



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CRIMINAL CASE NO. 8 OF 2014**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**PAUL WAINAINA BOIYO alias SHEKI.....1<sup>ST</sup> ACCUSED**

**CHRISTOPHER LUMBAZIO ANDIKA.....2<sup>ND</sup> ACCUSED**

**ANDREW KARANJA WAINAINA.....3<sup>RD</sup> ACCUSED**

**SAMUEL KURIA NGUGI.....4<sup>TH</sup> ACCUSED**

**ESTHER NDINDA MULINGE.....5<sup>TH</sup> ACCUSED**

**RUTH WATAHI IRUNGU.....6<sup>TH</sup> ACCUSED**

**RULING**

1. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons (hereinafter the Applicants) have by their respective Applications moved this Court seeking for orders of extension of time within which to file their Notices of Appeal to challenge the Ruling of this Court denying them bail pending trial. The Applications are based on **Article 159** of the **Constitution**, **Rules 59, 61** and **62(5)** of the **Court of Appeal Rules, 2010**. They are supported by the respective Affidavits of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons sworn on 14<sup>th</sup> April 2014, 18<sup>th</sup> April 2014 and 12<sup>th</sup> May 2013 respectively.

2. The Applicants desire to appeal against the Ruling of this Court made on 20<sup>th</sup> March 2014. However, they find themselves out of time for such an appeal. They state in their respective Supporting Affidavits that the delay was occasioned by failure to get typed copies of the proceedings and Ruling. That when the copies were finally availed on 4<sup>th</sup> April 2014, the period within which they ought to have instituted the intended appeals had already passed.

3. The Respondent opposes all three applications and has expressed such opposition in the Grounds of Opposition dated 16<sup>th</sup> May 2014 and filed on 19<sup>th</sup> May 2014. The Respondent states that the Applications are bad in law and incurably defective and further that the Court has no jurisdiction to grant the orders sought. In response to the ground that the applicants did not appeal within time for want of typed proceedings, the Respondent also expresses the view that **Rule 59 of the Court of Appeal Rules, 2010** does not require the issuance of typed proceedings before a Notice of Appeal is filed.

4. I heard submissions from **Mr. Mathenge** (for the 3<sup>rd</sup> & 4<sup>th</sup> accused/applicants) and **Mr. Mundia** (for

the 5<sup>th</sup> accused/applicant) and **Dr. Maingi** for the respondent. It is the applicants' submission that the application has been brought timeously and that the prosecution will suffer no prejudice if the orders were granted. On its part, the respondent submits that both **Article 159** of the **Constitution** and **Rule 59, 62, and 4** of the **Court of Appeal Rules** do not confer jurisdiction on the high court to extend time but that such jurisdiction belongs to the Court of Appeal.

5. The procedure for appealing a decision from the High Court is provided for under the **Court of Appeal Rules, 2010. Rule 59** provides that:

***(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal.***

6. On the face of it, it would appear that the jurisdiction to extend time is, as envisaged by the Rules the province of the Court of Appeal. As **Rule 4** provides:

***“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

Further **Rule 41** provides that:

***The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.***

7. The two rules cited above support the Respondent's view that the jurisdiction to extend time is the preserve of the Court of Appeal. Looking at **Rule 62** however, it is clear that the Rules do contemplate a situation where the High Court being a superior court may extend time. **Sub Rule 5** reads:

***(5) Notwithstanding sub-rule (1), the registrar of the superior court shall not prepare the record of appeal where— (a) the notice of appeal has been lodged out of time, until he has been notified that the time has been extended by order of the superior court or of the Court or unless the Chief Justice shall otherwise direct.***

8. This Rule shows that the filing of a Notice of Appeal is a condition precedent in the preparation of a record of appeal. Indeed the parent statute of the Court of Appeal Rules, the **Appellate Jurisdiction Act** supports this view. **Section 7**, provides ***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired”***

9. In commenting on Section 7 the Respondent argues that this provision does not support the Applicants' case, for the reason that it applies to appeals from the judgment of the Court, unlike in this case, where the Applicants are seeking to appeal from the Ruling of the Court denying them bail pending trial. I am unable to agree with this position for judgment according to **Section 2** of the Act includes ***decree, order, sentence and decision.***

10. The applicants have argued that they were unable to

appeal on time because of the delay in getting typed proceedings and certified ruling. They have urged the court to consider their predicament that under **Rule 62 (1)** the registrar cannot prepare the record of appeal without an order extending time. My reading of **Rule 59 (2)** of the Court of Appeal Rules however, shows no requirement of the record. It provides that a notice of appeal shall state

briefly the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal; and contain the address at which any documents connected with the appeal may be served on the appellant.

11. Therefore, at this stage, it is not necessary that the person seeking to appeal need to have the typed copy of proceedings. The prudent act on the part of the Applicants would have been to give notice and await the typing of proceedings for the purposes of the preparation of the record of appeal. There is no demonstration of diligent effort in this regard.

12. However, having carefully considered the law and the submissions on this application, I am inclined to grant the application. I find that the same has been filed timeously and I see no prejudice to be suffered by the respondent if the extension of time is granted. The applicants shall file their respective appeals within 7 days of today's date.

Orders accordingly.

**Signed, Dated and Delivered** in open court this **11<sup>th</sup>** day of **June, 2014**.

**R.LAGAT-KORIR**

**JUDGE**

In the presence of:-

All 6 accused persons

- .....: Court clerk
- .....: For the 1<sup>st</sup> Applicant/Accused
- .....: For the 2<sup>nd</sup> Applicant/Accused
- .....: For the 3<sup>rd</sup> Applicant/Accused
- .....: For the 4<sup>th</sup> Applicant/Accused
- .....: For the 5<sup>th</sup> Applicant/Accused
- .....: For the 6<sup>th</sup> Applicant/Accused
- .....: For the State/Respondent