



**Mwangi v Republic (Criminal Application E001 of 2024)
[2025] KECA 58 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 58 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION E001 OF 2024
SG KAIRU, JA
JANUARY 24, 2025**

BETWEEN

JOSEPH KAMAU MWANGI APPLICANT

AND

REPUBLIC RESPONDENT

*(An application from the Judgment of the High Court of Kenya at Mombasa
(Ogolla, J.) dated 30th October, 2019 in HC. Petition No. 22 of 2018)*

RULING

1. In his application dated November 2023 filed on 8th January 2024, the applicant Joseph Kamau Mwangi seeks, in the main, leave to appeal against the decision of the High Court delivered on 30th October 2019 in High Court Petition No 22 of 2018 in which his resentencing application was allowed and a death sentence imposed by this Court substituted with a custodial sentence of 40 years.
2. The background is that the appellant was charged with the offence of murder. He was tried before the High Court at Mombasa in High Court Criminal Case No 16 of 2008 and convicted in a judgment delivered on 14th June 2021. The High Court sentenced him to serve a custodial sentence of 40 years.
3. Dissatisfied, the applicant appealed against that decision to this Court being Mombasa Civil Appeal No 08 of 2013. His appeal was dismissed by this Court on 17th February 2017 and the sentence enhanced to the death sentence.
4. Following the decision of the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and taking advantage of the window provided by the Supreme Court in that decision, the applicant petitioned the High Court in Mombasa Petition No 22 of 2018 applying for resentencing. The High Court (E. Ogolla, J.) allowed the application in a judgment delivered on



- 30th October 2019 and set aside the death sentence and re-sentenced the applicant to 40 years essentially restoring the initial sentence meted out by the High Court in Mombasa Criminal Case No 16 of 2008.
5. Still not satisfied, the applicant applied, in Mombasa High Court Miscellaneous Criminal Application No E194 of 2021, for revision of that High Court decision re-sentencing him to 40 years imprisonment. That application was rejected and dismissed by Mativo, J. (as he then was).
 6. The applicant is now before me seeking leave to appeal the re-sentencing decision of the High Court given on 30th October 2019 out of time. He submits that it will be in the interest of justice that he be allowed to do so. He intends to challenge the re-sentence on the grounds that the forty years imprisonment term is excessive.
 7. During the hearing of the application before me on 25th July 2024, the applicant appeared in person virtually from Kamiti Prison and relied wholly on his written submissions in which he cited the Supreme Court of Kenya decision in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014 [2014] eKLR on the principles applicable in applications for extension of time. He submitted that the sentence he is currently serving is harsh and that he expected the pro bono lawyer appointed by the government to have filed the appeal but only learnt that had not been done; that it is in the interest of justice that the application be allowed as the delay is not deliberate.
 8. Miss. Valerie Ongeti, learned Principal Prosecution Counsel appearing for the respondent stated that the application is not opposed.
 9. I have considered the application, the affidavit in support and the submissions. The principles that guide the Court in applications of extension of time are well established. For instance, in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR Waki, J.A. stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso v Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina (No 4)* [1982] KLR 38.”
 10. More recently, in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, (above) the Supreme Court of Kenya pronounced: that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other factors include whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest.
 11. In effect although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially, and each case must be considered on its own facts. In the present case, the re-sentencing decision sought to be challenged was delivered on 30th October 2019. The present application was filed in January 2024. A delay of over four years. Beyond the statement by the applicant that it will be in the interest of justice for the application to be allowed, there is no



explanation in his supporting affidavit that speaks to or seeks to explain that delay. However, in his submissions, he states that he “did not receive the ruling in time and so the delay was not deliberate.” However, he does not provide any information at all regarding when he received “the ruling”. It is noteworthy that he applied for revision of the same when he filed Mombasa High Court Miscellaneous Application No E194 of 2021.

12. The other explanation for delay discernible from the applicant’s submissions is that he expected the pro bono advocate employed by the government to have filed the appeal but only learnt that he had not done so. Again, there is no indication when he learnt that the appeal had not been filed. In effect, there is a dearth of information or material regarding why it took the applicant so long and there is no satisfactory explanation for the delay involved. Even though counsel for the respondent indicated that the application is not opposed, it bears repeating, as stated by the Supreme Court, that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. In my view, the applicant in this case has not discharged that burden.
13. Moreover, and as already demonstrated, the applicant unsuccessfully applied for a revision of the re-sentencing decision of 30th October 2019. Prior to that, he had appealed the judgment of the High Court in which he was convicted and sentenced to imprisonment for a term of 40 years before the Court of Appeal, on appeal, enhanced that sentence to the death penalty. His petition on re-sentencing was successful to the extent that the death sentence was set aside and upon consideration of the circumstances under which the offence occurred and his mitigation, he was re-sentenced to a term of 40 years. His application to revise that decision failed. Litigation must come to an end.
14. All in all, I am inclined to decline the application. The same is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

