



**Karegi v Republic (Miscellaneous Criminal Application
E043 of 2021) [2022] KEHC 12666 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E043 OF 2021**

FN MUCHEMI, J

JULY 28, 2022

BETWEEN

EPHANTUS MUTAHI KAREGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling on the undated application filed on 4th October 2021 seeking for orders of extension of time to appeal against the High Court judgement delivered in HCCRA No. 323 of 2007 delivered on 29th September 2017 dismissing the applicant's appeal.
2. Being dissatisfied with the judgement, the applicant states he intended to appeal but was not able to file his appeal within the statutory timelines, thus the filing of this application.
3. The grounds relied on by the applicant are that his family had promised to hire for him an advocate to file the appeal on his behalf but this plan did not materialize. Secondly that he was not supplied with a certified copy of the High court judgement on time.
4. The court gave the respondent a chance to respond to this application orally due to its unique nature of prolonged delay. The respondent was of the view that the application lacks merit because of two reasons. Firstly that the delay of over 4 years has not been satisfactorily explained. Secondly that the applicant had appealed to the Court of Appeal against the first judgement of the High Court.
5. It is not in dispute that the applicant took about four years to file this application. During the hearing of the application, the applicant added a 3rd ground that since he was convicted, he was transferred from Nyeri G.K prison to Kibos in Kisumu where he stayed for one (1) year. He was then taken to Naivasha Maximum Prison, and to Kamiti Maximum Prison. While at Kamiti in 2021, he filed this application and later requested to be transferred back to Nyeri. This ground was opposed by the respondent in that the applicant could have filed this application in any of the prisons and avoided delay.



6. In dealing with an application of this nature, the court must consider whether the application was filed with delay and whether the delay was inordinate. Further, whether the intended appeal has chances of success. The other issue that arises is whether the applicant has a right to file an appeal in the Court of Appeal that will be the second one in the same case.
7. Record shows that the applicant was first charged before Senior Resident Magistrate Nyeri in Criminal case no. 1596 of 2003. He was convicted on 11th June 2004 and sentenced to death. On his appeal to the High Court Nyeri in HCCR Appeal No. 323 of 2007, the appeal was dismissed by a two –judge bench of Wakiaga J. and Ombwayo J. for lack of merit.
8. The appellant lodged an appeal in the Court of Appeal No . 66 of 2014 arguing that the High Court bench was not properly constituted because Ombwayo J. was a judge of the Environment and Land Court and had no jurisdiction to hear and determine criminal appeals. The Court of Appeal agreed with the appellant on the issue of jurisdiction and nullified the High Court judgement. The appeal file was sent back to the High court for hearing and disposal. This was judgement of the court delivered on 12th July 2016.
9. The appeal was heard and determined by Ngaah J in the same High Court as Appeal No. 323 of 2007. In the judgement delivered on 29th September 2017, the appeal was dismissed for lack of merit.
10. It is imperative to note that the applicant was charged and convicted with robbery with violence before Nyeri SRM Criminal Case No. 128 of 2005 and sentenced to death. He appealed to the High Court HCCRA No. 374 of 2007 which upheld the conviction and sentence. On 2nd appeal, the Court of Appeal in Appeal No. 4020 of 2009 quashed the conviction under Section 296(2) of the [Penal Code](#) and convicted applicant on a lesser charge under Section 296(1). The death sentence was quashed and he was sentenced to serve 14 years imprisonment. This was through the judgment of the court delivered on 06/06/2013.
11. From these background facts, it is clear that the applicant has not appealed against the High Court judgement in HCCRA No. 323 of 2007 in which Ngaah J. dismissed his appeal and upheld the judgement of the trial court. As such, the accused has a right of appeal against the High court judgement delivered on 29/09/2017.

I am aware that under Section 361 of the [Criminal Procedure Code](#) the court of appeal shall hear appeals on matters of law:-

“but not on a matter of fact, and severity of sentence which is a matter of fact.”

The court in the case of Solomon Kiptoo Sawe held that the Court of Appeal is restricted to matters of law only in a second appeal

12. The intended appeal by the applicant is a second appeal. I have perused the draft memorandum of appeal annexed to this application and note that the grounds to be relied on are all on matters of fact which the Court of Appeal shall not entertain. Although he has talked of his rights to trial under Section 50 of [the Constitution](#), the applicant has not explained how and which court violated his right. In my considered view, this allegation is based on the same grounds of matters of fact stated in the draft memorandum.
13. The applicant has said that while in prison, he could not manage to file his appeal and that the judgement was not provided to him on time. Like the prosecution, I am of the view that a convict can file an appeal while in prison and without an advocate at any time. The prison provides the facilities of para-legal officers who assist the convicts to draft memorandums of appeal while the Prison



Administration office forwards them to court for processing. The reason that the accused was waiting for relatives to hire for him a lawyer is not convincing because he had the capacity to file the appeal on his own. The practice of courts are that accused persons are provided with copies of judgements free of charge immediately or just a few days after delivery. If the court did not provide, the applicant had every reason to write to the court through the prison and ask to be provided with a copy.

14. It is my considered view that the delay of over four (4) years has not been explained and that the intended appeal has no chances of success being a second appeal based on grounds of facts.
15. For the foregoing reasons, I find no merit in this application and it is declined.
16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 28TH DAY OF JULY, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS DAY OF 28TH JULY, 2022

