



REPUBLIC OF KENYA



**Director of Public Prosecutions v Kangara (Miscellaneous Criminal Application E061 of 2024) [2024] KEHC 12586 (KLR) (Crim) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12586 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E061 OF 2024  
K KIMONDO, J  
OCTOBER 22, 2024**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**AND**

**PETER WACHIURI KANGARA ..... RESPONDENT**

**RULING**

1. The Director of Public Prosecutions (hereafter the DPP or the applicant) craves leave to lodge an appeal out of time. The notice of motion is dated 16<sup>th</sup> February 2024 and predicated upon the deposition of Ms. Edna Ntabo, Senior Prosecution Counsel.
2. The motion is ardently opposed by the respondent through a replying affidavit sworn on 2<sup>nd</sup> April 2024.
3. The background is fairly straightforward: On 26<sup>th</sup> September 2023, the respondent was acquitted by the lower court on charges of obtaining money by false pretences. Those proceedings were in the Chief Magistrates Court at Nairobi in Criminal Case No. 676 of 2019 *DPP v Joseph Gachoka Mubeu & Peter Wachiuri Kangara*.
4. The DPP failed to lodge his appeal within the prescribed 14 days. In a nutshell, the DPP assigns the delay to failure by the lower court to provide “typed proceedings and the judgment of the Honourable court timely”. A copy of the letter requesting the same is attached and marked EN2. It is also deposed that on 9<sup>th</sup> October 2023, the DPP received a letter from the complainant urging the office to prefer an appeal. Upon perusal of the judgment, the DPP formed the opinion that that an appeal was merited. A draft petition of appeal is annexed marked EN4.



5. The respondent avers that the letter seeking the proceedings dated 7<sup>th</sup> February 2024 was authored more than three months after the impugned judgment. He contends further that the DPP is being directed by the complainant contrary to Article 157 of the Constitution. Learned counsel, Mr. Kanyi Ndurumo, argued on the other hand contends that the supply of the certified copies of proceedings or ruling was not a bar to drawing and filing a petition of appeal; and, that it would be open to the DPP to later seek leave to amend it if need so arose.
6. In paragraphs 8 to 13 of the replying affidavit, the respondent averred that the prosecution failed to prove the charge in the lower court beyond reasonable doubt; and, that the trial court arrived at the correct decision. I heard the respondent to say that the intended appeal has no chances of success.
7. I take the following view of the matter. In view of the nature of orders that I propose to make, it would be prejudicial to delve into the merits of the intended appeal.
8. The legal parameters of an application of this nature are well settled: This court has wide and unfettered discretion to extend time. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Mungatu v Republic*, Court of Appeal Nairobi, Criminal Application E009 of 2023 [2023 KECA 671 (KLR)].
9. I can also safely state as follows. The DPP was an active participant in the lower court. A diligent prosecution counsel may well have formulated some grounds of appeal and drafted a petition of appeal even without waiting for the certified copies of the proceedings. It would remain open to seek leave to amend it later under section 350 of the Criminal Procedure Code.
10. I am at great loss why the DPP waited to be prodded by the complainant to make up its mind about appealing the decision. Article 157 (10) of the Constitution is explicit that in the exercise of his powers or functions, the DPP “shall not be under the direction or control of any person or authority.
11. That said, I note that the applicant applied for the proceedings after the lapse of three months. The letter from the complainant had been forwarded to the DPP in October 2023, about two weeks after delivery of the judgment. So much so that the DPP dithered on its decision to proceed with an appeal.
12. I have evaluated the length and the reasons for the delay and the nature of the intended appeal. I find that the DPP is under a duty to act in the public interest and that the delay in the request for proceedings or presentation of this motion is not inordinate. I agree with the respondent that he will suffer an element of prejudice including costs of litigating the appeal. But all this has to be weighed against the rights of the victim and the wider public interest.
13. I also agree that litigation should come to an end. But as to whether the door to this case should now be closed, or, whether the intended appeal is meritorious, the answers fall within the province of the first appellate court. The less I say about it the better.
14. For all those reasons, I am minded to exercise my discretion in favour of the applicant. My final orders shall be as follows:
  - a. That leave be and is hereby granted to the applicant to lodge an appeal out of time. The petition of appeal must be formally filed and served upon the respondent within 14 days of today’s date.
  - b. That in default, the leave granted shall automatically abate.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

**KANYI KIMONDO**

**JUDGE**

Ruling read virtually on Microsoft Teams in the presence of: -

Ms. Awino for the applicant instructed by the office of the Director of Public prosecutions.

Mr. Kanyi for the respondent instructed by Kanyi Ndurumo & Company Advocates.

Mr. E. Ombuna, Court Assistant.

