



**Cheruiyot v Republic (Criminal Miscellaneous Application  
E060 of 2021) [2022] KEHC 16791 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL MISCELLANEOUS APPLICATION E060 OF 2021  
RN NYAKUNDI, J  
DECEMBER 23, 2022**

**BETWEEN**

**VICTOR CHERUIYOT ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant approached this court *vide* a notice of motion dated October 21, 2021 seeking orders to be allowed to file his appeal out of time. The application is premised on the following grounds;
  1. That, the delay was not deliberate.
  2. That he now prays that he be granted leave to file an appeal out of time
  3. That his appeal has high chances of success
2. The appellant's case is that he was convicted and sentenced to 20 year's imprisonment for the offence of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#) on June 23, 2013 by Hon Limo. He was informed of his right to appeal and appealed within the stipulated time but his appeal failed to reach the court due to prison transfers and logistics. He sought to be allowed to appeal out of time as the delay was not deliberate and his appeal has high chances of success.
3. The court's power to extend time for filing appeal is provided for under section 349 of the [Criminal Procedure Code](#) 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.’

4. This section only recognizes only one ground namely the inability of the applicant to obtain the judgement and proceedings within the 14 days to enable him to appeal. This ground has always been recognized by the court. For instance, in *Abdulla Lule v R* (1960) EA 21, the applicant’s application to appeal out of time was allowed because he did not obtain the judgement and proceedings of the lower within 14 days to enable him to appeal.
5. The right of the applicant to appeal has been constitutionalized in article 50 (2) (q), which reads: “Every accused person has a right to a fair trial, which includes the right-  
  
if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
6. Further, article 159 (2) (d) of the 2010 *Constitution* of Kenya mandates this court to administer substantive justice without undue regard to procedural technicalities.
7. In view of the above constitutional provisions, although the grounds in support of his application are not recognized by the provisions of section 349 of the *Criminal Procedure Code*, this court is entitled to consider the grounds advanced by the applicant to decide whether his application is merited.
8. I have perused the pleadings and I have found no evidence by the appellant that the period of delay was caused by the logistics and transfers in prison. It is not enough that the appellant states the reasons for delay of his own knowledge. He states that he appealed but has not provided any copy of the petition of appeal that was filed at that alleged time. I rely on the principles in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997 (unreported) the court expressed itself thus; “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted”.
9. In the premises the application is dismissed.

**DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23<sup>TH</sup> DAY OF DECEMBER, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**

