



**Mutindi v Republic (Miscellaneous Criminal Application
E001 of 2024) [2024] KEHC 13100 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2024
FN MUCHEMI, J
OCTOBER 24, 2024**

BETWEEN

JOHN MUSEMBI MUTINDI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. This undated application was filed on 2nd January 2024 and it seeks for leave to file an appeal out of time.
2. The applicant states that he was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and sentenced to ten (10) years imprisonment in Thika CM Criminal Sexual Offences Case No 90 of 2020. The applicant states that he was unable to draw the appeal due to confusion and lack of professional advice. Further, due to financial constraints, he was unable to hire the services of an advocate to represent him. The applicant states that he has now received legal advice from the legal desk in prison where he is serving the sentence. He says he wishes to lodge his appeal and avers that his appeal has high chances of success.
3. In opposition to the application, the respondent filed a replying affidavit dated 27th March 2024 and states that the judgment against the applicant was delivered on 23rd September 2021 yet the applicant has filed an application for extension in the year 2024, which is about three (3) months after conviction.
4. The respondent argues that the applicant has not disclosed any good cause to warrant this court to allow the application. Further, the applicant has not accounted for or explained the delay in lodging an appeal against the trial court's decision.
5. The respondent states that the applicant has not annexed a draft petition for appeal which clearly demonstrates that the intended appeal is devoid of any arguable issue.



6. The respondent argues that the extension of time is not a right of a party but is an equitable remedy that is only available to a deserving party at the discretion of the court. Further a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court, which the applicant has failed to do. The respondent argues that there are no sufficient reasons for the delay to warrant this court to exercise its discretion in favour of the applicant.
7. The respondent states that the applicant's supporting affidavit is defective as it is neither signed nor commissioned hence a document not known in law. As such the application is not supported by any facts or evidence.
8. Directions were issued that the application be canvassed by way of written submissions but the applicant elected not to put in written submissions.

The Respondent's Submissions

9. The respondent reiterates what she deponed in her affidavit and submits that the applicant has not annexed any proof to show his efforts in procuring the proceedings for the judgment delivered. The applicant has not disclosed any good cause to warrant the court to allow the instant application for leave to lodge an appeal out of time.
10. The respondent submits that the applicant has not accounted for or explained the delay in lodging an appeal against the trial court's decision. Further, the applicant has not sufficiently made out a prima facie case or sufficient cause on the merits to warrant grant of any of the prayers sought in the application. The respondent further submits that the applicant did not annex a copy of the request for certified copies of the proceedings or judgment. Additionally, the failure by the applicant to annex a draft petition of appeal for consideration is fatal to the application.

The Law

Whether the applicant has made out a case for the grant of an order for leave to file his appeal out of time.

11. The court's power to extend time for filing an 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 lapsed, 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.

12. The Supreme Court in the case of [*Nicholas Kiptoo Korir arap Salat v IEBC and 7 others*](#) [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
13. The applicant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and was sentenced to 10 years imprisonment. Judgment was delivered on 23rd September 2021 and the applicant filed the instant application on 2nd January 2024. The applicant attributes the delay in filing his appeal to confusion and his inability to hire an advocate until recently when the legal desk in prison helped him draft his appeal.
14. Notably, the applicant has not averred that he ever requested for judgment or the record of proceedings. Neither did he annex a copy of the request for certified copies of the proceedings and judgment. Additionally, 2 years and 10 months have lapsed since conviction and the explanation provided for the delay is not satisfactory. Thus, the delay is inordinate and therefore inexcusable.
15. I have also considered the draft petition of appeal annexed to the application and noted that the intended appeal does not raise any arguable grounds of appeal. Accordingly, the applicant has not provided sufficient reasons for the delay to exercise discretion in his favour.
16. In my considered view, the application filed on January 2, 2024 lacks merit and is hereby dismissed with no order as to costs.
17. It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024

F. MUCHEMI

JUDGE

