



**Boro v Director of Public Prosecutions (Criminal Appeal
E025 of 2022) [2024] KEHC 740 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E025 OF 2022
GL NZIOKA, J
JANUARY 31, 2024**

BETWEEN

EVANS KAGECHE BORO APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

1. By a notice of motion application dated 19th May 2023, brought under the provisions of; Article 159 of the Constitution of Kenya, 2010, the applicant is seeking for the following orders: -
 - a. Spent.
 - b. That an order do and be issued substituting the name Esther Wanja Kageche & Nancy Nyokabi Kageche in place of the names Evans Kageche Boro- deceased.
 - c. That Wanja Kageche & Nancy Nyokabi Kageche be allowed to amend the petition of appeal to indicate the changes.
 - d. The costs of the application be in the cause.
2. The application is supported by the grounds on the face of it and an affidavit sworn by Nancy Nyokabi Kageche, an Administratrix and beneficiary of the estate of the late Evans Kageche Boro. She avers that she has authority of Wanja Kageche, one of the Administrators of the deceased's estate to depose to the matters in the affidavit.
3. She deposes that, the appellant had been sued by the State and he purposed to defend himself against the charges levelled against him, however he passed away on 8th August 2022.
4. That, Esther Wanja Kageche and Nancy Nyokabi Kageche, being the deceased daughters intend to continue prosecuting the appeal for purposes of getting a refund of; Kshs 200,000 deposited in court



- by the deceased. As such, they obtained a limited grant *Ad Litem* issued in Family Miscellaneous No E005 of 2023.
5. That for the expeditious determination of the suit and in the interest of justice, the name of the deceased appellant be substituted with the names of; Esther Wanja Kageche & Nancy Nyokabi Kageche. Further, no prejudice will be suffered by the respondent if the prayer is allowed.
 6. However, the respondent opposed the application *vide* grounds of opposition dated 25th October 2023 which states: -
 - a. That the appellant became deceased on 8th August 2022, after instituting this instant appeal.
 - b. That in criminal proceedings a person who lodges an appeal from a subordinate court is the only person who has the right of appeal.
 - c. That where an appellant die then the appeal abates.
 - d. That this instant application is against section 360 of the [Criminal Procedure Code](#) which specifically provides that where an appellant die before determination of his appeal, the appeal abates.
 - e. That the appellant's appeal lacks merit and should accordingly be dismissed.
 7. The application was argued orally whereby the learned counsel for the applicants Mr. Onindo stated that the appeal is over an issue of money and as such the deceased name be substituted with the names of the parties in the application.
 8. The learned counsel for the respondent Mr. Ndiema submitted that, in criminal cases it is only the appellant who has the right of appeal. He reiterated that under section 360 of the [Criminal Procedure Code](#) (herein after "the Code") once an appellant die before the determination of the appeal, the appeal abates. In the circumstances, the application lacks merit and should be dismissed.
 9. I have considered the application, the response thereof and the arguments of the parties and the only issue for consideration is whether the administrators of the deceased appellant can take over and prosecute a criminal appeal upon the demise of the deceased.
 10. In that regard the provisions of section 360 of the [Code](#) states that: -

"Every appeal from a subordinate court (except an appeal from a sentence of a fine) shall finally abate on the death of the appellant".
 11. Furthermore, in the case of; [Ahmed Omar Mohamed v Republic](#) [2012] eKLR the court stated as follows: -

"Each was sentenced to a fine of Kshs. 5,000/- and in default 2 months imprisonment. The conviction and sentence is the subject of this appeal. Although the 1st accused had also filed an appeal, he died on 23rd June, 2008 during the pendency of his appeal and this court on 5th December 2011, on the strength of the provisions of Section 360 of The [Criminal Procedure Code](#), marked the appeal as abated."
 12. Similarly, in the case of; [John Gakuo & 3 others v Republic](#) [2018] eKLR the court stated that: -
 - "7. There is no dispute that the 1st appellant died while serving sentence of a fine of Kshs 1,000,000 and in default serve one year imprisonment and in addition



three years imprisonment. At the time of his death, no amount of fine had been paid. Under Section 360 of the Criminal Procedure code, the appeal is automatically deemed to have abated.”

13. In the instant matter, the applicants have clearly stated that the appellant died on 8th August 2022, after filing the appeal and before it was concluded. The provisions of section 360 of the Penal Code referred to herein states expressly that the appeal has abated.
14. The ultimate object of the criminal proceedings is to punish the accused on his conviction of any offence. Therefore, the criminal proceedings abate on the death of the accused, as their continuance thereafter will be infructuous and meaningless. These provisions apply similarly to the appeals.
15. Indeed, abatement of action refers to termination of legal proceedings in an action for want of proper parties. It has the consequence of putting an end to a law suit and therefore the issue of substituting the applicants with the deceased does not arise.
16. As a result of the aforesaid, the application herein cannot be allowed. I therefore dismiss it for lack of merit.
17. It is also ordered.

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF JANUARY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr Abwachu for the Respondent

No appearance for the appellant

Ms Ogutu: Court Assistant

