as withdrawn.



- c. The respondent is granted 7 days, after service, to file and serve their submissions.
- d. All submissions should not exceed 4 pages, New Times Romans Font 12 double spacing.
- e. Matter to be mention before this court on 2nd July, 2024 to confirm compliance and taking a Judgment date.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED ON 14TH THIS DAY OF JUNE 2024 AT NAIROBI

Appellant: Present in Person - Virtually

Respondent: Mrs. Torosi holding brief for Miss Samita

Court Assistant: Peter Wabwire

RHODA RUTTO

JUDGE

