



Republic v Ondieki (Criminal Miscellaneous Application E012 of 2022) [2025] KEHC 9073 (KLR) (24 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E012 OF 2022**

JN KAMAU, J

JUNE 24, 2025

BETWEEN

REPUBLIC APPLICANT

AND

JAVAN ONDIEKI RESPONDENT

RULING

Introduction

1. In its Notice of Motion application dated 31st May 2022 and filed on 16th June 2022, the Applicant herein sought for orders that this court grant it leave to appeal out of time.
2. Caroline Gakumo, Prosecution Counsel, swore an affidavit in support of the said application on 31st May 2022 on behalf of the Applicant. It averred that the Trial Court in Vihiga Sexual Offence No 59 of 2020, acquitted the Respondent on 7th February 2022. It stated that the Prosecution Counsel in-charge of the matter then proceeded on maternity leave on 11th February 2022 and that it applied for proceedings on 4th April 2022 for purposes of appealing.
3. It contended that the proceedings were not been availed to it and hence the time allowed to file appeal had run out. It pointed out that the delay was occasioned by its office on unwarranted circumstances. It urged this court to allow the application in the interest of justice.
4. In opposition to the said application, the Respondent filed Grounds of Opposition dated 25th June 2024 on 26th June 2024. He averred that the Applicant was guilty of laches having brought the application nearly three (3) years after the Judgment and without credible explanation and thus was undeserving of the orders sought. He added that the application was an afterthought, an abuse of the court’s process and amounted to a fishing expedition and that no convincing reason had been given to warrant the granting of the orders the Applicant herein had sought.



5. The Applicant's Written Submissions were dated 19th November 2024 and filed on 22nd November 2024 while those of the Respondent were dated and filed on 8th August 2024. This Ruling is based on the said Written Submissions which both parties relied on in their entirety.

Legal Analysis

6. The Applicant submitted that the Respondent was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006. It pointed out that he was also charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of 2006.
7. It asserted that after full trial, the Respondent was acquitted on both main and alternative charge under Section 215 of the [Criminal Procedure Code](#) on 7th February 2022. It submitted that it had approached this court under Section 348A of the [Criminal Procedure Code](#) seeking leave to file an appeal out of time.
8. It further submitted that upon delivery of the Judgment, it applied for a certified copy of the proceedings on 11th March 2022 but the same was availed on 26th July 2023. It pointed out that it received a Certificate of Delay from the court dated 9th August 2023 of even date, which meant that the time of preparing the proceedings took one (1) year.
9. It argued that the delay in obtaining the copies of proceedings should not occasion an injustice on its part as the delay in filing the appeal was not deliberate. It asserted that its Petition of Appeal had good chances of success as it had raised serious issues of law which needed consideration by the court. It was emphatic that no prejudice would be occasioned on the Respondent if its application was allowed as he would be granted an opportunity to respond to the appeal.
10. On his part, the Respondent submitted that it was trite law that a party who was desirous of appealing against an order/sentence to the High Court has to do so within fourteen (14) days following the delivery of the Judgment/Ruling sought to be appealed against.
11. He cited Section 349 of the [Criminal Procedure Code](#) and placed reliance on the case of *Sila Mutiso vs Rose Hellen Wangari* Civil Application No 255 of 1997 UR where it was held that the decision whether or not to extend time for appealing was essentially discretionary and the factors to be taken into account included length of the delay, reason for the delay, chances of the appeal succeeding if the application was granted and the degree of prejudice to the respondent if the application was granted.
12. He pointed out that the Trial Court's Judgment was delivered on 7th February 2022 and the application herein was filed on 19th February 2024, which was two (2) years and twelve (12) days from the date of the said Judgment. He asserted that it was laughable for the Applicant to attribute the delay to file the appeal to the Prosecution Counsel who was handling the case having gone for maternity leave.
13. He cited Section 13(d) of the [Office of the Director of Public Prosecutions \(ODPP\) Act](#) and argued that at the material time when the said Prosecution Counsel was proceeding for maternity leave, there was Director of Public Prosecutions, Deputy Directors and Prosecution Counsel in office and that as such there was no void in leadership. He was emphatic that the reason that the counsel who was handling the case had proceeded for maternity was, therefore, not a satisfactory explanation for the delay.
14. He pointed out that the Applicant's intended appeal was an affront to his right to certainty in the criminal process and finality of the judicial process. He was emphatic that the Applicant had not made out a prima facie case to warrant the orders sought. He faulted the Applicant for not having attached



- the Judgment that it sought to appeal against and the proceedings which would have been proof that they had applied and secured the same to enable it file the intended appeal.
15. He contended that he stood to suffer prejudice as he was a school going student and that having been taken through full trial and the Trial Court having acquitted him, he had embarked on his studies and had forgotten the accusations levelled against him.
 16. He argued that the Prosecution could not purport to allow FIDA to advise it to file an appeal after two (2) years having failed to prove its case. It was his contention that that amounted to a fishing expedition, an afterthought and an abuse of the court's process.
 17. He argued that the Office of the Director of Public Prosecution was an independent office as provided under Article 157 of the *Constitution* of Kenya, 2010. He added that it was clear that the Prosecution had no intention of appealing but that it was FIDA who had compelled and applied for the necessary documents from the lower court. He termed the two (2) year period that had elapsed as unreasonable in the circumstances. He urged this court to disallow the Applicant's application herein.
 18. The procedure and timelines governing filing of appeal is as prescribed by law. Section 349 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provided that:-

“ An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”
 19. The delay should be explained to the satisfaction of the court. The question herein was, whether the Applicant had shown that the inability to file appeal in time was due to late supply of judgement or order appealed against or not.
 20. This court perused the Applicant's letter that was addressed to the Executive Officer, Vihiga Law Courts seeking to be furnished with the typed certified copies of proceedings and Judgment. The said letter was dated 11th March 2022. As the Judgment was delivered on 7th February 2020, the Applicant therefore had sought for supply of the said documents after two (2) years had lapsed. Delay had even been occasioned before it was supplied with the said documents on 26th July 2023.
 21. Be that as it may, this court was called upon to consider the prejudice that the Respondent would suffer if the Applicant was granted leave to file an appeal out of time. His liberty was not curtailed as he was acquitted of the offence that he had been charged with. While the court ought not to give a party a second chance to bite at the cherry and/or to re-prosecute the case, this court found that although there was inordinate delay on the part of the Applicant, it would be unjust if it was locked out from accessing the court due to the folly of its advocate.
 22. In the same manner that a court would grant leave to a party to appeal a decision out of time due to its own omissions or those of its advocate, this court was persuaded to grant the Applicant the orders sought. Indeed, if the Respondent suffered prejudice, he did not demonstrate the same.



Disposition

23. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application dated 31st May 2022 and filed on 16th June 2022 was merited and the same be and is hereby allowed.
24. The Applicant be and is hereby directed to file a Memorandum of Appeal and Record of Appeal within fourteen (14) days from the date of this Ruling.
25. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JUNE 2025

J. KAMAU

JUDGE

