



**Miriti v Republic (Criminal Case 11 of 2020)
[2023] KEHC 846 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE 11 OF 2020
LW GITARI, J
JANUARY 19, 2023**

BETWEEN

BENJAMIN MUTEMBEI MIRITI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The present application before this court is dated November 30, 2022 and seeks leave to appeal out of time. The grounds in support of the said application are as follows:
 - a. Spent.
 - b. That this honourable court finds it just to grant leave for the applicant to file a notice of appeal out of time.
 - c. That the delay has been caused by the delay in getting the judgment from the court's Registry and inability of the applicant herein to be able to instruct an advocate.
 - d. That the delay in making the application is not deliberate and the applicant's remorseful about the delay and any convenience it may have caused to the honourable court.
 - e. That this honourable court may deem fit and just to grant the applicant a perchance to appeal.
 - f. That cost be provided to the applicants.
2. The application is supported by the affidavit of Otieno Justus, the advocate for the Applicant who depones, *inter alia*, that the applicant is already serving a jail term and hence had a difficulty to access an advocate of his choice to be able to lodge a notice of appeal on time hence the delay in lodging the appeal. The said counsel further depones that there was a delay in getting the copy of the judgment and sentence from the court's registry.



The respondent filed grounds of objection and prays for the application be dismissed in its entirety.

3. From the onset, it is noteworthy that while the prayer No 6 in the application urged this Court to grant that costs to be provided to the Applicants, there is only one applicant in the present application. Secondly, the Respondent first opposed the application vide their Grounds of Opposition dated December 19, 2022 but when the matter came up for hearing on December 20, 2022, counsel for the Respondent indicated that they did not wish to oppose the application.
4. However, the respondent did oppose the application by filing his grounds of opposition dated December 19, 2022. The Respondent raised the following grounds of opposition:
 - a. That the application is vague and fatally defective, the prayers sought (prayer 1-6) cannot be granted as prayed.
 - b. That the application is made pursuant to section 349 of the Criminal Procedure Code, which provides for appeals from subordinate courts to the High Court. The applicant is not clear to which court they seek to appeal.
 - c. That the application has been brought under wrong provisions of the law.
5. The application is expressed to have been brought under the provisions of section 349 of the [Criminal Procedure Code](#) which provides 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 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 therefore.

This provision is under part XI of the [Criminal Procedure Code](#) which deals with appeals from subordinate courts. This provision is therefore not relevant to the present application. The relevant provision is section 379(1) (a) (b) of the [Criminal Procedure Code](#) which provides:

A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal –

- (a) against the conviction, on grounds of law or of fact, or of mixed law and fact;
- (b) with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.

This provision does not give the Judge of the High Court leave or discretion to extend time. Indeed Section 379 (2) (c) provides that a person convicted by the High Court may with the leave of the court of Appeal or upon a certificate by the trial Judge that it is a fit case for appeal



6. Part III of the *Court of Appeal Rules* (rules 58-73) governs the procedure in criminal appeals from superior courts. Rule 4 guides the Court on the basis which the applicant's motion may be determined. Rule 4 of the *Court of Appeal Rules* provide as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

This rule is under the *Court of Appeal Rules* and therefore court must be construed to mean Court of Appeal. Indeed court under the *Rules* means Court of Appeal and includes a division thereof and single Judge exercising any power vested in him sitting alone.

This rule gives the Court of Appeal unfettered direction to extend time. The court of appeal in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* (1999) 2 EA at page 231 quoted in Misc Criminal Application No 8/2020 *Dominic Okondo v Republic* stated that-

“That decision whether or not to extend time is discretionary.”

The court further cited the case of *Fakir Mohamed v Joseph Mugambi & 2 others* (2005) eKLR where it was stated;

“The exercise of this court's discretion under Rule 4 has followed a well beaten path since the stricture of sufficient reason was removed in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant.

7. The background of this case is that the Applicant, together with his co-accused, one Phares Mutembei Miriti, was charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. After full trial, he was convicted and sentenced to serve 22 (twenty two) years' imprisonment on October 12, 2022. The applicant consequently filed a notice of appeal dated October 25, 2022. The provisions of section 349 (*supra*) on the time limited to file the appeal in the High Court, does not apply to an appeal from the High Court to the Court of Appeal.
8. Guided by the legal provisions quoted herein above, it follows that for extension of time, the application ought to be filed in the Court of Appeal.
9. Pursuant to rule 59 *Court of Appeal Rules*, the applicant filed the notice of appeal in this court. The importance of this rule is that where the notice is filed within 14 days, of the date of the decision, the notice shall institute the appeal. This rule provides:-

Any person who desires to appeal to the court shall give notice in writing which shall be lodged in sextuplicate with the Registrar of the Superior Court at the place where the decision against which it is desired to appeal was given, within 14 days of the date of decision, and the notice of appeal shall institute the appeal.

The long and short of this ruling is that a notice of appeal in a Criminal Appeal filed within 14 days institutes or lodges that appeal.

10. In the circumstances since the notice of appeal was filed within 14 days, it means that the appeal was instituted within time. The applicant wishes to appeal against the decision of this court and so the appeal was instituted in the Court of Appeal. I am properly guided by the provision of this rule.



11. Appeals arising from the Judgment of the High Court are appealable to the Court of Appeal under the system of the court provided under article 164(3) of the Constitution.
 - (3) The Court of Appeal has jurisdiction to hear appeals from—
 - (a) the High Court; and
 - (b) any other court or tribunal as prescribed by an Act of Parliament.
12. On the other hand section 379 provides that an appeal lies to the Court of Appeal from the High Court to the Court of Appeal. It follows that the proviso to section 349 (*supra*) applies to appeals to the High Court from the Sub-ordinate courts. It is clear then that this application is brought under the wrong provisions of the law. The applicant filed a notice of appeal dated October 25, 2022 and it was signed by the Deputy Registrar on the same day. It is upon the Deputy Registrar to now move and comply with rule 61 and 62 of the Court of Appeal Rules by forwarding the notice of appeal to the Registrar of the Court of Appeal and then prepare the record of appeal.
13. From the foregoing, it is my view that this application was not necessary as the appeal was instituted within the stipulated time. The application is struck out.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT CHUKA THIS 19TH DAY OF JANUARY, 2023.

LW GITARI

