



**Republic v Nzioka (Criminal Application E013 of 2024)  
[2025] KECA 288 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 288 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPLICATION E013 OF 2024  
LA ACHODE, JA  
FEBRUARY 21, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DOMINIC MULI NZIOKA ..... RESPONDENT**

*(An application for orders for extension of time from the Judgment of the High Court at Mombasa (Ong'injo J) delivered on 7th March 2024 in)*

**RULING**

1. The Notice of Motion before me is dated 7<sup>th</sup> May, 2024 and is filed by the Director of Public Prosecution (DPP) pursuant to rule 4 and rule 1 (2) of the *Court of Appeal Rules* 2022. The Applicant is seeking orders for extension of time to file a Notice of Appeal against the judgment of the High court at Mombasa (Ong'injo J) delivered on 7<sup>th</sup> March 2024 in Mombasa HCCR Appeal No. E058 of 2023, *DMN v Republic*. In the alternative, the draft Notice of Appeal dated 7<sup>th</sup> March 2024 be deemed as having been filed within time and the Deputy Registrar of the High Court be directed to lodge the attached draft Notice of Appeal and supply the lodged copies to the Applicant to enable service upon the Respondent.
2. The application is premised on the grounds on its face and is supported by the affidavit sworn by Victor Juma Owiti, Principal Prosecution Counsel for the Applicant on 7th May 2024. He avers that on 7<sup>th</sup> March 2024, at the High court at Mombasa, Ong'injo. J delivered a judgment in which she upheld the decision of the learned trial magistrate on conviction. She however, substituted the sentence of 7 years imposed by the trial court upon the Respondent with an order of 3 years of supervised probation.
3. Counsel avers that the delay in lodging the Notice of Appeal is explainable, and there exist sufficient reasons for the extension of time to be granted. That the impugned judgment was only brought to their attention due to public outcry, social media mainstream and a letter from Cradle dated 3<sup>rd</sup> May



- 2024 seeking the Applicant's intervention against the impugned decision. The intended appeal is in line with the obligation of the Applicant in the administration of criminal justice and in the public interest, because the impugned decision will be binding on subordinate courts in the country.
4. Counsel avers that it is important to remedy the apparent error made by the learned Judge and correct the position of the law, with regard to sentencing in circumstances where a convicted sexual offender is put in a position of power and in direct contact with the public including minors as directed by the learned judge. That it would be a travesty of justice to let the impugned judgment stand, when it is plainly wrong, especially in regard to proof of the elements of the offence of defilement. That the appeal is arguable as it raises serious issues of law that need consideration by this Court and has good chances of success and the Respondent will not suffer any prejudice if the orders are granted.
  5. The application was canvassed by way of written submissions. The Applicant filed submissions dated 5th November 2024 and reiterated what was stated in the supporting affidavit which I need not rehash. The Applicant also states that while a Notice of Appeal is required to be lodged within 14 days of the decision against which the appeal is lodged, this Court has power under rule 4 of the Court to extend timelines for compliance. That the Court has inherent power under rule 1 (2) to make any orders as may be necessary for the ends of justice to be met, or to prevent abuse of the process of the Court and is not limited by the rules. It is a residual intrinsic authority which the Court may resort to in order to prevent an injustice as stated in *Kiu & Another v Khaemba & 3 Others* (Civil Appeal (Application) E270 of 2021) 2021 KECA 318 (KLR).
  6. Counsel submits that the ends of justice will only be served by extending time to avail this Court the opportunity to correct the apparent error by the learned Judge regarding sentencing of convicts in defilement cases. That pursuant to rules 1 (2) and rule 4, the need to promote the administration of criminal justice, and the public interest justify the extension of time and they have met the threshold stated in *Susan Ogutu Oloo & Others vs Doris Odindo Omolo*, Civil Application No. 10 of 2018 (UR 9/18).
  7. The Applicant submits that the application was brought without inordinate delay; that the Respondent shall not suffer prejudice as he shall have an opportunity to respond to the intended appeal, that the intended Appeal has high chances of success, and, it is in the interest of justice and fairness that it be heard on its merits. The Applicant relies on the case of *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 Others*, Civil Application Nai 89 (UR 59/2013) of 2013, where the Court of Appeal held that a Notice of Appeal should not be struck out where, as in this case, the delay has been explained.
  8. When the matter came up for hearing on 13<sup>th</sup> November 2024, Mr. Owiti, learned State counsel appeared for the Applicant and relied on his written submissions entirely. Mr. Kenga learned counsel, appeared for the Respondent but his submissions were not on record although he told the Court that he had filed them. They were still not on record at the time of writing this ruling.
  9. Mr. Kenga however, made oral submissions and stated that the Applicant was represented in court by Mr. Ngiri learned State Counsel, when the impugned judgment was delivered and if no Notice of Appeal was filed, it is because there was no intention to appeal. He urged that allowing the Applicant to file an appeal out of time without justifiable reasons, will open the flood gates of appeals filed out of time with no reasons given. He argued that in essence, the Applicant is trying to cure a problem by creating another problem. He asserted that rule 1(2) provides for orders to be made in the interest of justice and not as an abuse of court process.
  10. I have considered the rival arguments of the parties herein and the main issue for determination is whether the Applicant has met the threshold for the Court to grant the extension of time sought. Rule



- 4 under which my discretion has been invoked allows the Court to extend the time limited by the rules, or by any decision of the Court, or of a superior court, on such terms as may be just for the doing of any act authorized, or required by these rules, whether before or after the doing of the act.
11. The Court in the case of *ODPP v Mbugua & 6 others* (Civil Application E110 of 2023) [2023] KECA 858 (KLR), held that:

“It is now settled that the Court has unfettered discretion to extend time for the filing of a notice of appeal or record of appeal, but that the DPP must lay the basis for the exercise of the Court’s discretion by establishing that the delay in filing the appeal or record of appeal was not inordinate; that there was a good explanation for the delay; and that the application for extension of time has been made without delay”
  12. Extension of time is an equitable remedy to be enjoyed only by deserving Applicants who act equitably. He who seeks equity must do equity. The Applicant must demonstrate that he was not at fault for the lapse of time. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts for which litigants must lay a basis where they seek the court to grant it. (See- The Supreme Court decision in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.)
  13. The Supreme Court set out the conditions for extension of time to file an appeal in *Nicholas Salat* (*supra*) as follows;
    - a. Extension of time is not a right of a 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 to 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 respondents if the extension is granted
    - f. Whether the application has been brought without undue delay; and
    - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
  15. The burden of laying a basis for the extension of time to the satisfaction of the court lies with the Applicant in a case such as this; the Applicant must demonstrate that the delay is not unreasonable, that the Applicant is not at fault for the delay, and that no prejudice will be occasioned to the Respondent.
  16. Whereas counsel admitted that this application was filed two months after the impugned judgment, he has offered no reasonable excuse for the delay, nor has he explained to the satisfaction of the Court that the Applicant was not at fault for the delay. It is not disputed that learned State Counsel Mr. Ngiri was present in court for the Applicant, when the impugned judgment was delivered. It cannot therefore, be argued that the Applicant was unaware of the delivery of the judgment.



17. The discretion of the Court to extend time for filing an appeal is unfettered but it must be exercised judiciously. If the delay is unexplained or unjustified, the Court may decline the application to extend time. Equity aids the vigilant not the indolent and it is evident that the Applicant had no intention of lodging an Appeal and only filed this application as a reaction to “public outcry and social media mainstream” and the letter from Cradle requesting for immediate intervention.
18. In the end I find that the Applicant has failed to satisfy the requirements for an order of extension of time to issue under Rule 4 of the *Court of Appeal Rules*. Consequently, the Application dated 7<sup>th</sup> May 2024 is found to lack merit and is hereby dismissed. There are no orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

