



**Kariuki v Republic (Miscellaneous Criminal Application
E002 of 2024) [2024] KEHC 10418 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2024**

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

BETWEEN

PETER KARIUKI 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 an appeal out of time as a pauper against the decision in Ruiru SPMC Sexual Offence Case No. 49 of 2020.
2. The applicant states that he is currently serving 15 years imprisonment term at Kamiti Medium Prison. Further, the applicant states that after he was convicted he was promised by his family members that they would assist him in facilitating his appeal yet they failed due to financial constraints. He states that he is currently being assisted by the prisons authorities as a pauper.
3. In opposition to the application, the respondent filed a replying affidavit dated 27th March 2024 and states that the judgment against the applicant was delivered on 23rd December 2021 yet the applicant has filed an application for extension in the year 2024, which is two years four months 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. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

8. The applicant submits that he was convicted and sentenced on 23rd December 2021 and lodged his appeal at the High Court in Kiambu. The applicant further submits that the deputy registrar in Kiambu did not respond to his Notice of Appeal despite numerous reminders. The applicant thus submits that his delay in filing the appeal was occasioned by the deputy registrar failing to respond to him therefore failing to consider Article 22(2) & 50(2) of *the Constitution*.
9. The applicant submits that he has a constitutional right to appeal against the decision in the trial court pursuant to Article 50(2) and his appeal has very high chances of success. The applicant cites the case of *Republic vs Damson Mhunya* (no citation given) to support his submissions.

The Respondent's Submissions

10. The respondent reiterates what the contents of her affidavit and submits that the applicant has not annexed any proof to show his efforts 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 vs 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, 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. Additionally, the applicant has not annexed a draft petition of appeal for consideration as to whether he has an arguable appeal.

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 vs 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(3) of the *Sexual Offences Act* and was sentenced to 15 years imprisonment. Judgment was delivered on 23rd December 2021. He filed the instant application on 2nd January 2024. The applicant attributes the delay in filing his appeal to financial constraints affecting an advocate who had promised to help him file his appeal. In regard to convicts, criminal appeals are normally filed and proceedings provided by the court at no financial cost. As such, the claim of financial constraints by the applicant does not make sense. As for lack of legal assistance, it is an established fact that prisons have an aid section manned by paralegal personnel who normally assist the prisoners in drafting and filing their appeal and applications. As such, there was no need to engage an advocate at that initial stage of lodging the appeal.

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 submissions. The applicant submitted that he filed his Notice of appeal within time in the High Court in Kiambu but he did not receive any response from the Deputy Registrar.

16. From the record, there is no proof that the applicant ever filed a Notice of Appeal in the High Court in Kiambu. He failed to annex a copy of such notice to his affidavit in support of this application. The request, if any, for supply of proceedings and judgment was not annexed either. Two years have lapsed since conviction and the explanation provided for the delay is not satisfactory. Thus, the delay is inordinate and therefore inexcusable in the circumstances.

17. I have also considered the draft petition of appeal annexed to the application and noted that the intended appeal does not raise any arguable grounds.

18. Consequently, I find no merit in this application and I hereby dismiss it with no orders as to costs.

19. It is hereby so ordered.

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



F. MUCHEMI
JUDGE

