



**Kibiru v Republic (Miscellaneous Criminal Application E006 of 2024) [2024] KEHC 10443 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10443 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2024**

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

**BETWEEN**

**YOWERI KIBIRU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application for determination is undated and filed on 2<sup>nd</sup> January 2024 seeking for leave to file an appeal out of time as a pauper.
2. The applicant states that he is currently serving 15 years imprisonment term at Kamiti Medium Prison. The applicant further 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 to draft and file his applications.
3. The respondent filed a replying affidavit dated 12<sup>th</sup> March 2024 opposing the application. He states that the judgment against the applicant was delivered on 9<sup>th</sup> September 2021 yet the applicant has filed an application for extension of time in 2024, which is about two and a half years down the line.
4. The respondent argues that the applicant has not disclosed any good cause to warrant this court to allow the application. The applicant has not accounted for or explained the delay in lodging the intended 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 any 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 deposing that the judgment of the trial court was delivered on 9<sup>th</sup> September 2021 and the applicant notified the court on the spot orally of his intention to appeal against the judgment. The applicant states that he filed his petition of appeal through Thika Prisons Office dated 13<sup>th</sup> September 2021 in Kiambu High Court. He then applied for a copy of the court's proceedings and judgment which he has never received to date.
8. The applicant avers that he was later transferred to Kamiti Medium prison and later sent a reminder to the court on 9/3/2022, 7/11/2022 and 12/5/2023 inquiring on his appeal but still got no response. The applicant states that he then opted to file a fresh application in this court.
9. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

10. The applicant reiterates the contents of his affidavits and submits that he was charged with the offence of defilement with and alternative charge of committing an indecent act with a child. He states that he was convicted of the main charge on 4<sup>th</sup> April 2022 and sentenced to serve 15 years imprisonment. The applicant submits that since judgment was delivered, he has not been served with the trial court judgment and proceedings despite requesting for them and therefore he was unable to file his appeal on time in line with Section 349 of the Criminal Procedure Code.

### **The Respondent's Submissions**

11. The respondent reiterates 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.
12. 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, 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.**

13. 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.

14. 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.

15. The applicant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* and was sentenced to 15 years imprisonment. Judgment was delivered on 9<sup>th</sup> September 2021 and the applicant filed the instant application on 2<sup>nd</sup> January 2024. The applicant attributes the delay in filing his appeal to financial constraints. Notably, criminal appeals may be filed and proceedings provided at no cost. Therefore, the claim of financial constraints by the applicant does not make sense in that it is the practice of the court and prisons to accord prisoners free service in filing pleadings.

16. 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 27<sup>th</sup> July 2022 and sent subsequent reminders on 15/8/2022 and 19/4/2023 but he received no feedback.

17. There is no indication on record that the applicant ever filed an application for leave to file an appeal out of time in the High Court in Kiambu. Similarly, the applicant did not annex a copy of the request for certified copies of the proceedings and judgment or the reminders he alleges to have sent to the Kiambu High Court. I have noted that the applicant brought up the issue of certified proceedings and judgment after the respondent stated so in her replying affidavit. In my view, the said claim is an afterthought. Since conviction of the appellant in March 2022, two years have elapsed and the explanation provided for the delay is not satisfactory. Thus, the delay is inordinate and therefore inexcusable.

18. 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 of appeal. One of the grounds of appeal is the trial court did not consider the time he spent in custody pursuant to Section 333(2) of the *Criminal*



Procedure Code. Notably, the applicant need not file an appeal on such a ground but he may file an application for review.

19. Consequently, in the absence of sufficient reasons for the delay this court is not in a position to exercise discretion in the favour of the appellant. I find the application filed on 2<sup>nd</sup> January 2024 lacking merit and it is hereby dismissed.
20. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22<sup>ND</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI**

**JUDGE**

