



**Kyosi v Republic (Criminal Appeal E056 of 2022)
[2023] KEHC 1931 (KLR) (Crim) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E056 OF 2022
DR KAVEDZA, J
MARCH 15, 2023**

BETWEEN

BONIFACE MWANDAKA KYOSI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This appeal has been placed before me for directions. I note that in Misc Cr Application No E288 of 2020, the appellant was granted leave to file an appeal out of time by Ong’udi, J on November 26, 2020. The leave was granted on condition that the appellant do file his intended appeal within 10 days of November 26, 2020.
2. The appellant filed his appeal on April 14, 2022 being one year and four months after expiry of the leave granted by the court. However, C Githua, J struck out the appeal for being incompetent and marked the file as closed.
3. The issue for determination is whether the appeal should be admitted to hearing and the orders having the appeal struck out be set aside.

Analysis and determination

4. It is a primary consideration in criminal proceedings that both the state and the defence are given leeway to ventilate their positions in court for substantive justice to be done as envisaged in article 159 of the [Constitution](#) (2010).
5. In that regard, I have not seen any line of submissions by the prosecution praying for dismissal of the appeal. There was no hearing on merit of the appeal. Ms Odour, the prosecution counsel, has argued



that this court is functus officio and that the matter should proceed to the Court of Appeal. However, the record clearly indicates that there was no hearing of the appeal.

6. The question that follows is, what will the Court of Appeal hear? It is my considered view that there is nothing to be heard at all. Nonetheless, no prejudice will be suffered by the Respondent if I review the ruling by Cecilia, J dated April 14, 2022 striking out the appeal.
7. I therefore disagree that dealing with the application for review is tantamount to sitting on an appeal of a decision by a court of concurrent jurisdiction.
8. In *Abdulla Lule v R (1960) EA 21*, the application to appeal out of time was allowed because the applicant did not obtain the judgement and proceedings of the lower court within 14 days to enable him to appeal.
9. Similarly, I do note that the appellant herein was convicted and sentenced on October 23, 2019. Surprisingly, he has never been provided with copies of the judgment and proceedings to enable him lodge his appeal. Indeed, as I write this ruling, the trial court record has not yet been availed to this court. It only follows that the applicant meets the threshold for extension of time to file his appeal out of time under section 349 of the *Criminal Procedure Code*. Such delay was not occasioned by his negligence but rather the unavailability of the lower court file. It is in the interest of justice that he ought not to be dismissed unheard.
10. It is on this basis that I allow the application and consequently, the appeal is reinstated for hearing. I hereby direct that the record of appeal be served upon the respondent by the appellant within 30 days to enable the respondent to file its grounds of objection.
11. This matter will be mentioned on April 18, 2023 for directions.

RULING READ, DELIVERED AND SIGNED THIS 15TH DAY OF MARCH, 2023

D. KAVEDZA

JUDGE

In the presence of:

