



**Kibet v Director of Public Prosecution (Criminal Petition  
3 of 2019) [2023] KEHC 17931 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL PETITION 3 OF 2019**

**F GIKONYO, J**

**MAY 15, 2023**

**BETWEEN**

**JUSTONE KIBET ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

1. The applicant in his application dated 24/06/2019 styled relief sought as follows;
  - i. That this petitioner be heard on priority as the petitioner's right to appeal has been violated.
  - ii. That the registrar be compelled to provide records of appeal for the petitioner.
  - iii. That the petitioner's conviction and sentence be quashed and set aside.
2. The grounds stated by the petitioner are; that his right to a fair trial as enshrined under article 50 has been grossly violated, that his right of appeal within 14 days as provided for by section 349 of the CPC has been violated for he has been in prison for 8 years without being heard by the high court, and that this petition is supported by the decision in the case of *Danson Maina Muchoki vs Republic* [2013] eKLR.
3. The application is expressed to be brought pursuant to Articles 22(1),50(2)(Q), 23, 27,165,159 of the [Constitution](#), and section 349 of CPC.

**Directions of the court**

4. The application was canvassed by way of written submissions. The petitioner filed written submissions. The respondent did not.



### **Brief background as presented by the petitioner**

5. The applicant was charged with an offence of incest by male contrary to section 20(1) of the [Sexual Offences Act](#) 2006.
6. The applicant was charged, tried and convicted and sentenced to serve life sentence on 27/05/2011.
7. On 31/05/2011, the petitioner made an application to the high court Nakuru for a new trial. The application was never replied nor was he supplied with any response from court. He therefore opted to file an application under certificate of urgency to be allowed to file an appeal out of time. The said application was accompanied by a sworn affidavit which was sworn before the senior principal magistrate (Naivasha) on 28/06/2011.
8. The petition of appeal was duly signed on 15/06/2011 by Peter K. Mbutia COII for officer in charge GK prison Naivasha main. The comments thereafter were 'dealt as necessary'.
9. In 2019, the applicant lodged an application in form of a petition to get redress of the infringed right to have a fair trial.

### **Applicant's Submission**

10. The applicant submitted that his rights to have his appeal heard have been grossly violated and the right that is likely to be violated is the right to be heard under article 50(2) (q) of the [constitution](#).
11. The applicant submitted that the mistake could be on the part of the court or the officers who were supposed to furnish the court with the documents as they flew from the petitioner.
12. The applicant submitted that the remedy is found under article 159 of the [Constitution](#).
13. The applicant submitted that the prosecution will not be prejudiced in any way if the applicant is allowed to appeal out of time.
14. The applicant submitted that from the documents annexed, it is sufficient that the petitioner had made efforts to appeal.
15. The applicant prays that his application seeking leave to appeal out of time be granted for the interest of justice.
16. The applicant has relied on the following authorities;
  - i. Section 349 of the CPC.
  - ii. *Anarita Karimi Njeru vs Republic* [1976-1980] KLR1272
  - iii. *Matiba vs AG* (1990) KLR666
  - iv. [Leonard Otieno vs Airtel Kenya Limited](#) [2018] eKLR
  - v. Article 23, and 160 of the [Constitution](#).
  - vi. [Shollei vs. Judicial Service Commission & Another](#) Petition No. 34 of 2014.
  - vii. Supreme court of India in the case of *Natasha Singh Vs CBI*{2013} 5 SCC 741
  - viii. Supreme court of India in *Rattiram vs state of M.P* { 2012} 4 SCC 516
  - ix. *Zabira Habibullah Sheikh & Another Vs State Of Gujarat & Others* AIR 2006 SC1367.



- x. [\*Jaldesa tuke dabelo vs IEBC & another\*](#) [2015] eKLR
- xi. [\*Raila and 5 others vs IEBC & 3 others\*](#)[2013] eKLR
- xii. [\*Lemanken Arata Vs Harum Meita Lempaka & 2 Others\*](#) eKLR
- xiii. [\*Patricia Cherotich Sawe Vs IEBC & 4 Other\*](#) [2015] eKLR
- xiv. [\*Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet\*](#) [2018] eKLR
- xv. [\*Salat v Independent Electoral & Boundaries Commission & 7 others\*](#)[2014] KLR SC.

### **Analysis And Determination**

17. This court *vide* the ruling delivered on 30/05/2022, gave the following orders;
  - i. The applicant shall, within 14 days, provide to the court in writing, details, information and outcome or status of:-
    - a. The application for leave to appeal out of time he allegedly filed at Naivasha; and
    - b. The court file number of the appeal he allegedly filed at Nakuru, and date of alleged filing thereof
  - ii. The prosecution counsel may, however, dig from their archive and provide any record from the police files and the DPP's file in respect of this case.
18. The petitioner filed his written submissions and elaborated on the background of the application.
19. The respondent did not file or provide any documents sought.

### **Issues**

20. Nevertheless, the application and the petitioner's written submissions portend two issues for determination, namely:
  - i. Whether this court has jurisdiction to adjudicate upon this application; and
  - ii. Whether the applicant application is merited.

### **Redress for violation of right**

21. The application is made on the basis of alleged violation of the [\*Constitution\*](#) and more specifically, the Bill of Rights.
22. The High Court under Article 165 (3) and 23 of the [\*Constitution\*](#) has the jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
23. Accordingly, this court has jurisdiction to hear this application.

### **Court's authority to uphold rights**

24. The authority of the court in article 165(3) and 23 of the [\*Constitution\*](#) is inter alia, to uphold and enforce the Bill of rights. The authority also formally and actually gives the court power of consistently



structuring, developing and deploying progressive jurisprudence on rights and fundamental freedoms across time and space in accordance with the command in article 20(3) of the Constitution, that: -

In applying a provision of the Bill of Rights, a court shall—

develop the law to the extent that it does not give effect to a right or fundamental freedom;  
and

adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

### **Of alleged violation of right**

25. The pertinent claim by the applicant is that; his right to be heard under article 50(2)(q) of the constitution was violated.
26. I have perused the documents produced by the petitioner.
27. The petitioner claims that he filed a petition of appeal which is indicated as having been received by the in-charge prison, Naivasha Main Prison on 15<sup>th</sup> June 2011. Nothing shows it was filed in court. The only indisputable fact is that; the said document was filed in this proceeding. Nothing also shows that he pursued the petition of appeal he claims he filed in 2011.
28. He also claims that he later on filed an application for leave to appeal out of time together with a supporting affidavit explaining the delay in filing the appeal. The application and affidavit are dated 28<sup>th</sup> June 2011. Again, nothing shows that he filed the said application in court in 2011 or pursued the application. Yet, he filed the application and affidavit in this proceeding in 2019.
29. Eight (8) years later, he filed this petition dated 24<sup>th</sup> June 2019. And with it he filed all the other papers; petition of appeal and application for leave to file appeal out of time. This is curious.

### **Conclusions and orders**

30. Despite, claims that he filed appeal and application for leave to appeal out of time, there is no evidence that the documents were ever filed in court or of any follow-up with the court.
31. I do not even think this is a case of lost file or failure on the part of the court to accord the petitioner his right to be heard. The claim by the applicant to have engaged the court using multiple fronts is simply contrived; it is an abuse of court process or a ploy to found a claim for violation of right to be heard in the hope that it may yield positive results. It has not been explained why he did not provide the court in earliest opportune time with the copies of what he alleges he filed in court as a way of pursuit of the appeal or application for leave to file appeal out of time. I expected him to follow-up his cases with the vigor he pursued this petition. The petitioner may have abandoned his remedy intentionally.
32. In the circumstances, I do not find any violation of right to be heard. The petition herein is therefore dismissed.
33. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15<sup>TH</sup> DAY OF MAY, 2023.**

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**F. GIKONYO M.**

**JUDGE**



In The Presence Of:

Mr. Kasaso – CA

The applicant

Ms. Mwaniki for the Respondent

