



**Kalunda v Republic (Criminal Miscellaneous Application E050 of 2023)  
[2023] KEHC 22808 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22808 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E050 OF 2023**

**FR OLEL, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JACOB NGANDA KALUNDA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before court is the chamber summons application (undated) but filed in court on July 31, 2023, wherein the applicant seeks for leave to be allowed to appeal out of time against the judgement of Hon. Justice D.K Kemei dated February 2, 2018 which dismissed his appeal against sentence and conviction passed against the applicant in Kithimani Principal Magistrate court Criminal case No. 503 of 2011 where he was sentenced to suffer death upon being found guilty of robbery with violence.
2. Upon perusal of the record, I did note that upon his appeal being dismissed the applicant on September 13, 2019 did file High Court Misc Application seeking resentencing pursuant to the findings in “Muruatetu case”. The high court vide an order dated September 23, 2019 did direct that his file be returned to the trial court at Kithimani for resentencing. This was done and upon the trial magistrate considering the applicants mitigation and social inquiry report filed by the probation department, they did find that based on circumstances of the case, the death sentence passed was lawful and just when everything was considered. He therefore declined to review the sentence.
3. Not being satisfied, the applicant did proceed to file Machakos High Court Misc Application no E028 of 2020 seeing revision of his sentence and vide a ruling dated August 3, 2022 Hon Justice M.W Muigai did find that the judgment of Hon Justice D.K Kemei dated February 22, 2018 was on both conviction and sentence and advised the applicant to file/lodge an appeal to the court of appeal since the court lacked the requisite jurisdiction to hear and determine his application on resentencing.



4. No explanation has been given why the applicant opted to wait from 03.08.2022 to 31.07.2023 to lodge an application seeking leave to appeal out of time nor has he explained why he did not initially appeal from the judgement of Hon. Justice D.K Kemei dated February 2, 2018 dismissing his appeal.
5. Be that as it may Article 48 provides that the state shall ensure access to justice for all persons and shall not impede access to justice. Article 50 (1)(q) also provides that an appellant if convicted is allowed to appeal to or apply for review by a higher court as prescribed by law.
6. Though no good reason has been proffered why this application should be allowed, I do exercise my discretion and allow the appellant to appeal out of time against the judgement of Hon. Justice D.K Kemei dated February 22, 2018 delivered in Machakos HCC Criminal Appeal No.69 of 2015
7. The applicant shall file his petition of appeal within 14 days from the date of delivery of this Ruling.
8. This Misc Application file shall also be marked as closed.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

