



**Andimu v Republic (Miscellaneous Criminal Application
E015 of 2024) [2024] KEHC 10420 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E015 OF 2024**

**FN MUCHEMI, J
AUGUST 22, 2024**

BETWEEN

BENSON NYANDORO ANDIMU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief facts

1. The application for determination is undated and filed on 2nd January 2024 seeking for leave to file his appeal out of time and as a pauper.
2. The applicant states that he was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and sentenced to fifteen (15) years imprisonment in Ruiru Criminal Case No 33 of 2020. The applicant attributes the delay of filing of his appeal late to the inconveniences caused by the challenges in custody.
3. In opposition to the application, the respondent filed a replying affidavit dated 12th March 2024 and states that the judgment against the applicant was delivered on 30th September 2021 yet the applicant has filed an application for extension in the year 2024, which is two and a half years after the judgment.
4. The respondent argues that the applicant has not disclosed any good cause to warrant this court to allow the application. Further, the applicant has not accounted for or explained the delay in lodging an appeal against the trial court's decision.
5. The respondent states that the applicant has not annexed a petition for appeal which clearly demonstrates that the intended appeal is devoid of any arguable issue.
6. The respondent argues that the extension of time is not a right of a party but is an equitable remedy that is only available to a deserving party at the discretion of the court. Further a party who seeks extension



of time has the burden of laying a basis to the satisfaction of the court, which the applicant has failed to do. The respondent argues that there are no sufficient reasons for the delay to warrant this court to exercise its discretion in favour of the applicant.

7. The applicant filed a Further Affidavit and states that the judgment in the trial court was delivered on 30th September 2021 and he was not served with the judgment despite requesting for it and therefore he was unable to file his appeal on time. The applicant states that he filed a similar application for leave to file an appeal out of time in Kiambu High Court on 25th April 2021 but he did not receive any feedback. He further states that he sent reminders on 21st December 2022 and 3rd March 2023 but did not receive any feedback on whether the appeal was admitted. The applicant states that he then opted to file a fresh application in this court.
8. The applicant further states that after he was convicted his family members promised to assist him in facilitating his appeal financially but they failed to do so due to financial constraints.
9. Parties disposed of the application by way of written submissions. Although the applicant stated that he filed his submissions on 16th June 2024, no submissions were received in the case tracking system.

The Respondent's Submissions

10. The respondent reiterates what she deponed in her affidavit and submits that the applicant has not annexed any proof to show his efforts if any in procuring the proceedings for the judgment delivered. The applicant has not disclosed any good cause to warrant the court to allow the instant application for leave to lodge an appeal out of time.
11. The respondent relies on the case of *Nicholas Kiptoo arap Korir Salat v IEBC & 7 others* (2014) eKLR and submits that the applicant has not accounted for or explained the delay in lodging an appeal against the trial court's decision. Further that the applicant has not sufficiently made out a *prima facie* case or sufficient cause on the merits to warrant grant of any of the prayers sought in the application. The respondent further submits that the applicant did not annex a copy of the request for certified copies of the proceedings or judgment.

The Law

Whether the applicant has made out a case for the grant of an order for leave to file his appeal out of time.

12. The court's power to extend time for filing an appeal is provided for under Section 349 of the *Criminal Procedure Code* 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 lapsed, 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.



13. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

14. The applicant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and was sentenced to 15 years imprisonment. Judgment was delivered on 30th September 2021 and the applicant filed the instant application on 2nd January 2024. The applicant attributes the delay in filing his appeal to financial constraints. The practice of the courts is that criminal appeals are filed and proceedings provided free of charge to convicts. As such, the claim of financial constraints by the applicant does not make sense herein.

15. Although the applicant did not claim that he ever requested for judgment or the record of proceedings in his affidavit, he raised the issue in his further affidavit and submissions. The applicant submitted that he filed a similar application for leave to file his appeal out of time in the High Court in Kiambu on 25th April 2021 and sent subsequent reminders on 21/12/2022 and 3/3/2023 but he received no feedback.

16. From the record, there is no proof that the applicant ever filed an application for leave to file an appeal out of time in the High Court in Kiambu. The applicant failed to annex a copy of the request for certified copies of the proceedings and judgment or any reminder sent to the court in Kiambu. I have noted that the applicant brought up the issue of certified proceedings and judgment after the respondent stated so in her replying affidavit and therefore it is my considered view that it is an afterthought. Additionally, 2½ years have lapsed since conviction and the explanation provided for the delay is not satisfactory. Thus, the delay is inordinate and therefore inexcusable.

17. I have also considered the draft petition of appeal annexed to the application and noted that the intended appeal in my view does not raise any arguable grounds of appeal. Further one of the grounds of appeal is that the trial court did not take into consideration the time the applicant spent in custody pursuant to Section 333(2) of the *Criminal Procedure Code*. It is important to note that convict need not file an appeal on such a ground but he may file an application regarding the that particular issue.

18. It is noted that, the applicant has not provided sufficient reasons for the delay to exercise discretion in his favour. I find no merit in the application filed on 2nd January 2024 and its dismissed accordingly.



19. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

