



**Waminila & another v Republic (Criminal Application  
E040 of 2023) [2025] KECA 1166 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1166 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION E040 OF 2023  
PO KIAGE, WK KORIR & JM NGUGI, JJA  
JUNE 20, 2025**

**BETWEEN**

**FRED WAFULA WAMINILA ..... 1<sup>ST</sup> APPLICANT**

**ANDREW NYONGESA WANYONYI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An application to reinstate an appeal being Nairobi Criminal Appeal Number 167 of 2014 against the judgment of the High Court at Nairobi (Achode & Mbogholi, JJ.) dated 25th March, 2014 in HCCRA NO. 1364 of 1995 & 149 of 1996)*

**RULING**

1. By motion dated 8<sup>th</sup> November, 2023, the applicants seek, in the main, that this Court be pleased to reinstate Nairobi Criminal Appeal Number 167 of 2014 that was withdrawn on 21<sup>st</sup> January 2020; grant leave to the applicants to file an appeal out of time; and, the annexed amended memorandum of appeal be deemed as duly filed.
2. The motion is founded on grounds on the face of it and is supported by an affidavit sworn by the 1<sup>st</sup> applicant, Fred Wafula Waminila, on behalf of himself and the 2<sup>nd</sup> applicant. It is averred that the applicants withdrew their appeal to pursue resentencing pursuant to the Supreme Court decision in *Francis Kakioko Muruatetu & another v Republic* [2017] eKLR, where the mandatory nature of the death sentence was declared unconstitutional. The applicants' first appeal namely, Nairobi High Court Criminal Appeal Numbers 1364 of 1995 and 149 of 1996, was dismissed by Achode and Mbogoli, JJ. They then approached the Chief Magistrate's Court at Milimani Law Courts for resentencing vide Nairobi Miscellaneous Criminal Application Number 11 of 2019, and, on 25<sup>th</sup> March 2021, learned Magistrate, Kimilu (SPM), resented them to serve a custodial term of seventy (70) years each from the date of sentence before the trial court. Being dissatisfied with that ruling, the applicants lodged



an application for revision at the High Court being, Nairobi Criminal Revision Number E268 of 2021, which was dismissed on 5<sup>th</sup> May 2023 by Nzioka, J. Subsequently, the applicants, they claim “inadvertently”, filed another application for revision at the High Court being, Nairobi Miscellaneous Criminal Application Number E240 of 2022. This second application for revision was also dismissed by Kimondo, J. The applicants contend that it is in the interest of justice that the orders sought be granted.

3. During the hearing, the applicants’ law firm on record, M/s Howard & Kenneth Advocates did not make an appearance even though they had been served with the notice for hearing. The applicants, however, elected to proceed with the hearing while indicating that they were leaving the matter to the Court to make its own determination. Mr. O.J. Omondi, Senior Assistant Director of Public Prosecutions holding brief for Mr. Jeremiah Maroro for the Respondent, submitted that the application was unopposed. We note that there are no written submissions on record from any of the parties.
4. Although the applicants seek various prayers in the motion, the only prayer that is properly before us is for reinstatement of Criminal Appeal No 167 of 2014, and this was appreciated by the applicants during the hearing. Rule 70(3) of the Court of Appeal Rules confers on the Court discretion to grant leave for restoration of an appeal that has been withdrawn if satisfied that the withdrawal was induced by fraud or mistake and that the interest of justice requires that the appeal be heard. The Rule states;  

“An appeal which has been withdrawn under sub rule (1) may be restored by leave of the Court on the application of the appellant if the Court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interests of justice require that the appeal be heard.”
5. We have considered the application together with the averments made by the applicants and we do not see anything on record which suggests that the withdrawal of the appeal may have been induced by any mistake or fraud. What is clear is that after withdrawing the appeal, the applicants approached various courts, seeking relief, without success. We think that the applicants have all along been on a fishing expedition for a favorable forum and having been unsuccessful, they resorted to come back to this Court. Such conduct is a clear example of abuse of process which cannot be condoned by this Court. We, in the result, decline to exercise our discretion in favour of the applicants.
6. The motion is, therefore, devoid of merit. It accordingly fails and is dismissed in entirety.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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



Signed

**DEPUTY REGISTRAR**

