Oganga v Director of Public Prosecutions (Anti-corruption and Economic Crimes Miscellaneous E041 of 2022) [2023] KEHC 834 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES MISCELLANEOUS E041 OF 2022

EN MAINA, J

FEBRUARY 9, 2023

BETWEEN

FELIX OBONSI OGANGA ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

RULING

1. What is before this court is the notice of motion dated September 23, 2022 by which the applicant seeks leave to file an appeal out of time against a ruling delivered against him in Milimani CMACC No 1 of 2019 and that there be no order for costs.

2. The application is expressed to be made under section 349 of the *Criminal Procedure Code* and articles 50 and 159 of the *Constitution* of Kenya and is premised on the ground that the applicant was prevented from proffering the appeal within time due to a delay on the part of the court to supply copies of the proceedings and ruling. It is also contended that the appeal has high chances of success and it is mete and just that the applicant be granted the leave craved.

3. The respondent opposed the application through the replying affidavit of principal prosecution counsel Joyce Olajo, sworn on October 6, 2022. It is the respondent's contention that the application lacks merit, is an afterthought, an abuse of the court process and a clear attempt to derail the hearing and finalization of the trial against the applicant. According to Ms Olajo the applicant has not given a plausible explanation as to why it took them three months to bring this application; that the allegation that the delay was occasioned by the court is misconstrued, misguided, misleading and a fallacy. It is her contention that the impugned ruling was available to the parties on the same day it was delivered and that she in fact obtained a copy thereof on the same day. She blames the delay in obtaining the ruling and proceedings on the applicant's failure to make the requisite payments and states that the

ruling annexed to the affidavit in support is not even signed an indication that the proper procedure was not followed to obtain it. counsel therefore urges this court to dismiss the application as according to her the applicant has also not demonstrated the prejudice he is likely to suffer should the same be disallowed.

4. counsel on both sides filed submissions in which they stood by and maintained their differing positions.

5. I have considered the application, the grounds thereof, the affidavits, the rival submissions and the decided cases cited thereat, the impugned ruling, the draft petition of appeal and the law and in my view the only issue for determination in this case is whether the applicant is deserving of the leave sought.

6. The central issue in the impugned ruling was the admissibility of certain documents produced by the prosecution. After hearing the objection raised by counsel for the applicant and submissions of the prosecution and the defence the trial magistrate ruled that the documents were admissible under section 177(1) as read with section 177(2) of the *Evidence Act* and proceeded to have them marked as exhibits.

7. The impugned ruling was delivered on June 23, 2022. The applicant has annexed a letter which reveals that he applied to be supplied with certified copies of proceedings and the ruling on June 24, 2022. Whereas counsel for the applicant has deposed that the ruling was not supplied to them on August 5, 2022 he has omitted to annex the letter that forwarded the ruling to them so as to prove that the ruling was in fact supplied on August 5, 2022. It is also my finding that given the time it took to bring this application and the gravity of the matter it would have been only reasonable to obtain a certificate of delay. I do therefore agree with the submission by counsel for the respondent that there was inordinate delay in bringing the application; that the application may be an afterthought and for that reason I would decline to allow it as in my view it would not aid the administration of justice to allow the application.

8. Be that as it may, I do also find that even on the merits the application cannot succeed. The leave sought is to file an interlocutory appeal out of time. Courts have frowned upon interlocutory appeals. Indeed, the issue has now been settled by the Supreme Court in the case of *Joseph Lendrix Waswa v Republic [2020] eKLR* when it stated that whereas a party has a right to prefer an interlocutory appeal that right must be deferred until after the trial. The court gave only two instances in which the courts could consider interlocutory appeals. The court stated:-

> " 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*.
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> 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."

9. Moreover, it is evident from the draft petition of appeal that the applicant does not oppose the admissibility of the documents per se but that he contends the merits of the contents of the documents by stating that the trial magistrate relied on uncorroborated evidence and that the documents "were fatally defective especially due to matters raised in that regard". He also raises an issue that there were discrepancies in the documents. Those are all matters of the merits of evidence. Matters of the merits of evidence adduced at a trial cannot form the basis of an interlocutory appeal as that is tantamount to asking this court to take over the trial court's role of evaluating the evidence. In the case of *Joseph Lendrix Waswa v Republic* (supra) the Supreme Court made it clear that the only instances where the court can consider an interlocutory appeal are inter alia where the same touches on the admissibility of evidence where its rejection could weaken the prosecution's case. In my considered view admissibility of evidence should otherwise be treated as provided in section 175 of the *Evidence Act* which states that:-

> " 175. Effect of improper admission or rejection
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> The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision."

The provision envisages that the appeal concerning the proper or improper admissibility of evidence would be preferred at the end of the trial but not while the trial is on-going.

10. The upshot is that the application must not only fail because of the inordinate delay in bringing it but also because it is an interlocutory appeal which contends the weight of the evidence in the impugned documents but disguised as an appeal against their admissibility. It is dismissed but as these are criminal proceedings there shall be no order for costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2023.**

E N MAINA

JUDGE