



**State v Osiemo & another (Miscellaneous Criminal Application
E006 of 2023) [2023] KEHC 3301 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2023**

PN GICHOHI, J

APRIL 20, 2023

BETWEEN

STATE APPLICANT

AND

ZACHARIAH OSIEMO 1ST RESPONDENT

COLLISTA NYAMAO 2ND RESPONDENT

*(Originating from the Judgement in Ogembo Criminal Case
No 45 of 2020 by Hon GN Barasa Resident Magistrate.)*

RULING

1. By a Notice of Motion dated January 17, 2023, the Director of Public Prosecution has moved this Court under Section 348 A and 349 of the [Criminal Procedure Code](#) seeking leave to appeal out of time. The grounds thereon are that judgment was delivered on November 9, 2022 and the Complainant applied for the certified typed proceedings and judgment which were only availed on January 12, 2023. As a result, there was inordinate delay in seeking to file an appeal which the complainant believes has reasonable chance of success.
2. The Application is supported by the affidavit sworn by Peris Makanga on January 17, 2023. She depones that she is the complainant and when the judgment was delivered on November 9, 2022, she was dissatisfied with the acquittal of the accused persons and therefore contacted the Office of the Director of Public Prosecution in Kisii and was duly instructed to procure the proceedings so that she could be advised on viability of an appeal.
3. She states that she applied for the proceedings and judgment immediately but only received them of January 12, 2023 and hence the delay in filing was not intentional.



4. Though served, the respondents did not file any response and attend court. The application proceeded ex-parte. There were no submissions in this matter. The only issue for determination here is whether leave should be granted as sought. 5. Section 348A (1) of the *Criminal Procedure Code* provides that :

“When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on matter of fact and law.”

5. The limitation of time of appeal is provided for under Section 349 of the *Criminal Procedure Code* that :

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against: Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

6. I have perused this file and noted that they have annexed a copy of the intended Petition of Appeal dated January 17, 2023. The Applicant is intending to appeal against the judgment and acquittal of the Respondents in Ogembo Criminal Case No 45 of 2020 by Hon GN Barasa Resident Magistrate.

7. There is no letter of request of the judgment or proceedings annexed to the affidavit to show how soon that request was made after delivery of the judgment. However, if the Applicant obtained certified copies of the proceedings and judgment on January 12, 2023, that can be confirmed by the date of certification of the same by the magistrate. In essence, that is a delay of about two months.

8. Such delay is inordinate as acknowledged by the Applicant but the same appears to have been caused by the administrative procedures of the Court. The delay therefore may not be visited on the Applicant herein in the circumstances.

9. Having satisfactorily accounted for the delay, and there being no possibility of prejudice on the part of the Respondents by a grant of the extension of time, then this Court exercises its discretion in her favour and allows her to file the appeal out of time. The Applicant to file the Petition of Appeal within 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 20TH DAY OF APRIL, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ochiengo for Applicant

N/A for Respondents

Kevin Isindu, Court Assistant

