



REPUBLIC OF KENYA



**Diakite v Republic (Miscellaneous Criminal Application E289 of 2024)  
[2024] KEHC 16733 (KLR) (Crim) (26 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16733 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E289 OF 2024  
CJ KENDAGOR, J  
NOVEMBER 26, 2024**

**BETWEEN**

**MAMADY DIAKITE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application seeking to lodge a second appeal out of time  
in Criminal Appeal No. 20 of 2020 In the High Court – Milimani  
Law Courts delivered by Hon. Lady Justice D.O Ogembo on 28/03/2023)*

**RULING**

1. The Applicant submitted an application dated 15<sup>th</sup> August, 2024 seeking leave to file his petition of appeal out of time against the Judgment in Criminal Appeal No. 947 of 2019. The application is supported by the affidavit of Mamady Diakite, the Appellant.
2. The Appellant was charged with trafficking in narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 and was convicted after a full trial and sentenced to life imprisonment by Hon. L.O. Onyina (Chief Magistrate) on 16<sup>th</sup> August, 2019. His appeal to the High Court of Nairobi was partly successful, and his sentence was reduced to 30 years' imprisonment.
3. The Applicant argued that the delay in filing was unintentional, as he had been hospitalized at Kiambu and Kenyatta hospitals. He also mentioned that he was unable to pay legal fees and that due to changes at his embassy, the new administration was not forthcoming in covering these costs. He requested the Court to exempt him from paying Court fees, stating that he is financially disadvantaged.



4. The Applicant averred that the honorable court delayed giving a copy of the Judgment, which then delayed the appeal. Additionally, he submitted that the intended appeal has a strong chance of success and stated that allowing the application would not cause the Respondents any prejudice.
5. In response, the Respondent argued in Court that the Applicant's application was an afterthought and that no proof is attached to the application to show that it was the court that occasioned the delay.

### **Determination**

6. I have considered the Application and response by the parties herein and the submissions made thereto. The issue for determination is whether the Court should grant leave to the applicant to appeal outside time.
7. The period within which a criminal appeal should be filed is statutorily provided under Section 349 of *Criminal Procedure Code* CAP 75 which provides that;

“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 elapsed, 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.”
8. The Court may permit the admission of an appeal beyond the established time limits, provided that a party files a motion for such admission and meets the threshold for such orders. The Applicant contended that his inability to obtain a copy of the judgment promptly constituted the grounds for their request to file the appeal out of time. The Respondents, on the other hand, stated that the Applicant's Application was not intended and prayed that it be dismissed forthwith.
9. In the High Court case *Mohamed Shehe Maro v Republic* [2013] eKLR the court observed that Courts ought to lean more toward substantive justice than technicalities. In addition, Article 159(2)(a) of *the Constitution* also mandates the court to do substantial justice other than determine matters on procedural technicalities. It provides:

“In exercising Judicial Authority, the Courts and tribunals shall be guided by the following principles –

- Justice shall be administered without undue regard to procedural technicalities;”
10. The Applicant has explained his failure to file the appeal on time. The request to the Court for a judgment was made without undue delay. I conclude that the Applicant has adequately met the requirements stated in Section 349 of the *Criminal Procedure Code*.
11. I grant the following orders in respect to the Notice of Motion dated 15<sup>th</sup> August, 2024;
  - a. Leave is hereby granted to Mamady Diakite to file a second appeal out of time in respect to the case; High Court at Nairobi, Milimani Criminal Appeal No. 20 of 2020.
  - b. That appeal shall be filed within thirty (30) days from the date of this Ruling.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2024**



.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

