



REPUBLIC OF KENYA



**Marube v Republic (Criminal Appeal 21 of 2020)
[2024] KEHC 13750 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL 21 OF 2020
RE ABURILI, J
NOVEMBER 6, 2024**

BETWEEN

KEPHA MARUBE APPLICANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment, conviction and sentence passed in the Chief Magistrate's Court at Kisumu in CMCR (Anticorruption Court) Case No. 3 of 2018 by Hon. R.K. Ondieki, SPM on 1st September, 2020 (conviction) and 4th September, 2020 (sentence) respectively)

RULING

1. Before this court for determination is a notice of motion dated 25th June 2024 filed by the appellant seeking orders that this court be pleased to set aside the orders dismissing this appeal on 18th March, 2024 for want of prosecution and that the appeal be reinstated to be heard on its merits.
2. The application is opposed by the Prosecution on the ground that the appellant went to slumber and that he wants to go around this Court's Orders.
3. Before I delve into the merits of the application beforehand, the history of this appeal is important. The appeal was filed on 10/9/2020 through the firm of Ken Omollo & Company Advocates. Judgment in the lower court was rendered on 10/9/2020. It was an anti-corruption court case. On 11/5/2023, the lower court file was availed and on 5/6/2023, this court admitted the appeal to hearing and directed the appellant's counsel to file and serve a record of appeal together with written submissions within 30 days.
4. The court then fixed the appeal for mention on 7/8/2023 during the recess, before the Deputy Registrar to confirm compliance and for the court to fix a judgment date. The Court also directed the Registry to notify the parties and to cause judgment in HCCRA 22 of 2020 to be photocopied and



filed in this file since the appeal in HCCRA 22 of 2020 arose from the same proceedings and judgment where the appellant herein was jointly charged with the appellant in HCCRA 22 of 2020.

5. On 7/8/2023, Mr. Onsongo advocate appeared before the Deputy Registrar and sought for more time to “put his house in order” and the Deputy Registrar fixed the appeal for mention on 16/10/2023, over 2 months away. On the latter date, the Presiding Judge was attending a conference on notice hence the matter was mentioned before Hon. Serem Deputy Registrar who fixed it for mention on 28/11/2023. On the latter date, the Deputy Registrar fixed it before me for 15/12/2023 unfortunately the court was engaged in other official duties hence it could not deal with the matter and all this while, directions for filing of the record of appeal and submissions were subsisting so it was expected that the appellant takes advantage of that period extended by default to comply. The appeal was set for further mention on 19/12/2023. On the latter date, there was no appearance for the appellant and the court directed the Registry to notify the appellant’s counsel and to remind him to file a record of appeal as earlier directed, within an enlarged 14 days of the date in issue. That was faithfully done as per the Court emails effecting service of court directions.
6. I then set the matter for mention on 30/1/2024 when Mr. Onsongo informally appeared for the appellant and requested for time to take over the appeal since Mr. Ken Omollo was said to have filed the record of appeal and indeed, the record of appeal dated 18th January, 2024 was filed on 1/2/2024.
7. On 30th January, 2024, this Court also noted and recorded that on 28/11/2023, Mr. Ken Omollo had written to court disowning the appellant herein and Mr. Onsongo who was present in Court and requested time to formally come on record was granted 21 days to file and serve a record of appeal with written submissions. In the orders of 30th January, 2024, this Court made it clear that should the appellant fail to comply with directions of the Court on prosecution of the appeal, the appeal stood dismissed but I nonetheless fixed the matter for mention on 18/3/2024 to confirm compliance and on which latter date, there was no appearance by the appellant hence the formalization of the dismissal of the appeal by this court for non-compliance with the directions of the Court on prosecution of the appeal.
8. The applicant never acted until 26th June, 2024 when he filed this application subject of this ruling, seeking to set aside the dismissal order of 18th March, 2024.
9. The applicant asserts and deposes that he instructed Mr. Sylvestr Madialo Advocate to file the appeal for him which he did but used the firm name of Ken Omollo & Company Advocates to file the appeal and that he learnt that Mr. Madialo was a member of the Siaya County Assembly hence he could not represent the appellant against Siaya County Government which was the Complainant in the case before the lower court.
10. The appellant deposes that he was let down by his advocate and that he only learnt late that the case had been terminated hence the application.
11. That is the gist of this application.
12. The respondent State represented by Mr. Marete Principal Prosecution Counsel opposed the application submitting that the applicant wanted to go around the orders of the court and that the appellant was guilty of inordinate delay. That the appellant was simply shifting blame on advocates. He urged the court to dismiss the application.
13. In a rejoinder, Mr. Onsongo submitted that the appellant was abandoned by his advocate, that he has a good appeal which is likely to succeed and that no prejudice would be occasioned to the respondent if the orders sought are granted.



14. I have considered the application and the arguments for and against.
15. From the detailed history that I have given above, the appellant knew from the beginning what Mr. Madialo had done- representing him in the criminal case where the complainant was the County Government of Siaya whereas Mr. Madialo was a member of the Siaya County Assembly, and that is why he brought in Mr. Onsongo whose appearance in the proceedings, though informal, Counsel never at any one time state that he was holding brief for Mr. Madialo or Mr. Ken Omollo. Mr. Onsongo asked this Court to allow him put his house in order and to comply where Ken Omollo had failed to comply. The court at all times allowed Counsel time to comply.
16. The appellant was charged under various statutes, of the various offences of corruption and economic crimes. He has been dilly dallying with his appeal for reasons known to himself since this is a matter he cannot blame advocates on record as there is nothing on record to show that he was personally interested in prosecuting his appeal. He has not demonstrated that he ever personally appeared before this Court to establish the position of his appeal or that he followed up with Mr. Madialo advocate if at all he had fully instructed him to file this appeal and even prosecute it to the end.
17. He has not demonstrated how he was let down by the advocates that he instructed to represent him either formally or informally. He has not demonstrated that he fully instructed Mr. Onsongo to take over the matter from Mr. Madialo and or that Mr. Onsongo also let him down.
18. Mr. Onsongo was appearing for the appellant informally but asked this Court for more time, and Court readily allowed more time for the appellant to prosecute his appeal. In any case, in criminal proceedings, the formalities to filing notices of change of advocates are procedural technicalities which this court would not strictly allow to be applied in view of the inherent right of accused persons to be represented by counsel of their own choice.
19. I reiterate that the fact of the appeal having been filed in the name of Ken Omollo advocate by Madiallo Advocate was very much within the knowledge of the appellant and Mr. Ken Omollo did exonerate himself early enough by writing a letter to Court stating in very clear terms that he had never been instructed by the appellant to represent him. That cannot be an abandonment. Counsel was simply saying the truth.
20. This is one of those cases where discretion of this court has been fully exercised and exhausted. The laches by the appellant even in filing an application to attempt to set aside the dismissal order has not been explained. The delay is inordinate and the failure to comply with the court's directions led to the dismissal of the appeal which had been pending endlessly following directions for filing of the record of appeal and the written submissions.
21. Article 159 of the Constitution abhors delay and calls upon the Courts to administer justice without undue delay. There is undue delay in this matter. Although the appellant's counsel submits that the respondent shall not suffer any prejudice, it is not just prejudice that is key in this matter but that the Court's unfettered discretion as sought has been exercised fully in the past and that the said discretion is now exhausted. Furthermore, had the appellant considered that he would suffer any prejudice if his appeal was dismissed without a merit hearing, he would have been vigilant and not just send representation when it was convenient for him to do so.
22. Anti-corruption cases are public interest cases and they involve lots of documentation. Excessive delay in prosecuting the appeal after a conviction, is, in my view, prejudicial to the public and national interest because the resources that are lost leading to the prosecution of suspects belong to the public. Even the time for refund of fines paid is limited by statute under Section 4(5) of the Limitation of Actions Act to two years and a person who wants to clear his name from a corruption related conviction



cannot take all his time which is now over four years, taking the court in circles. Section 4(5) of the *Limitation of Actions Act* provides as follows:

“4(5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.”

23. It is true that courts are called upon to exercise discretion which discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.
24. In this case, I find no excusable mistake where the appeal has been in court for over 4 years with the appellant not making up his mind on whether to proceed or not when an advocate whose firm name was used to file the appeal had clearly written saying he had no authority to act for the appellant and the appellant had notice of the same that is why he went ahead and instructed Mr. Onsongo advocate to ‘watch brief’ in the matter for him.
25. In this case, the appellant cannot claim that his right to a hearing has been curtailed because he enjoys that right from the onset and enjoys it fully but that he has abused that right so that the Court is viewed as not working at all. If an appeal of 2020 has to date not been heard and determined in a court which is hearing and determining all current appeals, then where is the denial of a hearing?
26. For all the above reasons, I find and hold that there is no sound reason for this court to reopen the appeal which was dismissed for noncompliance with the Court’s directions which had been issued, reissued and timelines given and extended in exercise of unfettered discretion.
27. This court has inherent jurisdiction to dismiss cases which are filed and not prosecuted for an unnecessarily long periods of time. In this case, the court only exercised that jurisdiction after satisfying itself that it had given the appellant ample time as requested and on the material day, there was not only noncompliance with the directions given by the court, but that there was no attendance to seek further extension if any was to be allowed, of time to comply with the defaulted directions.
28. Again, it took three months from March 2024 to June 2024 for the application to reinstate the appeal to be filed. It should be noted that on 30th January 2024 in the presence of Mr. Onsongo, this Court made clear orders that should there be no compliance with the court’s directions as extended to file submissions, the appeal stood dismissed. What therefore followed on 18th march 2024 was not a dismissal for non-attendance as such, although had there been attendance, the appellant who has not even explained why there was no such attendance on the said date, the court would have accorded him audience to explain explained the reasons for the non-compliance.
29. I reiterate that the order of 18th March 2024 dismissing the appeal herein was for reasons of non-compliance with the Court’s directions to file submissions to prosecute the appeal as per the enlarged period and this Court was only affirming the conditional extension of the orders of 30/1/2024. The court record shows that on 18th March 2024, this court was clear that as there were no submissions filed to prosecute the appeal as directed on 30/1/2024, the appeal now stood dismissed for non-compliance with the Court’s directions to prosecute the appeal.
30. Finally, I observe that in the said application for reinstatement of the appeal, there is no prayer for extension of time to comply with the Court’s directions. In my humble view, in the circumstances of this case, the dismissal of the appeal was done to protect the integrity of the court process from abuse that would amount to delayed justice and at the end of the day, there should be proportionality and



not one party holding the Court at ransom as was the case herein where the appellant held this court at ransom, to keep his appeal open for prosecution at his convenient time. That is unacceptable.

31. In the end, I find the application dated 25th June, 2024 to be devoid of any merit. It is hereby dismissed.

32. This file is now closed.

33. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

