



REPUBLIC OF KENYA



**Mwaniki & 2 others v Republic (Miscellaneous Criminal Application  
40 of 2022) [2023] KEHC 3468 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3468 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS CRIMINAL APPLICATION 40 OF 2022**

**CM KARIUKI, J**

**APRIL 27, 2023**

**BETWEEN**

**SIMON NYAGA MWANIKI & 2 OTHERS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before this court is the notice of motion application dated November 10, 2022. The application is expressed to be brought pursuant to the provisions of sections 347 and 349 of the [Criminal Procedure Code](#) (cap 75 of the Laws of Kenya) seeking the following orders: -
  - i) That the applicants be granted leave to appeal out of time
  - ii) That the annexed draft appeal petition be deemed duly filed.
  - iii) Any other orders this honourable court may deem fit to grant
  - iv) Which application was premised on the grounds that:-
  - v) The applicants were charged with the offence of robbery with violence contrary to section 295 as read with section 292 (2) of the [Penal Code](#).
  - vi) The applicants were convicted on July 2, 2021 of the offence of stealing contrary to section 275 of the [Penal Code](#), but they did not appeal within the timelines stipulated by the law.
  - vii) The lower court's conviction aggrieved the applicants, and they wish to appeal against it.
  - viii) The applicants were remanded, awaiting the pre-sentencing reports, which were availed on August 17, 2021, over one month from the date of conviction.



- ix) The applicants' failure to file the appeal within the stipulated timelines was occasioned by their being remanded in custody for over one month since the date when they were convicted for stealing.
  - x) After the applicants were released from custody to serve their non-custodial sentence of three years in probation, the 3rd applicant's son, Charles Ndungu, fell ill.
  - xi) The applicants' elderly father also fell ill during this time, and they had to prioritize taking care of their sick loved ones as opposed to filing an appeal.
  - xii) Apart from their family members falling ill, the applicants have school-going children who require school fees as well as other school-related expenses, and this caused them to experience grave financial difficulties.
  - xiii) Due to the aforementioned reasons, the applicants could not instruct their advocates to file an appeal out of time.
  - xiv) The applicants have demonstrated sufficient reasons as to why their appeal was not filed on time.
  - xv) The annexed draft petition raises issues that ought to be considered by this honorable court.
  - xvi) In the interest of justice, the orders sought herein be granted.
2. The application was also supported by the supporting affidavit deponed by Lucy Wanjiku Mwaniki of even date.
  3. The applicants also filed a supplementary affidavit dated December 13, 2022.
  4. The respondent filed a replying affidavit dated December 5, 2022 deponed by Eusebius P.O Omooria, Senior Assistant of Public Prosecutions with the Director of Public Prosecutions, stating as follows:-
  5. That from August 17, 2021 up to November 11, 2022, when this application for leave to file appeal out of time, is a period of 1 year three months which is well over the 14 days granted to file an appeal and hence being inordinate delay.
  6. The reasons the applicants advanced that they were taking care of their sick father and child are not grounds to explain the delay of over one year. These facts were within their knowledge for the same were advanced by their advocate in the lower court during mitigation.
  7. from the draft petition of appeal annexed to this application, it appears after they were sued in a civil suit emanating from the criminal case that, they now want to seek leave to appeal out of time to counter the civil case.
  8. That the application as filed is misconceived, an afterthought, and an abuse of court process that ought to be dismissed.
  9. Applicants' Submissions
  10. The applicants were charged with the offence of robbery with violence contrary to section 292 (2) of the *Penal Code* vide Nyahururu Criminal Case 408 of 2018. The trial court found them guilty of stealing contrary to section 75 of the *Penal Code*, and they were sentenced to three years probation.



However, they could only do so after the prescribed time due to the reasons enumerated in the instant application.

11. The applicants submitted that they should be granted leave to appeal out of time because they were forced to prioritize their father's health and well-being as opposed to filing an appeal. That the 3<sup>rd</sup> applicant's son was involved in a road accident as a result of which he sustained serious injuries. They stated that they were financially constrained due to the costs of medical treatment and the education needs of their loved ones.
12. It was asserted that the applicants *vide* the annexed copy of the draft petition of appeal have demonstrated an arguable appeal that ought to be considered on merit. Reliance was placed on article 159 (2) (d) of the *Constitution*.
13. The applicant admitted that the appeal has been presented well over the required timeframe. However, for the purpose of administering justice, the court has the inherent jurisdiction to allow the applicant's appeal to be lodged out of time.
14. Reliance was placed on *Jamleck Kirimi v Republic* [2019] eKLR, and *Miriam Mwangeli & Patricia v Republic* [2017] eKLR
15. Respondent's Submissions
16. The respondent submitted that the period of 1 year and three months occasioned inordinate delay. Reliance was placed on section 349 of the *Criminal Procedure Code, Salat v Independent Electoral & Boundaries Commission & 7 others* [2018] eKLR
17. It was averred that the issues of illness indicated by the applicants do not amount to satisfactory reasons in that the hospital documents annexed to this application were prepared between August 14, 2021 and August 31, 2021 hence cannot explain why it took over one year to file this application.
18. The respondent contended that the application was purposely made to counter the civil suit brought against the applicant and that the same should be dismissed as an abuse of court process for having been brought to court after a period of over one year being an inordinate delay and brought with a sinister motive.
19. Analysis and Determination
20. I have considered the application, the grounds adduced thereto, the parties' affidavits, submissions, and authorities cited. The sole issue for determination is whether the applicants have sufficiently demonstrated that they should be granted leave to appeal out of time.
21. The legal position on the limitation of time for filing appeals is grounded under section 348A as read with section 349 of the *Criminal Procedure Code*, which provides as follows:

“348A. When an accused person has been acquitted on trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law.”

“349. 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 a 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.”

22. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR – SCK, the Supreme Court set out the principles to be considered by the court in exercising the discretion to extend time for filing an appeal as follows: -
- 1) 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.
  - 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  - 3) Whether the court ought to exercise the discretion to extend time is a consideration to be made on a case-to-case basis.
  - 4) Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the court.
  - 5) Whether the respondents would suffer any prejudice if the extension was granted.
  - 6) Whether the application had been brought without undue delay and, finally, whether public interest should be considered for extending time in certain cases like election petitions.
23. The applicants hinged their case on the fact that they were not able to file their appeal on time because after they were released from custody to serve their non-custodial sentence of three years in probation, the 3rd applicant’s son namely Charles Ndungu, fell ill. Further, their elderly father also fell ill during this time, and they had to prioritize taking care of their sick loved ones as opposed to filing an appeal.
24. It was also contended that apart from their family members falling ill, the applicants have school-going children who require school fees as well as other school-related expenses, and this caused them to experience grave financial difficulties.
25. The applicants are tasked with establishing a plausible and satisfactory explanation for their delay to unlock the court’s flow of discretionary favour. However, it is my finding that the same has not been done. The applicants’ attempted to blame their failure to file the appeal within the stipulated timelines on the fact that they were remanded in custody for over one month since they were convicted for the offence of stealing. Even if that was indeed the case, this application should have been filed; then, it was not. I find this reason to be unsatisfactory to warrant the grant of the orders sought by the applicants.
26. The period of delay from August 17, 2021 up to November 11, 2022 when the instant application was made, a period of about one year and three months. Within that period, the applicants stated that they were taking care of their father; nevertheless, there was no evidence of the same adduced before this court to substantiate this assertion.
27. Moreover, the applicants stated that they were taking care of the 3<sup>rd</sup> applicant’s son, who got into an accident and attached evidence of the same. The documents attached are evidence of the period within August 2021. I agree with the respondent that they did not satisfactorily explain why it took a period of over one year to file the application herein. I also find that the applicants’ submission that they were paying fees for their school-going children is not an exceptional or unusual circumstance that could amount to a good cause advanced for the delay in filing the appeal.



28. This court has also considered the draft petition of appeal annexed to the notice of motion application where grounds of appeal have been set out therein. However, this court has not found sufficient reasons for the delay to exercise discretion in favour of the applicants.

29. In the upshot I find that the application has no merit and it is hereby dismissed.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

