



REPUBLIC OF KENYA



**Heguda v Republic (Criminal Appeal E111 of 2023)
[2024] KECA 735 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 735 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E111 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

HIRIBAE KOKANE HEGUDA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the ruling and orders of the High Court at Garsen (S. M. Githinji, J.) made on 16th November 2023 in HC. Miscellaneous Application No. E025 of 2023)

JUDGMENT

1. From the scanty material placed before us in this appeal, it is not possible to discern the history of this appeal. However, for the purpose of determining it, we need not delve deeply into the history of the case.
2. What is clear is that the appellant, Hiribae Kokane Hekuda, filed Miscellaneous Criminal Application No. E025 of 2023 in the High Court of Kenya at Garsen vide the Chamber Summons dated 14th September 2023 in which he sought leave to file an appeal out of time pursuant to Section 349 of the Criminal Procedure Code. His application was supported by his affidavit sworn on 4th September 2023 in which he averred that he was not able to file his appeal since the judgment of the Trial court was not supplied to him in time. According to the appellant, his appeal had high chances of success. In that regard, he annexed a draft Memorandum of Appeal.
3. The record does not indicate whether the appellant's application was opposed.
4. On 1st November 2023, the application came before the High Court and the record put to us states:

Before: Githinji – Judge

Court Assistant: E. Ndonye



Prosecutor: A Mkongo

Applicant:

Court

This is an application for leave to appeal out of time. The lower court judgement was delivered on 19/12/2021. A period of almost 2 years has lapsed since and the delay which I consider inordinate has not been sufficiently explained. The application lacks merit and is hereby declined.

S. M. Githinji – Judge

5. When the appeal came before us on 11th June 2024 for hearing on the Goto Meeting virtual platform, the appellant appeared in person from Manyani Maximum Prison and relied entirely on his submissions dated 10th June 2024. Learned counsel Ms. Nyawinda appeared for the respondent and made oral submissions on the appeal.
6. The only issue for our determination is whether the appellant was heard before the learned Judge made his decision to dismiss his application. From the record, it is clear that none of the parties was heard. To our mind, the only provision that deals with summary determination in criminal cases is section 352 of the Criminal Procedure Code, which provides that:

When the High Court has received the petition and copy under section 350, a judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:

Provided that no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal, except -

- i. in a case falling within subsection (2) of this section;
 - ii. (Repealed by 5 of 2003. s. 94.)
 2. Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint.
 3. Whenever an appeal is summarily rejected notice of rejection shall forthwith be given to the Attorney-General and to the appellant or his advocate.
7. In our view, the afore-cited section does not apply to applications for leave to appeal out of time. Dealing with the court's power to summarily reject appeals, this Court (Nyarangi, Gachuhi & Apaloo, JJA.) in *Washingstone Walimulu s/o Masa v Republic* [1987] eKLR expressed itself as hereunder:

“The appeal to the High Court was summarily rejected under section 352(2) of the Criminal Procedure Code. The question therefore arises if any of the grounds of appeal came within



sub- section 2 of section 352 of the Criminal Procedure Code. It is plain from the grounds of appeal that there are issues of law on which the appellant should have been heard. Considering all these matters, we allow the appeal, quash the convictions and order that the appellant who has been in jail since December 31, 1980 shall be set at liberty forthwith unless otherwise lawfully held.”

8. In *Wilson Maina Murage v R* [2000] eKLR, this Court (Chunga, CJ, Shah & Owuor, JJA), while dealing with the same section, held that:

“Any Judge seized of the record under this section must give full consideration, not only to that record, but also, to the grounds put forward in support of the appeal. This task is greatest where, as here, the appellant is unrepresented and prepares his grounds of appeal in person. It is necessary to scrutinise the grounds put forward by the appellant in order to see, whether, they disclose a discernible point of law worth putting forward for a full hearing upon admission of the appeal...We are particularly concerned about the complaints disclosed by the appellant’s first ground of appeal. He complained that the circumstantial evidence tendered by the prosecution against him was not enough to support the conviction. As both counsel asked us to remit the appeal to the High Court, we do not find it necessary to go into the merits of the appeal by considering whether the circumstantial evidence was enough to support the conviction or otherwise, or whether, the learned trial magistrate directed himself on that evidence. In our judgment, there were points of law raised in the appellant’s grounds of appeal and we are satisfied that this was not a proper case for summary dismissal of the appeal under section 352(2) of the Criminal Procedure Code. For the preceding reasons and upon careful consideration of the record and the submissions of both counsel before us, we allow the appeal, set aside the order of summary rejection of the appeal by the High Court, and remit the appeal to the High Court for full hearing. We make no further orders in view of the conclusion we have reached above except to say that the appeal should be set down for hearing by the High Court as soon as is practically possible.”

9. On the authorities aforesaid, we find that the learned Judge erred by acting without jurisdiction when he dismissed the appellant’s application without hearing any of the parties who, as is indicated on the record, were before him.

10. Accordingly, we hereby allow the appeal, set aside the order made on 1st November 2023 dismissing the application dated 14th September 2023 and hereby remit it to the High Court for full hearing. In light of the disclosure by the appellant that he has substantially served his sentence, we direct that the application be set down for hearing by the High Court on a priority basis and as soon as is practically possible before a Judge other than Githinji, J.

11. We so order.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL



G. V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original

Signed

DEPUTY REGISTRAR

