

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. E112 OF 2023

REPUBLIC
APPELLANT

VERSUS

EVANS MAIRURA OMWENGA
RESPONDENT

(Being an appeal from the judgment of Hon. D. Mikoyan (CM) delivered on 6/11/2023 in Eldoret Chief Magistrate’s Court Criminal Case No. 6586 of 2014)

JUDGMENT

1. **Evans Mairura Omwenga**, the Respondent was charged before the Eldoret Chief Magistrate Court with two Counts. On Count I the Appellant was charged with forgery of a document of title contrary to **Section 350 (1) of the Penal Code**.

2. The particulars of the offence in the first Count were that on 19th June 1996 at Ardhi House in Eldoret Township within Uasin Gishu County with intent to defraud, forged a certain document namely Certificate of Lease of Land parcel LR No. Eldoret Municipality/Block 14/783 while purporting that the said Certificate of Lease had been signed by a Land Registrar Daniel Mulili Musyoki.

3. On Count II, the Respondent was charged with conspiracy to defraud contrary to **Section 317 of the Penal Code**. The particulars of the offence in the second Count were that on 19/06/1996 at Ardhi House in Eldoret

Township within Uasin Gishu County with others not before Court with the intent to defraud, conspired to defraud Daniel Chepkairor Chebet a parcel of land registered as LR No. Eldoret Municipality/Block 14/783 measuring 0.2000ha situated within Elgon View estate in Uasin Gishu County.

4. The Respondent pleaded not guilty to the abovementioned charges. The matter proceeded to trial after which he was found guilty on Count I, convicted and sentenced to a fine of Ks. 30,000/- and in default 6 months' imprisonment.
5. The Respondent, being dissatisfied with the decision of **Hon. D. Mikoyan (CM)** he appealed against both conviction and sentence in **Eldoret High Court Criminal Appeal No. 108 of 2023** prompting the Appellant to file the instant cross appeal only on sentence. The Appellant's Petition of Appeal is dated 6th June 2024 and is premised on grounds that:

- 1) **The Honourable trial Magistrate erred in law and fact by correctly convicting the Respondent on Count I but erred by imposing a fine of Ks. 30,000/- which is contrary to provisions of Section 350(1) of the Penal Code.**

- 2) **The Appellant prays for enhancement of the sentence to life imprisonment as no fine is provided under Section 350(1) of the Penal Code.**

Submissions

6. The Appeal was canvassed vide written submissions. The Appellant also filed submissions dated 27th June 2025 while the Respondent filed submissions dated 10th July 2025.

Appellant's Submissions

7. Prosecution Counsel gave a brief of summary of the case, the charge and the particulars thereof. In regard to the sentence meted by the trial Court, Counsel cited **Section 350(1) and (2) of the Penal Code** and submitted that once the accused was convicted for the forgery under this Section, the sentence he ought to have been given is that of life imprisonment.
8. Counsel further submitted that this section does not provide for imposition of a fine for one convicted. Counsel argued that the fine of Ks .30,000/- imposed upon the Respondent by the trial Court is illegal, null and void.
9. Counsel thus urged the Court to make a finding that the fine imposed by the trial Court does not have a basis in law and the same be set aside and in lieu thereof a proper sentence of life imprisonment be imposed against the accused/ Respondent. Counsel further urged that this cross-appeal be allowed and the appeal in No. E 108 of 2023 be dismissed.

Respondent's Submissions

10. Counsel for the Respondent also gave a brief summary of the parties' case in his opening submissions and raised five issues for determination. The first issue was that the appeal is fatal for non-compliance. He submitted that **Section 350(1) CPC** requires criminal appeals from subordinate Courts to

be filed as a petition in writing, accompanied by the judgment or order appealed. Counsel argued that this section does not provide for criminal appeals to be instituted by way of a Notice of Appeal. Counsel maintained that the Notice of Appeal filed is incurable and does not satisfy this mandatory requirement. He cited the case of **Mangiti & 21 others v Republic [2025] KECA 735** in this regard

11. Counsel further submitted that even as **Section 349 of the Criminal Procedure Code** gives discretionary powers to the Court to enlarge time in favor of an applicant to file his or her appeal out of time, he urged that by the spirit of this provision, delay of even a single day has to be accounted for by the applicant to enable the Court exercise discretion judiciously.
12. He maintained that the exercise of discretion is governed by the overriding objective of finality in litigation and by the general principles underlying the appeal regime and pointed out that in its exercise of discretion to extend time, or grant permission to file a petition of appeal out of time, it's the Court's duty to take into consideration the special facts and circumstances of the case with an objective to achieve a just and fair outcome.
13. Counsel added that scrutiny should be on the length of delay, the reasons for the delay, the applicant's chances of success on appeal, and whether such an extension of time is likely to prejudice or occasion an injustice to the Respondent.
14. On the issue of the appeal being time barred, Counsel asserted that **Section 349 CPC** prescribes a (14) day deadline for filing appeals, with discretion

can only be extended for “good cause”. That filing after the prescribed period without any leave or extension by the court corrupts the Court's jurisdiction to hear the appeal. He relied on the case of **Kipngetich v Republic [2023] KEHC 22887** in support of this submission.

15. With respect to the failure to apply to court for extension of time to file the appeal out of time, Counsel submitted that the State made no application under **Section 349 of the CPC** as he ought to have done, nor presented any grounds for the delay. Counsel pointed out that under the guiding principles set out in **Salat v IEBC [2014]**, the burden lies on the Applicant (State) to show the length of delay, the reason for delay, the chances of success on appeal, the prejudice that may be occasioned to the Respondent as well as the promptness of application.
16. Counsel maintained that in the in the absence of such an application in compliance with this requirement, no jurisdiction exists to entertain the appeal. Counsel submitted that the State's omission to seek leave is fatal and that no case is made for discretion.
17. In regard to the Respondent being prejudiced by the instant appeal, Counsel urged that a timeous appeal is a cornerstone of a fair criminal process. Counsel argued that it preserves the Respondent's right to prepare, secure legal representation, and assemble evidence. Counsel urged that the delay here prejudices Evans Mairura the Respondent.

18. He submitted that Court of Appeal in **Republic v Nzioka [2025] KECA 288** stressed that people seeking an extension must present cogent justification, and that equity demands fairness to the Respondent. Counsel urged that proceeding with a late, informally filed appeal would prejudice the Respondent and contravene the interests of justice.
19. On whether appeal is merited, Counsel submitted that state preferred to appeal and they filed a Notice of Appeal dated the 1st December 2023 and filed on 4th December 2023. That the Appellant later filed the Petition of Appeal on 10th June 2024 and with no Record of Appeal. Counsel cited **Section 350 and 349 of the Criminal Procedure Code** herein already captured and urged that in this case the Appellant did not seek leave to file an appeal out of time after the mandated time frame had lapsed.
20. Counsel maintained that filing an appeal out of time is not a right but a discretionary remedy where the Court decides on a case to case basis on whether to grant it. Counsel submitted that in the pertaining circumstances, there was no appeal filed.
21. On the issue of the fine imposed, Counsel submitted that Appellant in its Petition of Appeal at ground 1, states that the “Honourable trial magistrate erred in law by imposing a fine of Ks. 30,000/- which is contrary to provisions of **Section 350(1) of the Penal Code** whereas this section does not provide for imposition of a fine for one convicted. He submitted that **Section 350 of the Penal Code Cap 63** which prescribes the offence with which the Respondent was charged states that if one is found guilty of the offence, they are “liable to life imprisonment.”

22. Regarding the discretion of the Court on sentencing, Counsel relied on the following authorities; **Daniel Kyalo Muema vs Republic [2009] eKLR, Karingo v. Republic [1982] KLR 213. In M’Riungu v. Republic [1983] KLR 455, Bernard Kimani Gacheru v Republic [2002] eKLR, Francis Karioko Muruatetu & another vs Republic [1017] eKLR** and the case of **Peter Mbugua Kabui vs Republic [2016] eKLR**. Counsel urged that from the aforementioned cases, the trial Court therefore had the discretion to impose a fine to the Respondent and was right to do so after considering the nature of the charge.

Determination

23. Having considered the Application as well as the submissions, it suffices for the court to state at this stage that this matter is inter related with **ELDORET HCCRA No. E018** of 2023. Therein, the Respondent herein is the Appellant and has appealed against both conviction and sentence. The State who is the Appellant herein is the Respondent. The Appeal by the State herein is over the sentence imposed which the Respondent herein has appealed against. Both matters were heard simultaneously though each as a separate and distinct cause.

24. The determinant cause in both cases is **HCCRA E018 of 2023**. This is because the court’s finding on the appeal against sentence will most definitely affect the instant appeal which is against sentence only. The court in made a determination that the proceedings before the trial court in the matter that is subject of theses twin appeals amounted to a mistrial. The court therefore set aside the judgement rendered in its entirety together with

the entire proceedings that were conducted before the trial court and referred the matter back to the subordinate court for a fresh trial.

25. This therefore means that the sentence that was imposed by the trial court which is the subject of this appeal having been set aside, this appeal is rendered moot and otiose for reasons that there is no scaffolding upon which it is anchored. It is accordingly dismissed.

Read dated and signed at ELDORET on 12th March 2026

E. OMINDE

JUDGE