



**Republic v Mulaya (Miscellaneous Criminal Application  
E217 of 2022) [2023] KEHC 19540 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
MISCELLANEOUS CRIMINAL APPLICATION E217 OF 2022**

**AC MRIMA, J**

**JULY 6, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**EMILY KIVALI MULAYA ..... RESPONDENT**

**RULING**

**Introduction and Background:**

1. By dint of the provisions set out in section 349 of the *Criminal Procedure Code*, cap. 75 of the Laws of Kenya, the application by way of Notice of Motion dated April 21, 2020 and filed on April 23, 2020 by the State, sought the following reliefs: -
  - 1) ..... Spent;
  - 2) That this honorable court be pleased to grant leave to the Applicant to file an appeal out of time;
  - 3) That costs be in the cause.
2. The gist of the application is that the Respondent was charged with 12 counts ranging from stealing, making a document without authority, uttering a false document to conspiracy to defraud in Kitale Chief Magistrates Criminal Case No. 3836 of 2014 (hereinafter referred to as ‘the Criminal case’).
3. Ultimately, the trial Court on May 20, 2019 acquitted the respondent on all the counts.
4. Dissatisfied with the outcome, the applicant herein filed an appeal in High Court Criminal Appeal No. 56 of 2019.



5. On filing the said appeal, the applicant realized that the appeal was filed 3 days late without leave of the court.
6. In that regard, the respondent filed a preliminary objection that instigated the withdrawal of that appeal.
7. The applicant acknowledged that under section 349 of the *Criminal Procedure Code*, an appeal lies as of right within 14 days after the date the impugned decision has been rendered. It computed that the appeal window against the trial court's decision lapsed on June 4, 2019.
8. In justification for the appeal, the applicant averred that the value of the subject matter spanned in millions of shillings. Guided by the dictates of the law allowing it to withdraw an appeal and seek leave to appeal out of time, the applicant stated that it was in the interest of justice that the orders sought be granted as the appeal is weighty.
9. Finally, it was posited that the application occasioned no prejudice on the respondent.

#### **The Response:**

10. The respondent opposed the application. He filed a replying affidavit on July 6, 2022 sworn by her Advocate Elisha Zebedee Ongoya on the same day.
11. Counsel reiterated the history of the matter that led to the withdrawal of the initial appeal.
12. Counsel further took issue with the instant application which was filed in the appeal file and yet the Applicant held that the matter had been withdrawn. Counsel deposed that the instant application was incompetent and bore the following curious characteristics; firstly, it bore the title of the present cause yet the application preceded the case number. Secondly, it is supported by an uncommissioned affidavit of one Eusebius P. O. Omooria. Thirdly, it purports to state that the appeal was withdrawn yet it is still alive. Finally, while the application contended that it raised weighty issues in support of the appeal, no draft Petition of Appeal was attached to the application.
13. The deponent continued that the pendency of the appeal hanging over the Respondent's head is prejudicial ipso facto. He added that owing to the irregularities deciphered in the application, the ends of justice are met by an order of dismissal or striking out of the appeal and the application.

#### **The parties' submissions:**

##### **The Applicant's:**

14. The applicant filed its submissions dated October 27, 2022 on even date.
15. It relied on the proviso to section 349 of the *Criminal Procedure Code* to hold that this court ought to exercise its unfettered discretion to grant leave to appeal out of time since the application occasioned no prejudice upon the respondent, was made bona fide and timeously, and the intended appeal raised triable issues.
16. It submitted that the court should be hesitant to close the corridors of justice without having heard the parties.
17. It prayed that the application be granted as sought.

##### **The Respondent's:**

18. The respondent's submissions were dated November 7, 2022 and filed on November 9, 2022.



19. She observed that the instant application was filed almost 1 year after delivery of the impugned decision. In the same vein, the Notice of Withdrawal was filed several months after the appeal had been filed and not instantaneously.
20. It was submitted that the risk in allowing the application will be prejudicial to her since it would go against her constitutional rights set out in articles 50(2) and 159(2)(b).
21. Further, reading section 349 of the *Criminal Procedure Code*, the respondent explicated that the said provision assisted a litigant who had not contributed to the delay. That was not the case here as the applicant delayed without explanation. She submitted that while the applicant tried to explain the delay in filing the appeal, there was no explanation on the delay in filing the Notice of Withdrawal.
22. There being no explanation for the delays, the court was invited to dismiss the application with costs.

**Analysis:**

23. Before delving into the consideration of the application, this court wishes to draw the parties' attention to the proceedings of September 20, 2022.
24. On the said day, the court considered the Notice of Withdrawal which had been filed in Kitale High Court Criminal Appeal No. 56 of 2019. In the presence of Counsel for the State and the Respondent, this Court directed that the appeal be marked as withdrawn on the basis of the Notice of Withdrawal of Appeal dated January 14, 2020.
25. In that vein, the court ordered that there be no further proceedings in the said appeal file. Further orders directed that Misc. Crim. Application No. 140 of 2019 be given a new file number. In that respect, the application dated April 21, 2020 filed in the appeal file was transferred into the present Misc. Crim. Application file.
26. Resulting from the above orders, the issue of the Notice of Withdrawal of the appeal was put to rest and the appeal was finally marked as withdrawn and file closed. Therefore, any issues on whether the appeal is still current or was properly withdrawn cannot be considered in this matter. Such issues are spent and overtaken by events. Indeed, they are res judicata.
27. Having said so, the court will now deal with the application.
28. The application substantively seeks leave of this court to appeal out of time. It is premised on section 349 of the *Criminal Procedure Code* which provides as follows: -

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.

29. Drawing from the above, it is the position in law that an appeal may be admitted out of time if the court is satisfied that the failure to comply within the precincts of time was caused by the inability to obtain a copy of the judgment or order appealed against and a copy of the record within reasonable time after applying for the same.



30. In such a case, the reasons for granting leave to appeal out of time under section 349 of the *Criminal Procedure Code*, are well spelt out and statutorily ring-fenced. There are only two reasons, being, one, the inability to obtain a copy of the judgment or order appealed against within the 14 days post the decision and, two, the inability to obtain a copy of the record within reasonable time after applying for the same.
31. That being the case, it should also not be forgotten that further guidance ought to be obtained from the dictates of the *Constitution* more so in articles 10(2) and 159(2) in so far as a court is to render substantive justice to all parties.
32. Going forward, this court will look at the provisions of section 349 of the *Criminal Procedure Code* through the lenses of articles 10(2) and 159(2) of the *Constitution*.
33. The first consideration is the period of delay, and the second is the reason(s) thereof.
34. The impugned decision was rendered on May 20, 2019. The appeal which was later withdrawn was filed on June 6, 2019. That was a period of 3 days post the 14 days' window for appeal under section 349 of the *Criminal Procedure Code*.
35. As a result of the disappearance of the appeal file, the applicant (then appellant), had to finally bring the matter to the attention of the court on September 20, 2022. It was on that day when the appeal was marked as withdrawn and the application ordered to be heard separately.
36. As stated above, before the withdrawal of the appeal, the applicant had filed the instant application on April 23, 2020.
37. Given that the appeal was filed way back in June 2019 and the instant application filed in April 2020, it is possible that this matter would have been long dealt with had it not been the disappearance of the court file.
38. It can only be the position that none of the parties herein was behind the disappearance of the court file. As such, none of the parties may be blamed for the subsequent delay and the resultant lapse of time cannot be attributed to any party.
39. As a result of the above events, the operative delay period can only be the 3 days after the lapse of the appeal window.
40. Having settled the delay period, the reason then follows. Section 349 of the *Criminal Procedure Code* mainly attributes the delay to failure to obtain the impugned decision or a copy of the record. As the proceedings in the criminal case are yet to be typed and certified, suffice to say that a like position existed at the time the appeal and the application were respectively filed. In such a case, even a certificate of delay cannot issue to explain the delay since the delay still continues.
41. This court is also alive to the submissions made by the applicant's Counsel on September 20, 2022 that Counsel had made countless trips to the court registry in search for the court file in vain. That was when she decided to file the instant application in seeking the intervention of this Court.
42. It is the position in this matter that the proceedings in the criminal case are yet to be typed and certified. In that case, the requirements in section 349 of the *Criminal Procedure Code* yield in favour of the Applicant.
43. As the issue as to whether the proceedings in the criminal case were typed and certified is factual and one which this court has ascertained from the court record, such a fact need not necessarily be deposed to on oath. In fact, it is a fact which a court is to take judicial notice of under section 60 of the *Evidence*



Act, cap. 80 of the Laws of Kenya as a matter of general or local notoriety coupled with the fact that the Respondent has not disputed the position.

44. In this matter, the interests of justice shall be best served in according the Applicant to prefer the appeal. While being alive to the sentiments by the Respondent on the time the matter has taken on one hand, on the other hand, none of the parties may be squarely blamed for the delay which was mainly caused by the disappearance of the court file.
45. Having said so, it is this court's finding that the application is merited.

**Disposition:**

46. Deriving from the foregoing, this court will also issue directions towards an expedited disposal of the intended appeal in view of the time this case has taken in the courts.
47. In the end, the following final orders do hereby issue: -
  - a. The Notice of Motion dated April 21, 2020 is merited.
  - b. Leave is hereby granted to the Applicant to file and serve a Petition of Appeal within 21 days of this order.
  - c. The Honourable Deputy Registrar of this Court shall expedite the typing and certification of the proceedings in Kitale Chief Magistrates Criminal Case No. 3836 of 2014.
  - d. Further orders shall be made in the appeal file.
  - e. This file is hereby marked as closed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF JULY, 2023.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered virtually and in the presence of:**

Miss. Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State/Applicant.

Mr. Ongoya, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

