



**Ongeri v Republic (Miscellaneous Criminal Application
E005 of 2024) [2024] KEHC 10422 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2024**

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

BETWEEN

JUSTUS ONDERI ONGERI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief facts

1. The application for determination is undated and was filed on 2nd January 2024 seeking for leave to file an appeal out of time and as a pauper.
2. The applicant states that he is currently serving a sentence of fifteen (15) years imprisonment at Kamiti Medium Prison. He further, states that after he was convicted, he was promised by his family members that they would assist him in facilitating costs for filing his appeal but they failed to do so due to financial constraints. He says he is currently being assisted by the prisons authorities to file his appeal
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 4th April 2022 yet the applicant has filed an application for extension of time to appeal in the year 2024, two years after the delivery of the judgment.
4. The respondent argues that the applicant has not disclosed any good cause to warrant this court to allow the application. It is further argued that the applicant has not accounted for or explained the delay in lodging his appeal.
5. The respondent states that the applicant has not annexed a draft petition of appeal which is necessary herein. This omission clearly demonstrates that the intended appeal is devoid of merit or is not arguable.



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. A party who seeks extension of time has the burden of laying a basis for his application 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 the judgment was delivered on 4th April 2022 and he was not served with a copy despite requesting for it. As such, 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 27th July 2022 but he did not receive any feedback. He further states that he sent several reminders between the 15th August 2022 and 19th April 2023 but he did not receive any feedback on whether the appeal file was opened and processed. For those reasons, the applicant opted to file a fresh application in this court.
8. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

9. The applicant reiterates, what he deposed in 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 was convicted of the main charge on 4th 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's 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

10. 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 and the judgment. Neither has the applicant disclosed any good cause to warrant grant of orders sought in this application.
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. He has not sufficiently made out a prima facie case or shown 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. It is notable that 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 serve 15 years imprisonment. Judgment was delivered on 23rd December 2021 and the applicant filed the instant application on 2nd January 2024. The applicant attributes the delay in filing his appeal to financial constraints in regard to his family. Notably, criminal appeals proceedings are provided to convicts by courts at no financial costs. In my view, the claim of financial constraints in his by the applicant does not make sense in normal circumstances in practice of courts.

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 27th July 2022 and sent subsequent reminders on 15/8/2022 and 19/4/2023 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 to produce evidence of any request made for certified copies of the proceedings and judgment. He did not annex any reminders sent to the court as he claims. A copy of the application filed in Kiambu should have been annexed to this application. It is noted that the applicant brought up the issue of certified proceedings and judgment after the respondent challenged him in her replying affidavit. In my view, he issue of failure to be supplied with proceedings and judgment was an afterthought and not a satisfactory delay. The applicant came to court two (2) years after conviction. This long delay is inordinate and has not been satisfactorily explained.

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. The applicant states that he intends to lodge an appeal on the basis that the time he spent in custody was not taken into consideration pursuant to



Section 333(2) of the Criminal Procedure Code. The law allows the applicant to file an application for review in case of non-compliance with Section 333(2). As such, an appeal is not necessary herein.

18. As I have mentioned earlier in this ruling, the trial court provides copies of certified proceedings and judgment to convicts free of charge. The prayer to be allowed to file the appeal as a pauper is misplaced in my view since payments are not applicable in the applicant's case.
19. I find that the applicant has failed to give satisfactory reasons for delay. Consequently, I find no merit in this application and it is hereby dismissed with no orders as to costs.
20. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

