



**Republic v Muli (Miscellaneous Criminal Application E004 of 2024)
[2024] KEHC 12842 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2024
LM NJUGUNA, J
OCTOBER 23, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

KENNEDY WAMBUA MULI RESPONDENT

RULING

1. The applicant filed a notice of motion dated 24th January 2024 premised on the grounds on its face and in the supporting affidavit thereof, seeking the following orders:
 - a. That the applicant be granted leave to file an appeal out of time against the discharge of the respondents under section 202 of the Criminal Procedure Code in Siakago Principal Magistrate’s Court Sexual Offence no. E058 of 2022 on 14th December 2023; and
 - b. That the annexed petition of appeal be deemed as duly filed
2. In Siakago Principal Magistrate’s Court Sexual Offence no. E058 of 2022, the respondent was facing the charge of defilement. The police file was not availed by the investigating officer from Mbondoni Police Post but the rest of the witnesses were ready to testify. The applicant stated that the prosecution counsel, Juliah Nkini Tawuo sought to withdraw the matter under section 87(a) of the Criminal Procedure Code but the trial court discharged the accused person under section 202 of the Criminal Procedure Code on 14th December 2023.
3. It stated that the victim’s mother and the prosecution counsel wrote to the officer in-charge of Makima Police Station which oversees Mbondoni Police Post and they complained about failure to avail the police file. That they also wrote to the trial court to avail copies of proceedings for appeal purposes but the court delayed in availing certified copies of the proceedings and ruling. That the appeal raises arguable points of law. It urged the court to find merit in the application in order to allow the victim to testify.



4. In response, the respondent urged the court to look into the issues that led to him being discharged in the first place. That he is an orphan and has dependants but the victim's mother is determined to tarnish his name using the allegations made in the charge sheet. He urged that he was not found guilty of any offence and therefore the court should let his matter rest.
5. The court directed the parties to file written submissions but none of them complied.
6. The issue for determination is whether the application has merit.
7. Section 349 of the *Criminal Procedure Code* permits this court to exercise its discretion in enlarging time to appeal for good cause. Delay in obtaining certified copies of the proceedings and ruling from the trial court is one such reason. This provision states:

“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.”

8. The applicant applied for certified copies of the proceedings through a letter to the trial court dated 28th December 2023, being 2 weeks after the impugned ruling of the court. The trial court proceedings were certified on 10th January 2024 and this application was filed on 24th January 2024. Considering the provisions of section 349 of the *Criminal Procedure Code*, this court is at liberty to admit an appeal out of time, being satisfied that the delay was in obtaining certified copies of the impugned order. The applicant has already filed a petition of appeal and seeks that the same be deemed as properly on record following granting of leave.
9. I am guided by the decision in the case of *Samson Owiti Otambo v Republic* (2018) eKLR the court stated:

“The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court.”

Further, in the case of *Michael Onyango Owala v. Republic* (2018) eKLR the court stated as follows:

“Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the *Criminal Procedure Code* to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an ‘appeal’ is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.”

10. In the circumstances, and for the reasons given herein, I find that the application has merit and it is hereby allowed as prayed.
11. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondent

