



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 25 OF 2018

MWENDWA MUSILI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. The applicant seeks for orders to appeal out of time to the Court of Appeal in his application dated 22/06/2018. In his supporting affidavit and in the grounds on the rear of the application, the applicant relies on the following grounds: -

i. That he was convicted of the offence of robbery with violence at Runyenjes court on 9/07/2008.

ii. That he appealed in Embu HCA No. 140 of 2008 which was dismissed by a two judge bench.

iii. That he was promised by his family that they would get him a lawyer to file the appeal for him but was informed a bit late in the day that they did not find one.

iv. That his appeal has high chances of success.

2. The application was opposed by the stat on grounds that Section 349 of the Criminal Procedure Code allows only 14 days for lodging an appeal. The applicant has taken over seven (7) years to bring this application. He has not supported his application with documents.

3. The respondent's counsel urged the court to dismiss the application.

4. The judgment by the honourable Senior Resident Magistrate Runyenjes where the applicant was convicted with the offence of robbery with violence was delivered on 9/07/2008. He filed the appeal and it was admitted on 11/11/2008. The appeal was heard by a two judge bench who upheld the conviction and the death sentence on 10/02/2012.

5. During the hearing of the appeal in the High court, the applicant had no advocate and proceeded in person arguing his appeal before the two judge bench. The reason of his family promising to get a lawyer for him and informing him late that they could not hire one is not convincing.

6. He was capable of filing the appeal by himself on time and later look for a lawyer to present him. This would have helped him to comply with the provisions of Section 349 of the Criminal Procedure Code.

7. The delay of over seven years was not explained by the applicant. It is an unreasonable delay that called for a serious explanation. The applicant made no attempt to give any explanation.

8. I am of the considered opinion that this application has no merit and it is hereby dismissed.

1. I take notice of the fact that the applicant was sentenced to death in this case. In the case of ***DOUGLAS MUTHAURA NTORIBI VS REPUBLIC Misc. Criminal Application No. 3 of 2015***, the High Court cited with approval the case of the Supreme Court decision in ***FRANCIS KARIOKO MURUATETU & ANOTHER VS REPUBLIC [2017] eKLR***. It was held: -

It is my view that the High Court is duly bound to consider cases where litigants have already been sentenced to suffer death. This consideration is not limited to only murder cases but to all capital offences.

9. The same principle that the mandatory nature in sentencing takes away the discretion of the court also applies to Section 296(2) of the

Penal Code under which the applicant was sentenced. The accused is entitled to be heard by the trial court for re-sentencing.

10. I hereby refer him to the Senior Principal Magistrate Runyenjes for re-hearing on sentence.

DATED, DELIVERED AND SIGNED AT EMBU THIS 31ST DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mate for Respondent

Applicant present