



**Dunya v Republic (Criminal Application E163 of 2024)
[2025] KECA 791 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 791 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION E163 OF 2024
HA OMONDI, JA
MAY 9, 2025**

BETWEEN

TERESIAH ADHIAMBO DUNYA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for extension of time, to file an appeal out of time, for bail pending appeal, as well as stay of execution of warrants of arrest from the Judgment of the High Court of Kenya at Kisumu (M. S. Shariff J.) dated 31st October 2024 in HCCRA No. E062 of 2023)

RULING

1. By a Notice of Motion dated 21st November 2024, brought pursuant to rule 5(2)(b) of the Court of Appeal Rules Section 349 of *Criminal Procedure Code*, Articles 50(D) and 159(2)(a), 164(3) (a) of the *Constitution* of Kenya 2010; and supported by the affidavit of even date sworn by Teresiah Adhiambo Dunya, the applicant seeks:
 - a. enlargement of the time for filing the appeal against the judgement delivered on 31st October 2024, as well as stay execution of the warrants of arrest.
 - b. the applicant be admitted to reasonable bail and bond terms pending appeal.
 - c. pending the filing, hearing and determination of the intended appeal, orders be issued to stay execution of the warrants of arrest order and or judgement together with all consequential orders flowing therefrom arising from the Judgement delivered on 31st October 2024 in High Court Criminal Appeal No. E062 of 2023.
2. The genesis to this application finds its root in the arrest of Teresiah Adhiambo Dunya, the applicant herein, who was subsequently arraigned before the Chief Magistrate's Court at Kisumu in Criminal Case No. E791 of 2022, charged with the offence of assault contrary to Section 251 of the *Penal Code*.



The incident occurred on 2nd October, 2022 when the appellant assaulted her 11 year old step-son, SO, by slapping his head, cheeks and right hand thus occasioning him actual bodily harm. She pleaded not guilty; the matter was heard, and the trial court acquitted her on grounds that the child's evidence was uncorroborated; and did not prove the charge.

3. The State was dissatisfied with the outcome appealed; and the High Court in reversing the decision found that the evidence proved the charge, and sentenced her to serve three years imprisonment. She is desirous of lodging an appeal against the decision hence this application; she explains that she had instructed an advocate to defend the appeal, but the advocate failed to enter appearance and file submissions, nor update her on the status of the matter. As a consequence, she did not receive any notifications from the judiciary regarding the status of the case; and she only became aware that the judgement had been entered and warrants of arrest issued when the police visited her offices to effect the arrest; she will be incarcerated, and have no one to tend to her one-year-old child, since she is her sole care giver and bread winner. She laments that the acts and omissions of the previous advocate on record were grievously detrimental to her interest, and occasioned a miscarriage of justice.
4. The applicant maintains that the failure to timeously lodge the Notice of Appeal was neither wilful nor due to negligence; and the application has been brought without undue inordinate delay, being twenty-one (21) days from the date of judgment; that immediately she became aware of the Judgement and warrants issued against her, she promptly instructed her advocates to lodge a Notice of Appeal; and requested for copies of the certified judgement and typed proceedings to be timeously supplied, so as to prepare the record of appeal.
5. She has annexed a drafted Memorandum of Appeal which she describes as raising arguable grounds with overwhelming chances of success. The applicant is also apprehensive that should orders sought herein be granted, she will be arrested and incarcerated. It is her contention that the respondent shall suffer no prejudice upon the grant of the prayers sought herein.
6. The applicant has presented to the Court an "omnibus" application seeking multifaceted prayers, of enlargement of time within which to file the appeal, stay of execution of warrants of arrest as well as grant of bail pending appeal. Stay of execution and bail pending appeal cannot be granted by the Court sitting as a single Judge; and can only be granted by a full bench of this Court as provided by rule 55 of the [Court of Appeal Rules](#) which states that:
 - "(1) Such application, other than an application specified in sub rule (2), shall be heard by a signal Judge. Provided that such application may be adjourned by the Judge for determination by the Court.
 - (2) The rule shall not apply to:
 - (a)
 - (b) an application for stay of execution, injunctions or stay of further proceedings. (c)."
7. Clearly, this Court, sitting as a single Judge, does not have jurisdiction to consider prayer for stay and for bail pending appeal. This Court will therefore not render a decision in respect of the same; however, the applicant shall be at liberty to list those prayers for determination by the full bench of the Court.
8. Consequently, the only prayer this Court can deal with as a single judge relates to the prayer seeking extension of time within which to file the appeal. In support of the application for extension of time within which to file the appeal, the applicant refers to the case of [Andrew Kiplagat Chemaringo vs.](#)



Paul Kipkorir Kibet, [2018] KECA which addressed the principles to consider in an application for extension of time.

9. I have considered the application, the grounds in support thereof, submissions filed; and I take note that the respondent has not filed any response or written submissions. I am alive to the fact that in an application of this nature, the court is allowed to exercise its discretion. The issue for determination is whether the applicant is deserving of the orders sought. The discretion that I am called to exercise in the determination of this application is unfettered and is provided under rule 4 of the Court of Appeal Rules which provides as follows:

The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

10. Rule 4 of the Court of Appeal Rules does not list factors the court ought to consider in an application for extension of time, although courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

11. In *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 (also cited by the applicant), the Court observed that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

12. How long was the delay in this instance? Judgment was delivered on 31st October 2024. Under rule 61(1) of the Court of Appeal Rules:

- (1) A person who desires to appeal to the Court shall give Notice of notice in writing, with the registrar of the superior Court at the place where the decision against which it is desired to appeal was given, within fourteen days after the date of that decision, and the notice of appeal shall institute the appeal.

This in effect means that the Notice of appeal ought to have been filed on 15th November 2024, this did not happen; and the application for extension of time was filed on 21st November 2024, an additional 6 days after the lapse of time. There is no maximum or minimum period of delay set out under the law, however, the reason or reasons for the delay must be reasonable



and plausible. For instance, in *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

The applicant has explained the reason for the delay, in my view 21 days is not inordinately long, and having realised that there was an unfavourable outcome, then within six (6) days outside the statutory period, she quickly moved to court in bid to remedy the situation. Apart from that, she has explained the challenge she had due to on communication by her then counsel on record, drawing from the decision in *Omwoyo vs. African Highlands and Produce Co. Ltd* [2002] 1KLR to urge that the mistakes of counsel should not be visited on the client, as her counsel did not communicate to her the impugned outcome in a timely manner. This assertion has not been contested from any quarter, and I am satisfied that the reasons already alluded to posed a challenge to the applicant to act in a timely manner; I also take note that, the sentence the applicant is challenging is one which if her prayer is denied will occasion her great prejudice.

13. The upshot is that the application is merited and is allowed.

The applicant is granted extension of time to file and serve the notice of appeal out of time within fourteen (14) days of today’s date. The applicant shall file and serve the respondent with the record of appeal within thirty (30) days upon service of the Notice of Appeal.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

