



**Wanjiku v Republic (Criminal Appeal 74 of 2017)  
[2022] KEHC 16688 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL 74 OF 2017  
RM MWONGO, J  
DECEMBER 20, 2022**

**BETWEEN**

**PAUL KIMANI WANJIKU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Appellant was charged and convicted for the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. He was found guilty and sentenced to serve life imprisonment on November 13, 2017. Dissatisfied, the Applicant moved to the High Court of Kenya at Kerugoya under Appeal Number 74 of 2017.
2. On November 19, 2020 this court (Gitari, J) issued a judgment in the appeal in which it determined that the criminal case should be retried in the lower court before a Magistrate other than Hon PM Kiama. The judgment was rendered virtually. The record of proceedings does not indicate the parties present at the time of delivery.
3. By a notice of motion dated January 18, 2022, the applicant has therefore filed this application which seeks the following substantive orders:
  - a. That this Honourable court be pleased to extend to the applicant, the time for giving notice of intention to appeal to the Court of Appeal from the judgment of the High court given on the November 19, 2020.
  - b. That the Notice of appeal annexed to this application be deemed as duly filed.
  - c. That this Honourable court be pleased to make such other orders as are necessary for the ends of justice.



4. The application is made pursuant to Sections 3A, 3B and 7 of the *Appellate Jurisdiction Act*, Cap 9 and is premised on the following principal grounds:
  1. That the judgment read on November 19, 2020 is alleged to have been read to the applicant virtually in the absence of the appellant's counsel.
  2. That Counsel for the appellant obtained a copy of the judgment from the High Court registry, long after the 14 days limited for lodging the Notice of appeal had expired.
  3. That the intended appeal is a serious appeal and not frivolous.
  4. That the delay is sufficiently explained.
  5. That the intended appeal has overwhelming chances of success.
5. The applicant deponed a 22 paragraphs supporting affidavit and the main averments are;
  1. That the High Court did not inform him that it would deliver the judgment virtually on the November 19, 2020.
  2. That the applicant has been in prison custody since his arrest on June 24, 2017 for inability to raise bail of Kshs 500,000.
  3. That he managed to obtain a copy of the judgment and the proceedings of the November 19, 2020 at the High Court Kerugoya registry.
  4. That over one year and 90 days has lapsed since the orders of retrial were made and the retrial has not yet taken off.
  5. That neither the appellant, his advocate can be blamed for not filing the Notice of Appeal within 14 days of the date of judgment; that is November 19, 2020.
  6. That a copy of the intended Notice of Appeal and proposed memorandum of Appeal to the Court of Appeal are both annexed to this affidavit as annexures MGN 3 and 4 respectively.
  7. That the intended Appeal to the Court of Appeal is a serious one and is not frivolous.
  8. That the state will not be prejudiced by the grant of the orders prayed in the application.
6. The prosecution filed a replying affidavit dated May 24, 2022 and the main averments were:
  1. That pending the hearing of the application inter-parties, the Honourable Court be pleased to order a stay of the hearing of the re-trial ordered by the High Court Kerugoya on November 19, 2020.
  2. That the Honourable Court be pleased to extend the time for giving Notice of Intention to Appeal to the Court of Appeal from the Judgement of the High Court Kerugoya given on the November 19, 2020.
  3. That the notice of appeal annexed be deemed duly filed.

#### **Parties submissions**

7. No written submissions are on record for the applicant.
8. The prosecution's written submissions were focused on whether this Court can Order a stay of a retrial in Criminal SO No E008 of 2022.



9. The prosecution submits that this Court heard the appeal in Criminal Appeal No 74 of 2017 and ordered a retrial that is the subject of Criminal SO No E008 of 2022 and now is called to address the issue of Jurisdiction in limine. According to the prosecution this Court's power to review its own decision can only arise in the following instances;
    - a. The judgement, Ruling, or Order, is obtained by fraud or deceit;
    - b. The judgement, Ruling, or Order, is a nullity, such as when Court itself was not competent;
    - c. The Court was misled into giving judgement, Ruling or Order, under a mistaken belief that parties had consented thereto;
    - d. Judgement or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision
  10. The prosecution submits that the Applicant herein has not demonstrated where or if at all the judgement made on the November 19, 2020 by this Court was made or obtained fraudulently, deceitfully, was a nullity, was made under a mistaken belief or was rendered on the basis of a repealed law.
  11. According to the prosecution, the applicant intends to appeal this matter in form of review. The Applicant should demonstrate to the satisfaction of this Court, how if at all, this High Court erred in the exercise of its discretion; further the applicant should show whether this Court can extend time for the Applicant give notice of intention to appeal to the Court of Appeal.
  12. The prosecution argues that the court draws its powers from Articles 165(1) which stipulates that:

“The High Court shall not have jurisdiction in respect of matters

    - a. Reserved for the exclusive jurisdiction of the Supreme Court,
    - b. Falling within the jurisdiction of the Courts contemplated in Article 162(2)
  13. The prosecution submits that the Constitution has no provision in express terms allowing the High Court to review its decision in criminal cases or sit on appeal over its own decision.
  14. At the hearing of the application the applicant, through his counsel sought prayers 3 and 4 of the application (set out as (a) and (b) herein) . He relied on the grounds in the application mainly: reason for the delay, validity of the intended appeal and the interest of justice.
  15. Further, he pointed out that he was not present when the judgment was delivered virtually; That the appeal is not frivolous and should be allowed to contest the order for re-trial; and that the application is not opposed as the replying affidavit has not been commissioned; and that the state will not be prejudiced if the application in allowed.
  16. The prosecution/respondent reiterated its submissions that the applicant sought for the retrial to be stopped; that the High Court did not have jurisdiction to do so; that on delay, the judgement was delivered virtually and a copy of the same served the accused/applicant; that the court cannot order stay as it would amount to reviewing its decision; and that the prayer for extension of time was frivolous.
- Lastly, the applicant's counsel submitted that section 7 of the [Appellate Jurisdiction Act](#) gave the High Court jurisdiction to extend time to file appeal.



### Issue for determination

17. The only issue is whether this Court can extend time to afford the Applicant give notice of intention to appeal to the Court of Appeal.

### Analysis and Application of the law

18. Section 7 of the [Appellate Jurisdiction Act](#) provides as follows:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired” (Emphasis added).
19. The High Court at Kerugoya heard the appeal and ordered re-trial. Following that judgment, the Chief Magistrate’s Court Wanguru in SO E008 of 2020 Republic v Paul Kimani Wanjiku is scheduled to hear the criminal case afresh.
20. It is not disputed that the judgment of the High Court was rendered virtually. On close perusal, it is not clear from the record that any party was present at all when the judgment was so rendered.
21. The mere absence of the applicant/accused or his counsel at the time of the delivery of the judgment on November 19, 2020 is, in my view, sufficient to explain a delay, though whether the delay should have been for over one year is a question that has not been addressed by any of the parties.
22. It is clear from Section 7 of the [Appellate Jurisdiction Act](#) cited above that this court can entertain the present application. The prosecution’s argument that the applicant is seeking to review the High Court’s decision is simply not correct in light of section 7.
23. In similar circumstances in [Martha Njoki Maina v Republic](#) [2017] eKLR Kasango J held:

“The applicant by her affidavit stated that this court delivered its judgment on 8th March 2017 against her Criminal appeal. That she was dissatisfied with that judgment. That her previous advocate failed to lodge her appeal within time. The court grants orders that: The applicant is granted an extension of time to file a Notice of appeal against Nanyuki High Court Criminal Case No. 22 of 2015.”

### Disposition

24. In the light of foregoing this court orders as follows:
  - (1) The applicant is granted extension of time to file to file a Notice of Appeal against the Judgment of Gitari, J herein.
  2. The Court further orders that given the long duration of time that has elapsed, the extension of time granted is thirty (30) days from the date hereof within which the applicant must have filed such notice, failing which no further extension shall be granted.
  3. Stay of the re-trial is granted for Thirty (30) days.

Orders accordingly.

**Dated at Kerugoya this 20<sup>th</sup> day of December, 2022**

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**RICHARD MWONGO**

**JUDGE**

**In the presence of :**

Mugo holding brief for Njagi for the Applicant

Mamba for the State

**Court Assistant: Murage**

