



Republic v Muchalwa & another (Miscellaneous Criminal Application E003 of 2023) [2024] KEHC 1981 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2023
PJO OTIENO, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

SYLVESTER JOMO MUCHALWA 1ST RESPONDENT

STANLEY NZIYA SHIVAYILO 2ND RESPONDENT

RULING

1. Before this court is the applicant’s notice of motion application dated 11th January, 2023 seeking orders to file an appeal out of time. The application is supported by the grounds on the face of the application and the affidavit of Natasha Chala in which she avers that the intended appeal is against the judgment delivered by the lower court on 1st December, 2022 which the complainant vide a letter dated 9th December, 2022 requested the applicant to appeal against and which she asserts has high chances of success. She blames the delay in the filing of the appeal on inability to obtain certified copy of proceedings and judgment within reasonable time.
2. The application has been resisted by Stanley Nziya Shivayilo, the 2nd respondent, vide a replying affidavit sworn on 7th March, 2023 in which he contends that the DPP is required to act independently in the discharge of their duties and the indication by the DPP that they received a letter from the complainant which triggered them to call for the police file to appraise themselves with the matter giving rise to the intended appeal raises doubts as to whether or not the decision to appeal was instigated by the complainant. On the applicant’s statement that the delay in filing the appeal was occasioned by difficulties in obtaining typed proceedings and judgment from the trial court, he asserts that the applicant has not demonstrated any steps made to obtain typed proceedings and that the typed judgment was ready on the day it was delivered that is, 1st December, 2022. These averments have been reiterated in the 2nd respondent’s grounds of opposition dated 7th March, 2023.



3. In the supplementary affidavit of Ms. Natasha Chala for the applicant sworn on 26th May, 2023, she responds to the 2nd respondent's replying affidavit by stating that the decision to appeal was made pursuant to the mandate conferred to the office of the DPP under article 157 of the Constitution and that a party should not be denied the right to be heard on appeal because of a procedural technicality.
4. I have not seen any response by the 1st respondent on record. Nonetheless, the applicant and the respondent have submitted on the application as below;

Applicant's Submissions

5. It is their submission that where an appeal is not filed within 14 days from the date of order or sentence appealed against, section 349 of the Criminal Procedure Code gives the court the discretion to allow the appeal where it is proven that the delay was occasioned by the inability of the appellant or his counsel to obtain a copy of the judgment appealed against or a copy of record within reasonable time.
6. They further argue that article 50(2)(q) of the Constitution gives the accused the right to appeal and that article 159(2)(d) of the Constitution mandates the court to administer justice without undue regard to procedural technicalities. They place reliance on the case of Michael Mukhwana Wanyonyi v R (2021) eKLR in this regard.

2nd Respondent's Submissions

7. It is their submission that under article 157(10) of the Constitution, the DPP is required to act independently and that the admission by the applicant that they waited to receive a letter from the complainant for them to determine whether to appeal or not shows that their decision to appeal was influenced by the complainant and that cannot be allowed to stand. In that regard, they cite the case of R v William Macharia Muratbe (2016) eKLR.
8. They further submit that the applicant has failed to indicate any steps they took to obtain proceedings prior to the complainant writing a letter to the DPP and that the proposed appeal lacks merit because there was no direct evidence linking the 2nd accused person to forgery.

Issue for Determination

9. The only issue that presents itself for determination by this court is whether the subject application is merited.
10. The guiding law on an application to file an appeal out of time is contained in section 349 of the Criminal Procedure Code which provides as follows;

“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 therefore.”

11. From the above reading, the legal basis for an application to file an appeal of time is the inability to obtain a copy of the judgment intended to be appealed against and a copy of the proceedings on time.



This position has been reinforced in Misc. Criminal Application No 10/14 - *R v Jane Njeri Mwangi* where the court observed as follows;

“The respondent’s counsel’s submission that the appeal does not raise any triable issue either in law or fact does not appear to have any legal basis; this is because under section 349 of the [Criminal Procedure Code](#), the only consideration this court must give regard to in exercising its discretion to grant leave to file the appeal out of time is “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.” Whether the appeal will succeed or not does not seem to count at this stage.”

12. The judgment intended to be appealed against was delivered on 1st December, 2022. The applicant has indicated that they received a letter from the complainant on 9th December, 2022 requesting them to appeal and this meant that they needed to appraise themselves with the file before filing an appeal hence the delay. From the reasons given, it is clear that following the judgment of the trial court, the applicant did not independently, as required to under article 157(10) of the [Constitution](#), find a need to lodge an appeal until it was moved by the applicant. They did not make any efforts to obtain a copy of the judgment and copy of the proceedings in order to appeal, these being the only reasons why an appeal ought to be allowed out of time.
13. That said, I find that the applicant has not demonstrated sufficient reasons for the delay to warrant this court to exercise discretion in their favour. I therefore find the application to be devoid of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Applicant

2nd Respondent in person

Court Assistant: Polycap Mukabwa

FURTHER ORDER

After preparing this Ruling, parties have filed an agreement that they shall seek to resolve the root cause of the dispute by pursuing Succession. That is most welcome.

That agreement now supersedes this decision.

PATRICK J. O. OTIENO

JUDGE

