



Kotani v Director of Public Prosecutions (Miscellaneous Criminal Application E468 of 2024) [2025] KEHC 4505 (KLR) (Crim) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E468 OF 2024**

K KIMONDO, J

APRIL 8, 2025

BETWEEN

ERICK KOTANI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

1. On 24th November 2023, Erick Kotani (hereafter the applicant), was convicted by the lower court for the offence of stealing contrary to section 268 (1) as read with 275 of the *Penal Code*. He was fined Kshs 400,000 in default to serve three years in prison. Those proceedings were in the Chief Magistrates Court at Nairobi in Criminal Case No. 33 of 2016: Republic v Erick Kotani & Nixon Ogongo Otieno.
2. He paid the fine and obtained his freedom. He now craves leave to lodge an appeal out of time. The notice of motion is dated 13th December 2024 and predicated upon his deposition of even date.
3. The grounds are three-pronged: Firstly, that his counsel was absent during the delivery of the judgment and sentence which “left him exposed, vulnerable and to his own devices”. Secondly, that he is a pastor and the conviction is “prejudicial to his reputation and the same is now being used to prosecute a civil case filed against the applicant’s company”. Thirdly, that the conviction was based on weak circumstantial evidence and failed to take into account exculpatory facts. He contends that in light of the annexed “draft memorandum of appeal”, the appeal has high chances of success.
4. The motion is ardently opposed by the respondent through grounds of opposition dated 19th March 2024. In a nut shell, the respondent contends that there has been lengthy and ill-explained delay; and, that the motion is an afterthought or abuse of court process.



5. I take the following view of the matter. The legal parameters of an application of this nature are well settled: The court has wide and unfettered discretion to extend time. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Mungatu v Republic*, Court of Appeal Nairobi, Criminal Application E009 of 2023 [2023] KECA 671 (KLR).
6. In this case, the impugned judgment and sentence was delivered way back on 24th November 2023. The notice of motion for leave to appeal out of time was presented to the High Court well after one year. The only reason proffered for the lengthy delay is that the applicant’s counsel was absent during the delivery of the judgment and sentence which “left him exposed, vulnerable and to his own devises”. In a word, the applicant claims that he did not have advice on his right to an appeal.
7. I find the reason to be lame for a number of reasons. Firstly, the lower court clearly explained to the applicant that he had an undoubted right of appeal within 14 days. Secondly, the applicant raised the fine immediately and secured his liberty. That means that he had all the time to seek legal counsel on mounting any appeal. Fourthly, and by his own admission, he is a pastor and director of some company. He thus well understood the contents of the impugned judgment or the right to an appeal that was explained to him.
8. The plea to appeal out of time is clearly an afterthought and largely motivated by the realization that it may prejudice him in other civil proceedings. He gives it away by deposing that that the conviction is “prejudicial to his reputation and the same is now being used to prosecute a civil case filed against the applicant’s company”. That plainly is what has jolted him into action. That being the case, I readily find that the application is a clear case of abuse of the court.
9. From the perusal of the typed judgment of the lower court and a cursory glance of the document annexed titled “draft memorandum of appeal”, I am not also persuaded that the intended appeal has a high chance of success. I say so without making a finding as I am not sitting as the first appellate court.
10. I have also reached the inescapable conclusion that there has been inordinate and unreasonable delay in seeking leave to appeal out of time. The delay is not well explained. As a general rule, when delay is established, unless it is well explained, it is deemed to be inexcusable. See *Ivita v Kyumbu* [1984] KLR 441; *Leo Sila Mutiso v Rose Mwangi* [supra]. I have equally found that the entire motion is a clear case of abuse of process and unmerited.
11. In the end, I am unable to exercise my discretion in favour of the applicant. The upshot is that the notice of motion dated 13th December 2024 is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

Mr. Olala for the applicant instructed by Litoro & Omwebu Advocates.

Ms. Kigira hoding brief for Ms. Awino for the respondent instructed by the office of the Director of Public prosecutions.



Mr. E. Ombuna, Court Assistant.

