



REPUBLIC OF KENYA



**ODPP v Kiprop (Miscellaneous Criminal Application
E005 of 2021) [2023] KEHC 661 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2021**

TM MATHEKA, J

FEBRUARY 6, 2023

BETWEEN

ODPP APPLICANT

AND

MATHEW KIPROP RESPONDENT

RULING

1. What is before me is the Notice of Motion dated 10th March, 2021 brought under Sections 348 and 349 of the [Criminal Procedure Code](#), Order 51 of the CPR seeking orders by the Republic through the Directorate of Public Prosecutions(DPP): -
 - i. That leave be granted to file appeal of time.
 - ii. That the annexed memorandum of appeal be deemed as duly filed.
 - iii. Any other orders that court deems fit to grant.
2. The gist of the application is set out by the grounds on its, and the affidavit shown by Joseck Abwajo, a prosecution counsel and the annexure's therewith.
3. Basically that the respondent Mathew Kiprop was charged with the offence of malicious damage to property Contrary to Section 339 (1) of the [Penal Code](#). That on 20th January, 2021 the learned trial magistrate Hon. V. O. Amboko acquitted him. The complainant was aggrieved by the acquittal and through his counsel requested for typed proceedings which were only made available on 10th February, 2021 after the 14 days of appeal had lapsed. The trial magistrate declined to issue a Certificate of Delay and directed them to seek leave to file the application out of time.
4. Annexed to the affidavit is correspondence from Mwaita & Co. Advocates on behalf of Philip Kiplangat, seeking typed proceedings, dated 21st January, 2021, another letter dated 1st February, 2021 to the DPP Kabarnet, stating that the complainant was dissatisfied with outcome of the case and was



asking the DPP to lodge an appeal; a letter to court dated 10th February, 2021 seeking certificate of delay; the trial court's notes explaining refusal to issue certificate of delay; that the petition could have been filed pending the typing of proceedings, and that the proceedings were paid for on 10th February, 2021; the draft Memorandum of Appeal, setting out three grounds: -

- i. That the defence of alibi which the learned trial magistrate relied on was dislodged by the prosecution.
 - ii. That she erred in not finding that the prosecution had established the 4 elements of the charge of malicious prosecution.
5. The application is opposed vide the Replying Affidavit of Mathew Kiprop filed on 27th July, 2022 sworn on 25th July, 2022.
 6. His point is that the DPP (Republic) was satisfied with the outcome of the case but was enticed/pushed into signing an application devoid of merit and full of deceit prepared by the complainant.
 7. That the said complainant was ably represented by his advocate and the applicant, he could have filed the appeal without the proceedings. That the judgment of the court was already typed and there was no reason to wait for the typed proceedings.
 8. The proceedings were paid for late, 10th February, 2021, and indication that the letter of 21st January, 2021 was never presented to court. That the letter dated 1st February, 2021 was one day to the lapse of the 14 days and there is no evidence it was received by the applicant.
 9. That the applicant's position, as an independent institution did not require the prompting of the counsel for the complainant to file the appeal, as it is required to act fairly, avoid abuse of the process by wading off frivolous applications.
 10. That all in all the applicant has not demonstrated good reason for the application, and in any even the appeal has no chances of success.
 11. The applicant filed submissions where the grounds in the affidavits were reiterated. One authority was cited, *Miriam Mwangeli & Patricia Mwaniki vs R* (2017) eKLR.
 12. The only issue for determination is whether this application has merit.
 13. The applicable provisions of the law are Section 348A and 349 of the Criminal Procedure Code. Section 349 provides that an appeal which may for good cause admit an appeal out of time, but only if the court is satisfied that the failure to file in time was caused by the inability of the applicant to obtain a copy of the judgment/order appealed against and a copy of the record, with reasonable time of applying to the court.
 14. In addition, Section 350 provides that the appeal shall be by way of a petition accompanied by a copy of the judgment or order appealed against, unless the court provides otherwise.
 15. In this case, the applicant filed a draft Memorandum of Appeal. The same is not accompanied by either the charge sheet, the judgment or the proceedings, despite evidence that the same were obtained. The applicant did not at any time controvert the respondent's averment that at the time the judgment was read, it was already typed, and therefore the applicant ought to have annexed it to the application.
 16. The letters annexed to the application have not been acknowledged by the lower court. In fact, the court indicated that there was no reason why the appeal would not have been lodged pending the typed proceedings.



17. While the right of appeal is a constitutional right, it is required to be exercised in a specific manner, as per the provisions of Section 349 of the Criminal Procedure Code.
18. In this case the applicant has not complied, and has not given any good cause why the applicant did not comply.
19. It is evident that the applicant had no intention of filing any appeal until the applicant was prompted by the counsel for the complainant. Nothing wrong with that but the applicant does not explain itself, but places reliance on the actions by the counsel for the complainant.
20. If indeed the applicant wanted to appeal, there would have been evidence of the applicant's effort to obtain the proceedings and judgment. In this case the applicant is depending on facts that are in the know of the counsel for the complainant, that counsel ought to have sworn an affidavit on the facts related to the process of obtaining the proceedings.
21. In any event the applicant has not explained why the applicant did not obtain the judgment when it was read and the proceedings at the close of the case, clearly the applicant has not placed good cause before this court.
22. I have perused the authority cited.
23. True, in that case the court allowed the application, but in that case one, the applicants were previously the accused persons, two, the facts are not similar, and even the grounds for the appeal indicated that the appeal had chances of success.
24. Having considered the whole application, it is my considered view that no good cause has been set out by the applicant for the delay to warrant the prayers sought.
25. The same is declined.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF FEBRUARY, 2023.

MUMBUA T. MATHEKA,

JUDGE.

In the presence of:

C.A Kemboi

Ms. Ratemo for Applicant present

Mr. Chebii for Respondent N/A

