



**Musyimi v Republic (Miscellaneous Criminal Application
E004 of 2024) [2024] KEHC 10421 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2024**

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

BETWEEN

PETER MUTUKU MUSYIMI 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.
2. The applicant states that he was charged with eight offences of stealing motor vehicles and motor vehicles spare parts from different complainants. After the trial, he was found guilty of the following offences and sentenced accordingly.
 - a. In Count I was the offence of stealing a motor vehicle and was sentenced to two (2) years imprisonment.
 - b. In Count II was, the offence of stealing motor vehicle parts and was to serve two (2) years imprisonment.
 - c. In Count III was the offence of stealing a motor vehicle and was sentenced to two (2) years imprisonment.
 - d. In Count IV was the offence of stealing motor vehicle parts and was sentenced to two (2) years imprisonment.
 - e. In Count VII was the offence of stealing a motor vehicle and was sentenced to two (2) years imprisonment.



f. In Court VIII was the offence of stealing motor vehicle parts and was sentenced to two (2) years imprisonment.

The sentences were ordered to run consecutively.

3. The applicant 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.
4. In opposition to the application, the respondent filed a replying affidavit dated 10th June 2024 and states that the judgment against the applicant was delivered on 17th May 2022 yet the applicant has filed an application for extension in the year 2024, which was two years and three months after the judgment.
5. The respondent argues that the applicant has not disclosed any good cause to warrant this court to allow the application. It is evident that the applicant has not accounted for or explained the delay in lodging an appeal against the trial court's decision.
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. According to the respondent, 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 Respondent's Submissions

8. The respondent reiterates the contents of in her affidavit and submits that the applicant addressed the issue of time spent in custody pursuant to Section 333(2) *Criminal Procedure Code*. However, he cannot argue on the issue as he has not yet been granted time to appeal out of time.
9. The respondent submits that the applicant has not annexed the draft petition for appeal which clearly demonstrates that the intended appeal is devoid of any arguable issue.
10. The respondent argues 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 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.

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 convicted of six counts of the offence of stealing a motor vehicle contrary to Section 278(A) of the [Penal Code](#) and stealing motor vehicle parts contrary to Section 279(g) of the Penal Code and sentenced to two years in each count. The sentences were ordered to run consecutively. Judgment was delivered on 17th May 2022 and the applicant filed the instant application on 2nd January 2024. The applicant attributes the delay in filing his appeal to financial incapacitation. It is noted that criminal appeals are filed and proceedings provided at no cost before the courts in the country. The claim of fore financial constraints by the applicant is not true.

15. Notably, the applicant has not averred that he ever requested for judgment or the record of proceedings. Neither did he annex a copy of the request for certified copies of the proceedings and judgment. Additionally, 2 years and 3 months have lapsed since conviction and sentencing. explanation provided for the delay is not satisfactory. The said delay is inordinate and is inexcusable in my view.



16. 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.
17. Accordingly, the applicant has not provided sufficient reasons for the delay to exercise discretion in his favour. In my considered view, the application filed on January 2, 2024 lacks merit and is hereby dismissed with no orders as to costs.
18. It is hereby so ordered.

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

F. MUCEMI

JUDGE

