



**Owegi v Republic (Criminal Appeal 41 of 2020)  
[2025] KECA 1363 (KLR) (25 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1363 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 41 OF 2020  
PO KIAGE, J MOHAMMED & WK KORIR, JJA  
JULY 25, 2025**

**BETWEEN**

**ALOYS OWINO OWEGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi  
(Mutuku, J.) dated 29th September 2016 in Criminal Appeal No. 188 of 2013)*

**JUDGMENT**

1. On 14<sup>th</sup> June 2007, the Nairobi Anti-Corruption Senior Principal Magistrate (as she then was), R.E. Ougo found Aloys Owino Owegi (the appellant), and his co-accused guilty of two counts of corruption. She proceeded to convict and sentence them to a fine of Kshs.25,000 and in default 4 months imprisonment on each count.
2. Dissatisfied with that verdict and sentence, the appellant preferred an appeal to the High Court at Nairobi. That appeal was by way of a petition of appeal lodged at the High Court more than 5 years later on 6<sup>th</sup> July 2012. We have not been able to establish how such a flagrantly belated appeal was admitted at that court.
3. The record does show that between 27<sup>th</sup> May 2013 and 21<sup>st</sup> January 2016, that appeal was listed for hearing several times but did not proceed for various reasons. On that 21<sup>st</sup> January 2016, the appeal was listed before Kimaru, J. (as he then was). The State was represented by Ms. Kule, while for the appellant, Mr. Kamwende held brief for Mr. Wasuna. Mr. Kamwende sought and was granted an adjournment on behalf of Mr. Wasuna, whereupon the learned judge fixed the appeal for hearing a month later on 25<sup>th</sup> February 2016.



4. Come the day, Mr. Wasuna was again absent. His brief was held by a Ms. Otieno. What she told the learned judge and what transpired on the day appears at page 171 of the record as follows;

“25/2/2016

Coram: Kimaru J Malik – Court Assistant

Ms. Nyauncho for the State

Ms. Otieno holding brief for Wasuna for the Appellant Appellant present

Ms. Otieno: I have instructions to withdrawn the Appeal.

Ms. Nyauncho: I have no objection to the withdrawal of the Appeal.

Order:

The appeal is marked as withdrawn. The conviction and the sentence of the trial court is upheld. The file is ordered closed.”

5. That should have been the end of the matter but, alas not! It would seem that the appellant did not rest. Instead, he filed an application citing Articles 50, 159(2)(d) and 165(3) of the *Constitution*, seeking to set aside the learned judge’s order marking the appeal before him as withdrawn, and also seeking to reinstate the withdrawn appeal to hearing. Mr Wasuna for the appellant is on record as stating before the learned judge and correctly so, that there is no statutory provision for setting aside an order granting a plea to withdraw an appeal. The learned judge was unimpressed and unpersuaded by those pleas and the grounds and affidavits in support thereof, with the result that by a ruling dated 29<sup>th</sup> September 2016, he dismissed the application.
6. It is against that dismissal that the appellant appeals to this Court. He lodged a notice of appeal dated 6<sup>th</sup> October 2016 and followed it with a memorandum of appeal dated 2<sup>nd</sup> June 2017 in which he complains that;

- “ 1. The learned judge misdirected himself and erred in law by not focusing on the issue that was before him, to wit, whether or not there were sufficient grounds for setting aside his order for reasons that were advanced by the appellant and his counsel which was that the order withdrawing the appeal was premised on a bona fide mistake on the part of the counsel who held brief for the appellant’s counsel.
2. The learned judge failed to appreciate that counsel for appellant did not apply for an adjournment of the appeal but for an allocation of time after counsel was through with the Supreme Court hence the averment by him that the appellant’s advocate was seeking an adjournment was a misdirection.
3. The record of the proceedings in the High Court on various dates from 26<sup>th</sup> June 2013 to 25<sup>th</sup> February 2016 do bear out the averments and conclusions of the learned judge that the appellants advocate was delaying the proceedings or was not ready to proceed with the appeal at all material times.
4. The learned judge failed to exercise his unfettered discretion judiciously wherefore his decision has led to a miscarriage of justice.



5. The decision of the learned judge was against the weight of evidence and all the material before him.”
7. When the appeal came for hearing before us, learned counsel Mr. Odero appeared for the appellant while Mr. Omondi, the learned Senior Assistant Director of Public Prosecutions was for the State. Mr. Odero’s argument, as we heard him, was that the “newly admitted junior counsel” who appeared before the learned judge had “limited instructions” to ask for “time allocation [for Mr. Wasuna to come argue the application] and not to withdraw the appeal.” Counsel then went on to castigate the learned judge for failing to exercise his discretion judiciously. We asked him if the learned judge’s decision in the circumstances of the case was perverse and, to our surprise, Mr. Odero unflinchingly opined, without batting an eyelid, that it was!
8. On his part, Mr. Omondi first stated that the notice of appeal lodged herein, and on which this entire appeal is based, is not supportable under the Rules of this Court and the appeal could only be filed with leave which has neither been sought nor obtained. Next, the learned Senior Assistant Director of Public Prosecutions lambasted his counterpart’s submissions before us as not being factual as they comprised statements not found anywhere on record. He took particular issue with the omission from the record he filed, admitted by Mr. Odero when we questioned him about it, of the application and supporting affidavits that were before the court below. In Mr. Omondi’s view, absent those documents or pleadings, the court will be in no position to verify the veracity of the allegation that Ms. Otieno misheard the instructions she was given, or otherwise made a mistake.
9. Mr. Omondi went on to assert that the appellant’s conduct before the fateful withdrawal of his appeal clearly indicated that he was never keen on and was not interested in pursuing his appeal at the High Court. He dismissed the application to reinstate that appeal as an afterthought, having been made over two months after the withdrawal. He rested with the contention that the application before the learned judges was not proper and deserved dismissal as what the appellant should have done is seek leave to file a fresh appeal out of time. To those submissions Mr. Odero did not make reply.
10. We have considered this appeal and the opposing submissions thereon in light of the record before us. The first matter to observe is that the appellant’s failure to include the application that was before the judge, on which he made the impugned ruling, was a fatal omission. When an appellate court is called upon to determine the correctness or otherwise of a decision of the court appealed from, it is basic and imperative that all the material that was before that Court must be placed in the record. There was no explanation given for that omission and, even when we pointed it out to him, learned counsel made no effort to as much as seek time and leave to place the application on record by way of a supplementary record of appeal. Indeed, given what we are able to glean from both the submissions made at the High Court vis-à-vis those made before us and the learned judge’s observation, we are left to wonder whether that omission was not deliberate and not merely inadvertent. We say no more.
11. Whereas that omission alone would have sealed the fate of this appeal, we think there is yet another reason why we think it ought to be struck out, and it is this. Mr. Omondi learned counsel urges, correctly in our view, that the appeal before us does not lie unless with leave. He says, indubitably so, and with neither contest nor controvert, that an appeal such as is before us is not known to law, and cites section 379 of the *Criminal Procedure Code*, Cap 175. It provides, in simple and clear terms that a person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding 12 months, or to a fine exceeding Kshs.2,000 (sic!) may appeal to this Court.



12. We do not think, the correctness of the argument notwithstanding, the said section is the correct one applicable to the present matter, because the High Court was not a trial court exercising original jurisdiction. The appellant was before it in its appellate capacity.
13. The provision of the *Criminal Procedure Code* that governs second appeals to this Court, is section 361 and it is clear from a plain reading thereof that such appeals must be on points of law arising from decisions of the High Court in the exercise of its appellate decision. The same must be predicted on a conviction and a sentence, unless it be a decision of the High Court in its revisionary jurisdiction which is deemed, by dint of section 361(7) to be a decision of that court on its appellate jurisdiction.
14. In so far as the ruling of the learned judge was not a decision touching on the conviction and sentence of the appellant, and was also not a decision on revision under sections 362 and 364 of the *Criminal Procedure Code*, no right of appeal lies therefrom to this Court. Moreover, a reading of Rules 61 and 64 of the Court of Appeal Rules also lends credence to this view. That would render this appeal incompetent on the face of it and we would be entitled to strike it out on that basis as well.
15. Now to the merits of this appeal, which we go into only because the single issue before us, urged fully by both sides, is whether the learned judge erred in not setting aside the withdrawal order. From the excerpt of the proceedings that we set out earlier in this judgment, there is absolutely no doubt that the appellant's counsel Ms. Otieno applied to have the appeal withdrawn. She is recorded as having spoken simply, clearly and without any ambiguity whatsoever, as to what she wanted the court to do: she had instructions to withdraw the appeal.
16. In reply, counsel for the State expressly stated that she did not object to the withdrawal of the appeal. It is then that the Court made the order that the appeal was marked as withdrawn. The conviction and sentence of the trial court were upheld and the file ordered closed.
17. In light of those repeated statements about the withdrawal of the appeal, we find it totally unbelievable that the advocate has misapprehended the instructions she had. Time allocation and withdrawal of an appeal are worlds apart. Counsel did not mention to the learned judge that her senior was at the Supreme Court. The advocate having consciously and lucidly upheld to withdraw the appeal, and opposing counsel having consented to the withdrawal, we think it is too much of a stretch for the appellant to have come up with the alternative and incredible narrative sworn to a couple of months later. That latter narrative was implausible and a perfect example of an afterthought akin to buyer's remorse.
18. We have carefully considered the ruling of the learned judge and cannot, with respect, agree with counsel's bold characterization of the same as perverse. We see no abuse of discretion. Instead, the learned judge considered the application between him in light of the clear record indicative of the appellant's unreadiness to prosecute his appeal. He considered, as he was wont to, the appellant's prior conduct, and arrived at the justified conclusion that he had been indolent. The appeal was an old one delayed by a number of adjournments at the behest of the appellant's counsel. The learned judge weighted all relevant factors before coming to the conviction that the plea for reinstatement was one for rejection. Rightly so.
19. We on our part have been given no reason upon which we can fault the learned judge's exercise of discretion. Thus, even though we could have struck out this appeal, we find that it is without merit. It is accordingly dismissed in entirety.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2025.**

**P.O. KIAGE**



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**JUDGE OF APPEAL  
JAMILA MOHAMMED**

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**JUDGE OF APPEAL  
W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

