



**Omar v Republic (Anti-Corruption and Economic Crimes Appeal E011 of 2021)  
[2025] KEHC 11237 (KLR) (Anti-Corruption and Economic Crimes) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E011 OF 2021**

**LM NJUGUNA, J**

**JULY 30, 2025**

**BETWEEN**

**AHMED SAHAL OMAR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant herein has moved this court by way of an application dated the 7<sup>th</sup> May, 2025 under Article 48, 50(1) and 159 (2) (d) of *the Constitution* of Kenya 2010; Section 1A,1B,3A and 95 of the *Civil Procedure Act*, Order 45 Rule 1, order 42 Rule 21, Order 50 Rule 51 and Order 51 of the Civil Procedure Rules, seeking the following Orders;
  1. Spent.
  2. That the Orders granted by the Hon. Lady Justice E.N Maina on the 22<sup>nd</sup> of November 2022 dismissing the Appeal for want of prosecution do hereby be set aside.
  3. That the Appeal be reinstated for hearing and determination inter-partes on merit.
  4. That the costs of this Application be provided for.
  5. That the Court be pleased to issue any such further orders in the circumstances.
2. The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn by the applicant on even date, in which the applicant has averred that on the



26<sup>th</sup> November, 2018, he was charged alongside others before the Milimani Chief Magistrate's Court Anti-Corruption Case No. 47 of 2018 for two (2) counts;

- a. Count 1; Conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48 of Anti-Corruption and Economic Crimes Act, No. 3 of 2003.
  - b. Count iv; Abuse of office Contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 2003.
3. That on the 15<sup>th</sup> March, 2018, he was acquitted in count I and convicted in Count IV and being dissatisfied with the judgment, he lodged an appeal against both the conviction and sentence, but on or about January, 2025, it came to his attention that the appeal was dismissed by the court for want of prosecution as his previous advocate had refused to attend court as required.
  4. That his previous advocate had cut-off communication in regard to the progress of the appeal and had not informed him of the progress of the same. That due to the breakdown of communication, he was unable to obtain the documents relating to the appeal which were all in the custody of his previous advocate.
  5. That he is still desirous of pursuing the appeal and has appointed another advocate to replace his previous advocate and pursue the appeal to finality. He further avers that he lost his employment and has continued to suffer as he is unable to find meaningful employment due to the existing conviction and dismissal of the appeal and currently he is barred from holding a public office.
  6. He states that due to the actions of his previous advocate, his Constitutional right to access justice under Article 48 of the Constitution has been infringed and unless this court grants the Orders he has sought herein, he shall continue to suffer irreparable loss. That Article 50 (1) of the Constitution guarantees him the right to a fair trial which includes the right to have a dispute resolved by the application of law decided in a fair and public hearing before a court as his appeal was not heard on merit but was dismissed on a technicality in circumstances that were not his fault.
  7. He avers that he has an arguable appeal with a great chance of success because of the Court of Appeal judgment in Nairobi Court of Appeal Case No. E094 of 2023 (David Abdullah vs. Republic) in which his co-accused was acquitted.
  8. That there is no demonstrable prejudice to be suffered by the respondent if the Orders sought herein are granted but to the contrary, he is suffering irreparable harm and continues to suffer loss and damages as a consequence of the judgment which is the subject of this appeal in the Chief Magistrate Anti-Corruption Case No. 47 of 2018.
  9. The respondent filed Grounds of Opposition dated the 24<sup>th</sup> May, 2025 on the following grounds;
    - a. The applicant's application is wanting, for unreasonable delay brought after a period of more than two and a half years from the date of the order for dismissal, dated the 22<sup>nd</sup> November, 2022
    - b. That the learned Judge exercised her jurisdiction on the basis of law and evidence in line with the legal principles entailed in the case.
    - c. The advocate in the instant case was deemed to be an agent of the applicant and his actions or inactions should be taken to be those of the applicant unless



it is shown that the mistake was genuine and failure to correct it would result to injustice to an innocent litigant

- d. That the Order sought to be set aside was made by a court of concurrent jurisdiction, hence the Honorable court lacks jurisdiction to entertain, deliberate upon and make findings on application seeking to set aside orders arising therefrom.
- e. The application herein lacks merits and the same should be dismissed.

10. The application was disposed of by way of written submissions

### **Applicant's Submissions**

11. The applicant identified one issue for determination;
  - a. Whether the application has merits.
12. He submitted that this court is constitutionally bestowed with inherent or residual powers to render justice in every case that comes before it in accordance with Article 159 of *the Constitution*. He relied on the case of Kenya Power & Lighting Company PLC vs. MT. Kenya Abattoirs (2014) eKLR and that of John Nahashon Mangi vs. Kenya Finance Bank Limited (in liquidation) (2015) eKLR which speaks to the discretion of the court and the duty of the court to do substantive justice under Article 159 of *the Constitution*.
13. That the applicant has a right to be heard as envisioned by the provisions of Article 48 and 50 of *the Constitution* and that the respondent will not suffer any prejudice if the orders sought herein are granted.
14. He further submitted that a mistake of a counsel cannot be visited on an innocent client, in this case, failure of the counsel to attend court, and this court has the powers to intervene and ensure that the applicant is not punished for his advocate's negligence in failing to attend court. That unless the orders sought herein are granted, the applicant shall continue to singularly and unfairly bear the burden of the conviction yet his co-accused were acquitted.

### **Respondent's Submissions**

15. The respondent submitted on the following issues;
  - a. Whether the Honourable court has jurisdiction to hear and determine the instant application.
  - b. Whether there is any sufficient or tenable ground to justify setting aside the learned Judge's order of dismissal dated the 22<sup>nd</sup> November, 2022.
  - c. Whether there is inordinate delay in filing the instant application which is squarely blamable upon the applicant.
  - d. Whether the learned Judge exercised her discretionally powers properly in line with relevant provisions of law governing review.
16. The respondent submitted that this court does not have jurisdiction to review the decision of a court of concurrent jurisdiction and relied on the case of Momanyi vs. The Republic (2024) KEHC 2079 KLR in which the court observed and determined that the power of revision does not apply to proceedings in the High court.



17. It was further submitted that by dint of Article 165 (6) of *the Constitution*, this court does not have Supervisory jurisdiction over a superior court and reliance was placed on the case of Bellevue Development Company Limited vs. Francis Gikonyo & 7 others eKLR in which the court stated that Judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other.
18. The respondent averred that in the course of the trial before the trial court, the court ensured that all procedural Constitutional safeguards were put in place in line with the requirements of Article 48 of *the Constitution* on the right to access to justice. That he was represented by an advocate and was given an opportunity to be heard.
19. On the issue of the absence of his advocate, the respondent states that no plausible explanation has been given by the applicant why himself or his advocate failed to attend court on the date the appeal was dismissed. That he has also not explained what steps his advocate had taken to ensure that the appeal was expeditiously prosecuted from the time it was filed up to the time it was dismissed for want of prosecution.
20. The respondent further submitted that there was inordinate delay in bringing the present application as it has been a period of more than two years since the appeal was dismissed, which delay is not capable of any plausible explanation. That there is no indication on record that the said advocate was not in good terms with the applicant. Reliance was placed on Criminal Revision No.119 of 2020 (Antony Nyaga Njagi vs. Republic) in Embu in which the court held that it did not have jurisdiction to review a decision by a court of concurrent jurisdiction. The respondent also relied on the case of Samuel Macharia Kamau & another vs. KCB & 2 others and that of Victor Mutuja Kivava vs. Republic in which similar sentiments were echoed.

### **Analysis and Determination**

21. The court has considered the application and the supporting affidavit, the Grounds of opposition and the submissions that have been filed by the parties herein.
22. The appeal herein was filed in the year 2021 and on the 22<sup>nd</sup> November, 2022, Justice Maina dismissed the same for want of prosecution for failure by the appellant/applicant and his advocate to attend court on the said date despite having been notified of the hearing date for the appeal.
23. From that date, no action was taken by the applicant or his advocate until 9<sup>th</sup> May, 2025 when the present application was filed in which the applicant has sought the setting aside of the order dismissing the appeal and an order reinstating the same. It has been a period of two years since the appeal was dismissed.
24. The applicant has attributed the delay to his previous advocate for not keeping him informed of what was happening in the appeal not even the dismissal of the same. He stated that as a result, he was unable to obtain the documents relating to the appeal which were all in the custody of his previous advocate. It is his contention that due to the actions by his previous advocate, his Constitutional rights to access justice under Article 48 of *the Constitution* have been in fringed.
25. The guiding principles in an application like the one herein are;
  - a. The length of the delay.
  - b. Whether the delay has been sufficiently explained.
  - c. Whether the respondent will suffer any prejudice if the orders are granted.



26. As earlier stated in this ruling, the appeal herein was dismissed on the 22<sup>nd</sup> November, 2022 and the application herein was filed on the 7<sup>th</sup> May, 2025 which is a period of more than two (2) years which is a long period of time. The counsel for the applicant has not sworn an affidavit to explain why he did not attend court on that day, yet, he had been notified of the hearing date.
27. The applicant herein avers that he only got to learn of the dismissal of the appeal in the month of January, 2025 and that he is desirous of prosecuting the same. Going by that assertion, the court notes that it took the applicant five (5) months to move the court with an application for reinstatement. Though the applicant has blamed his advocate for the delay in prosecuting the appeal since it was filed until it was dismissed, he is very silent and has not sufficiently explained the delay between the time he discovered of the dismissal and the filing of the application. It cannot be that he took a whole five months to file the application.
28. The applicant avers that he has an arguable appeal and has based his assertion on the fact that his co-accused were acquitted by the court of appeal. In this regard, it is unconscionable for the applicant to argue that his appeal has a high chance of success simply because his co-accused were successful in their appeals. It is trite law that success of an appeal is determined by the law and the evidence, and each case is decided on its merits and hence, the acquittal of the co-accused does not automatically entitle the acquittal of the applicant herein.
29. In my considered view, the application herein must have been an afterthought and the applicant only sought to reinstate the appeal after discovering that his co-accused's appeals were successful. There has been inordinate delay in bringing this application and the applicant has not demonstrated sufficient cause to justify reinstatement of the appeal. The delay both in prosecuting the appeal, and bringing the application herein, are inordinate and not satisfactorily explained. Reinstating the appeal at this stage undermines judicial finality and clogs the justice system, and there has to be finality of litigation and efficient use of judicial time and available resources.
30. The issue of the jurisdiction of the court to entertain the application herein was raised. The nature of the application is almost similar to a review of the orders that were made by a court of concurrent jurisdiction with this court. Under the civil Procedure Code an application for review can only be heard by the Judge who gave the Orders unless the Judge is not available. In the case herein the orders sought to be set aside were issued by Justice Maina who has since left the Division on transfer and in the circumstances, I am of the considered view that this court though having concurrent jurisdiction can hear the application.
31. In the end, I find that the application has no merits and it is hereby dismissed.
32. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30<sup>TH</sup> JULY 2025.**

.....

**L.M. NJUGUNA**

**JUDGE**

In the presence of:-

Miss Atukunda for the Appellant

No appearance for the Respondent

Court Assistant – Wilson

