



**Maina v Republic (Miscellaneous Criminal Application
304 of 2018) [2023] KEHC 2557 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION 304 OF 2018**

**HM NYAGA, J
MARCH 28, 2023**

BETWEEN

ROBERT MACHARIA MAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, *vide* an application filed on December 4, 2018 seeks for orders that leave be granted to him to file an appeal out of time and that the annexed petition of appeal be deemed as duly filed.
2. The application is supported by an affidavit sworn by the applicant Robert Macharia Maina on undated date. He depones that he was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 and sentenced to serve life imprisonment, and that he could not appeal on time because he relied on his relatives who promised to hire him a lawyer but could not do so due to financial constraints.
3. The application is unopposed.

Issues For Determination.

4. The issue that this court should determine is whether or not to grant leave to appeal out of time.

Analysis

5. The record of the lower court indicates that the applicant was convicted and sentenced on June 17, 2009.
6. Section 349 of the *Criminal Procedure Code* provides as follows;



- i. “An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:
 - ii. 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.”
7. By the apparent provisions of the above section an appeal ought to have been lodged within 14 days from the date of delivery of the sentence or order. However, the said provision allows the appellate court to consider a request for lodging an appeal out of time if an applicant shows that the inability had been caused by late supply of judgement or order appealed against.
8. The applicant herein major ground in support of his application is that he relied on his relatives who promised to hire a lawyer but could not do so due to financial constraints. This explanation does not fit or pass the test of the law as provided under section 349 of the *Criminal Procedure Code*. However, as per this section the court is clothed with discretionary powers to be exercised for the interest of justice to the parties in a litigation. The principles that the court ought to keep in mind in the exercise of its discretion may be drawn from *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR – SCK, the Supreme Court set out the principles to be considered by court in exercising the discretion to extend time for filing an appeal as follows: -
- a. Extension of time is not a right of a 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 ought to exercise the discretion to extend time is a consideration to be made on a case to case basis.
 - d. Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the court.
 - e. Whether there would be any prejudice suffered by the respondents if the extension was granted.
 - f. Whether the application had been brought without undue delay and finally whether in certain cases like election petitions public interest ought to be a consideration for extending time.
9. Comparatively, Supreme Court of Appeal of South Africa in the case of *S v Smith* [2012] 1SACR 567 elaborated the test to be applied on applications for leave to appeal in the following manner:
- i. What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicants must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a



sound, a rational basis for the conclusion that there are prospects of success on appeal.

10. Applying the above principles to the instant motion, it is my considered view that this is a proper case for the court to exercise its discretion in the applicant's favour for reasons that the issues raised in his annexed petition of appeal are arguable; he has a right to fair hearing under article 50 of the Constitution & therefore he should not be ousted from the seat of justice; there will be no prejudice occasioned to the respondent if the application is allowed; and lastly the reasons for delay advanced are excusable.
11. This court therefore allows the application as prayed.
12. Having allowed the application, I think I need to address the legal issues surrounding appeals and the numerous applications flooding the courts.
13. It is important to start by saying that in the intended appeal, if filed, this court will address all the issues including the constitutionality of the sentence meted out by the trial court.
14. If no appeal is filed, the applicant has the option of petitioning this court for re-sentencing. This is following the decision in Philip Mueke Maingi & others v Director of Public Prosecutions & another (2022) eKLR. The said case built up jurisprudence following the decisions of the Supreme Court of Kenya in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu 1) and Francis Karioko Muruatetu & another v Republic:Katiba Institute & 5 others (amicus curie)(2021)eKLR (Muruatetu 2).
15. A petition for re-sentencing is presented before this court in exercise of its powers as granted by article 165 of the Constitution. Article 165(2)(b) provides that this court has:-

“Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.”

Article 165(3)(d) provides that this court has:-

“Jurisdiction to hear any question respecting the interpretation of this constitution including the question whether any law is inconsistent with or in contravention of this constitution.”
16. Such a petition raises constitutional questions regarding violation, infringement of the petitioner's constitutional rights. The provisions of article 165(2) and (3) empower this court to hear and determine the constitutional issues, among others raised.
17. The court notes that Misc criminal application No 290 of 2020 was opened in the lower court pursuant to an application by the applicant for re-sentencing.
18. I have already stated where this court derives its authority to hear such a petition. I am in doubt if, in the absence of an order of the superior court, the magistrate's court had jurisdiction to entertain the application for re-sentencing in the first place. Once it convicted the accused and sentenced him, that court became functus officio. It could only entertain such an application if it was remitted back to it to do so. No such order was ever granted to the applicant prior to the filing of that application. Therefore, the said application was a non-starter.
19. In view of my finding on the jurisdiction of the Magistrate's Court to entertain the application for re-sentencing, the only recourse for that court is to close the Misc file and await further directions of the superior court.



20. Consequently, I direct that the court files in Misc criminal application No 290 of 2020 and CM's criminal case No 235 of 2008 be returned to the lower court . The latter shall be recalled if and when the applicant has chosen the avenue he wishes to apply to approach this court.
21. A copy of this ruling will be forwarded to the lower court for its records and compliance.
22. This file is closed.

DATED, SIGNED & DELIVERED AT NAKURU THIS 28TH MARCH, 2023.

H.M. NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Ms Murunga for state

Applicant present

