



**Mbuthia v Republic (Criminal Appeal 42 of 2017)
[2025] KEHC 5829 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 42 OF 2017
CM KARIUKI, J
MAY 12, 2025**

BETWEEN

ELIUD MBUTHIA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, *vide* a notice of motion dated 04/06/2024, sought orders.
 - i. Spent.
 - ii. That the notice of appeal filed on the 20th of June 2024 be deemed properly filed.
 - iii. That honourable Court grants the Applicant leave to file an appeal out of time and orders that the annexed draft petition of appeal be deemed duly filed.
 - iv. This honourable Court does grant the appellant/ applicant bail/bond pending appeal.
 - v. In the alternative and without prejudice to the foregoing, this honourable Court suspends and/or stays the execution of all the orders and sentences issued by the trial court and the first appellate Court pending the hearing and determination of the appeal.
2. The application is premised on articles 164(3), 27, 50(2), and 51 of the *Constitution*, section 3 of the *Appellate Jurisdiction Act*, rules 4 and 5(2) of the *Court of Appeal rules 2010*, section 349, 361, and 379 of the *Criminal Procedure Code*.
3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Eliud Mbuthia on 30/07/2024.



The background

4. On 21/08/2013, the Applicant was convicted and sentenced by the trial court on two counts of robbery with violence contrary to section 296(2) of the [Penal Code](#). The Applicant was also convicted and sentenced on count III for the offence of having a firearm without a firearm certificate contrary to section 4(2) (a) as read with section 4(3) (a) (a) of the [Firearms Act](#).
5. In Count I, the Applicant was sentenced to death. In Count II, the Court held in abeyance imposing a second death sentence pending execution of the Count I sentence. In Count III, the Court held in abeyance, pronouncing its sentence pending execution of the Count I sentence.
6. The Applicant appealed against the conviction and sentence to the High Court, but the appeal was dismissed on all counts on 25/07/2023.
7. Dissatisfied with the judgment of the first appellate Court, the Applicant is desirous of having the second appeal determined by the Court of Appeal.
8. The Applicant contends that he was unsuccessful in obtaining certified copies of the judgment and proceedings, so he could not appeal within the time limit. He therefore seeks leave to appeal out of time.
9. The Applicant contends that he will likely serve a substantial part of the death sentence before the proceedings are typed and appealed, and the appeal is heard. He has been in prison for over 10 years now. Therefore, he prays to be granted bail pending appeal.

The response.

10. The respondent opposed the application, replying to an affidavit sworn by Ruth Walusala Rakama on 16/09/2024.
11. The respondent contends that the Applicant has not disclosed any reasonable cause for this Court to allow the instant application.
12. The respondent contends that the Applicant has not accounted for or explained the delay in appealing against the High Court's decision.
13. The respondent contends that nothing on record shows that the Applicant applied for the supply of proceedings or judgment.

Further affidavit.

14. The Applicant filed a further affidavit sworn by Eliud Mbuthia on 01/10/2024.
15. The Applicant averred that he has been in prison and has had limited options in moving any court process, including obtaining documents or legal assistance. The only help he got was through prison officers whom he sent, and their return was always that they were acting; past that, he could not influence.

Directions of the Court.

16. The application was canvassed by way of written submissions.

The Applicant's submissions.

17. The Applicant submitted that the application had been delayed for about a year before appealing. The Applicant contends that the delay was because he was in custody after his conviction and sentence,



and had very limited options and resources to get a copy of the judgment and proceedings. He further contends that he used handwritten requests to supply judgment and proceedings, which he could not retain copies of after handing them over to prison officials. The Applicant relied on section 349 of the *Criminal Procedure Code*, Court of Appeal in criminal appeal [application] E287 of 2022, *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA, Court of appeal criminal appeal [application] E022 of 2024, *Andrew Kiplagat chemaringo v paul kipkorir kibet* [2018] eKLR, court of appeal criminal appeal [application] E025 of 2024, article 50(6) of the *Constitution*.

18. The Applicant submitted that the appeal raises substantive law issues on gross inconsistencies in the prosecution's case. The Applicant relied on article 48 and 50(2)(h) of the *constitution*.

The respondent's submissions.

19. The respondent submitted that the Applicant has not furnished the Court with justifiable reasons to allow the application seeking leave to appeal out of time. The respondent relied on section 349 of the *CPC*, *Republic v Ahmed Fakir Mohammed* [2021] eKLR
20. The respondent submitted that the appeal has no overwhelming chances of success and thus the instant application should not be allowed.

Analysis And Determination.

21. This Court has considered the application, the supporting affidavit, the replying affidavit, the further affidavit, and the respective parties' submissions. The broad issues for determination are.
- i. Whether the Applicant should be granted leave to appeal out of time.
 - ii. Whether the Applicant should be granted bail pending appeal.

Leave to appeal out of time.

22. Section 349 of the *Criminal Procedure Code* permits this Court to exercise its discretion in enlarging time to appeal for good cause. Delays in obtaining certified copies of the proceedings and rulings from the trial court are one such reason. This provision states:

“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 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 therefor.”

23. Considering the provisions of section 349 of the *Criminal Procedure Code*, this Court is free to admit an appeal out of time, satisfied that the delay was in obtaining certified copies of the impugned order. The Applicant has not stated whether he has already filed a petition for appeal. Judgment was delivered on 25/07/2023. This application was filed on 31/07/2024.
24. For the Applicants to succeed in their applications, they must satisfy the Court that he has reasonable grounds to bring them within the exception to that provision. The only grounds under that section are that the delay was caused by the inability of the Applicant or his advocate to obtain a copy of the judgment or order appealed against or a copy of the record within a reasonable time of applying to the Court.



25. Per Section 349, the Court is clothed with discretionary powers to be exercised for the interest of justice to the parties in a litigation. Illuminative principles that the Court ought to keep in mind in the exercise of its discretion may be drawn from *Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. 255 of 1997 UR, where the Court stated:

“It is now well settled that the decision whether or not to extend 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.”

26. Juxtaposing the Applicant’s Motion against the foregoing principles, my conclusion is that the Applicant has not satisfactorily expressed himself within the provisions of section 349 of the [Criminal Procedure Code](#). The Court is not satisfied that the delay in filing the appeal was not inordinate. In any case, it was occasioned by not having the proceedings and judgments supplied within the stipulated period by law, since in filing a criminal appeal, one needs to lodge the notice of appeal, and the appeal is deemed filed.

27. That said, the Applicant has not demonstrated sufficient reasons for the delay in persuading this Court to exercise discretion in his favour. Therefore, I find the application devoid of merit, and it is hereby dismissed.

Bail pending appeal

28. In his application dated 04/06/2024, the Applicant seeks to be admitted to bail/bond pending appeal to the Appeal of Appeal at Nakuru.

29. On 21/08/2013, the Applicant was convicted and sentenced by the trial court on two counts of robbery with violence contrary to section 296(2) of the [Penal Code](#). The Applicant was also convicted and sentenced on count III for the offence of having a firearm without a firearm certificate contrary to section 4(2) (a) as read with section 4(3) (a) (a) of the [Firearms Act](#).

30. In Count I, the Applicant was sentenced to death. In Count II, the Court held in abeyance imposing a second death sentence pending execution of the Count I sentence. In Count III, the Court held in abeyance, pronouncing its sentence pending execution of the Count I sentence.

31. The Applicant appealed against the conviction and sentence to the High Court, but the appeal was dismissed on all counts on 25/07/2023.

32. The Applicant contends that he is a sole breadwinner.

33. I find no substance in the application that can be lodged before the Court of Appeal for consideration.

34. The application for bail pending appeal to the Court of Appeal, which is not even supported by any material, and coming 10 years after conviction by the trial court and one year by this very Court, is undoubtedly an afterthought and mischievous. Thus, the Court makes orders.

i. The application is hereby dismissed.



ii. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 12TH DAY OF MAY, 2025.

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CHARLES KARIUKI

JUDGE

12/05/2025

