



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kalungu (Criminal Application E007 of 2024)
[2025] KECA 900 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 900 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E007 OF 2024
F TUIYOTT, A ALI-ARONI & LA ACHODE, JJA
MAY 23, 2025**

BETWEEN

THE REPUBLIC APPLICANT

AND

RAPHAEL MUOKI KALUNGU RESPONDENT

(An application for restoration of the notice of appeal, a stay of intended release of the respondent and enlargement of time within which to file an appeal arising from the judgment and decree of the High Court of Kenya at Nairobi (Kimondo, J.) delivered on 21st June 2023 in HCCR. No. 77 of 2014)

RULING

1. A brief background of the matter is that the respondent was arrested on 18th August 2014 and charged with the offence of murder of his wife, Mary Waruguru Maina (deceased), on 28th August 2014. The case was heard and judgement delivered on 21st June 2023. The respondent was found guilty and sentenced to fifteen (15) years imprisonment.
2. The State was aggrieved with the sentence meted out and filed a notice of appeal dated 5th July 2023. The notice of appeal was subsequently withdrawn through a notice of withdrawal dated 3rd July 2024. The withdrawal of the appeal did not sit well with the deceased's family, and after consultations, the State decided to have the appeal restored.
3. Before the court are two applications; the first is dated 21st February 2024, brought under section 379 of the *Criminal Procedure Code* and rules 4 and 5(2)(a) of this *Court's Rules*. The second is dated 11th July 2024, and brought under section 379 of the *Criminal Procedure Code*, rule 4, 5(2)(a), 70(1) and 70(3) of this *Court's Rules*. The second application replicates the first with additional prayers. In our view, the most prudent step would have been for the DPP to have withdrawn the 1st application, as the second encompasses the prayers in the first, which he failed to do. We shall in the circumstances confine



this ruling to the second application which seeks for; withdrawal of the notice of withdrawal dated 3rd July 2024 and restoration of the notice of appeal dated 5th July 2023, leave to file the record of appeal out of time, and for the memorandum of appeal and record of appeal dated 28th June 2024 and filed be deemed as duly filed and for a stay of release of the respondent from prison pending determination of the intended appeal.

4. Rule 55 of this [Court's Rules](#) stipulates applications to be heard by a single judge and those by a full bench as follows:

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- (1) Each application, other than an application specified in sub-rule (2), shall be heard by a single judge:

Provided that such application may be adjourned by the judge for determination by the Court.

2. This rule shall not apply to—
- a. an application for leave to appeal;
 - b. an application for a stay of execution, injunction, or stay of further proceedings;
 - c. an application to strike out a notice of appeal or an appeal; or
 - d. an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing.

The application before us contains a mixture of prayers, three of which should be heard by a single judge. We therefore cannot deal with the three. Indeed, at the hearing of this application, we gently prodded learned counsel for the applicant to reflect on the matter but in vain. Counsel may move the court appropriately. We shall confine ourselves to responses on the issues properly before us.

5. The victim's family filed a replying affidavit dated 12th of August 2024, sworn by Joseph Maina Kimani, the deceased's father, in support of the application, wherein the history of the matter was enumerated. We find the history unnecessary for the purposes of the application before us. As such, we shall not rehash the averments therein, save the contention that respondent has served the sentence period briefly, which is grossly insufficient to determine his suitability for remission, his likely release would undermine the whole essence of the restorative/rehabilitative programs by the prison's department; the withdrawal of the notice of appeal was made without taking into account the deceased family's position; and that the intended release of the respondent scheduled for 18th August, 2024 would render the appeal moot.
6. The respondent in opposing to the application filed a replying affidavit sworn on 8th August 2024, in which he deposed *inter alia* that he has met the required threshold to be considered for remission as he has served the better part of his sentence; the appeal had also been filed out of time; the applicant has not come to this Court with clean hands; the application should be dismissed in the interests of justice and fairness.
7. The respondent filed a further affidavit sworn on 13th August 2024 where he contended *inter alia* that the victim family's replying affidavit offends the mandatory provisions of section 9 of the [Victim Protection Act](#), 2014, as further interpreted by the Supreme Court of Kenya in [Waswa v. Republic](#)



[Petition 23 of 2019] KESC 23 (KLR); the said affidavit was filed without leave of this Court, further it goes beyond mere views and concerns of the matter at hand and ought to be struck out.

8. Further in support of the application, Learned State Counsel filed submissions dated 17th April 2024, where he contended the court ought not to arrive at a definite conclusion at this stage, as the merit or otherwise of the appeal will be determined at the full hearing of the appeal; that an arguable appeal is not necessarily one that is bound to succeed, but one that deserves the court's consideration and in exercising discretion, the court should balance the interest of the parties. In support, learned counsel relied on the case of *Wycliffe Oparanya Ambetsa v. Director of Public Prosecutions*, SC Petition 14 of 2016 [2017] eKLR, and *Trust Bank Limited & Another v. Investech Bank Ltd & 3 Others* (Civil Application 258 & 315 of 1999) [2000] KECA 38 (KLR), where the court restated the twin principles necessary in granting stay. In addition, public interest as an additional principle may be considered when granting a stay order.
9. Learned counsel submitted further that the issue of the sentence meted out to the respondent is an arguable issue, which is not frivolous and goes to the root of the appeal since the court is being asked to determine whether the sentence was proportionate and commensurate with the offence. He urged further that the sentencing policy also emphasizes on the concept of proportionality, uniformity and accountability in sentencing.
10. On the part of the victim's family learned counsel filed submissions dated 12th August 2024 where he contended inter alia that the intended release of the respondent should be stayed pending the hearing and determination of the intended appeal as the draft memorandum of appeal raises arguable points and that the respondent's release would render the intended appeal nugatory. In support, he referred to the case of *Wycliffe Oparanya Ambetsa v. DPP* (*supra*).
11. Learned counsel, appreciating that sentencing is a matter of discretion, submitted that the trial court was lenient in sentencing the respondent to 15 years. He submitted that a court should consider all relevant factors in sentencing. He cited the Supreme Court case of *Francis Karioko Muruatetu*, Petition No. 15 of 2015, which outlined factors for consideration when sentencing in murder trials.
12. On his part, learned counsel for the respondent filed submissions dated 9th July 2024 in response, wherein he complained that the notice of appeal had not been served upon the respondent or his counsel. Further, learned counsel argued that section 379(5A) requires that where the DPP intends to have a sentence passed by the High Court reviewed by the Court of Appeal, the DPP must certify the intention; and that no such certification has been filed before this Court, yet the requirement is mandatory under rule 61(7) of the *Court of Appeal Rules, 2022*.
13. We have carefully considered the application, rival parties' submissions, case law cited, and the law. The two issues for our consideration are whether to stay the respondent's release and whether to fast-track the appeal.
14. Whether to stay the respondent's release from prison or not may be moot at this point. Nevertheless, we found the prayer speculative when hearing the application, as the letter annexed to the application was not conclusive. In any event, the respondent's release would not interfere with the hearing of the appeal; should the other prayers before a single judge succeed, the hearing ought to proceed, and if the sentence is altered, the relevant State organ will deal with the outcome of the appeal. We were not persuaded that the appeal would be rendered nugatory if the respondent is released on remission. The prayer flops.



15. On the request to fast-track the hearing, we note that criminal hearings in Nairobi are real-time. An order fast-tracking the appeal is therefore unnecessary. In any event it would be premature to order the fast-tracking of an appeal which has yet to be restored.

16. Ultimately, we dismiss the entire application for the reasons enumerated above.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR

