



REPUBLIC OF KENYA



**Keter v Republic (Criminal Application E003 of 2023)
[2024] KECA 408 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 408 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E003 OF 2023
FA OCHIENG, JA
APRIL 26, 2024**

BETWEEN

THOMAS KIPLIMO KETER APPLICANT

AND

REPUBLIC RESPONDENT

(An application for extension of time to lodge an appeal out of time against the judgment, conviction and sentencing of the High Court of Kenya at Kabarnet (W. Korir, J.) delivered on 28th July, 2022 in H.C.CR.A. No. 18 of 2020)

RULING

1. The applicant, Thomas Kiplimo Keter, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. In a nutshell, he is said to have intentionally and unlawfully caused his penis to penetrate the vagina of the complainant “LJK”, who was 10 years old at the material time.
2. When the plea was taken, the applicant denied having committed the offence. In the light of the plea of “not guilty”, the prosecution canvassed its case by calling 5 witnesses.
3. After evaluating the evidence tendered by the prosecution, the learned trial Magistrate held that the applicant had a case to answer.
4. In his defence, the applicant gave an unsworn testimony, but he did not call any other witness.
5. On 19th February 2020, the learned trial Magistrate delivered his judgment, in which he convicted the applicant for the offence of defilement. Thereafter, the applicant was sentenced to life imprisonment.
6. The applicant was dissatisfied with both the conviction and the sentence, and he challenged them through an appeal which he lodged at the High Court.



7. On 28th July 2022, the High Court delivered its judgment, dismissing the appeal in its entirety.
8. On 26th October 2022 the applicant filed an application at the High Court, seeking orders for a re-hearing on the issue regarding the sentence. It was his view that the Court ought to receive his mitigation, and to consider it to determine the appropriate sentence.
9. The applicant had told this Court that on 6th July 2023, he withdrew the application for rehearing on the issue of the sentence.
10. Following the withdrawal of the application, the applicant now proposes to file an appeal at the Court of Appeal, to challenge the judgment delivered by the High Court.
11. However, the time within which he ought to have lodged an appeal had long passed. It is for that reason that the applicant has asked this Court to grant him leave to appeal out of time.
12. He urged this Court to hold that the delay is not extremely inordinate. Indeed, in the applicant's view, the delay was excusable.
13. In answer to the application the respondent first noted that an appeal from the High Court ought to have been lodged within 14 days from the date when the impugned decision was rendered.
14. Nonetheless, the respondent did not oppose the application, as it was of the view that if the applicant was granted an extension of time to lodge his appeal, that would not be prejudicial to the respondent.
15. Pursuant to Rule 4 of the [Court of Appeal Rules, 2022](#);

“The Court may, on such terms as may be 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 authorised 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.”

16. It is clear that that rule grants discretion to this Court to determine whether or not to extend the time for lodging a notice of appeal.
17. Section 349 of the [Criminal Procedure Code](#) provides that:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

18. It follows, therefore, that the court is clothed with discretionary powers to be exercised in the interest of justice. In the case of *Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. 255 of 1997 UR the Court stated thus:

“It is now well settled that the decision whether or not to extend 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.”

19. The Supreme Court of Appeal of South Africa in the case of *S.V Smith* [2012] 1SACR 567 elaborated the test to be applied on applications for leave to appeal in the following manner:

“What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicants must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for the conclusion that there are prospects of success on appeal.”

20. The court is however under an obligation to ensure that its discretion is exercised in a judicious manner, rather than on the basis of either a whim or sympathy.

21. Accordingly, the court has settled on the matters which should be taken into consideration when the court was called upon to exercise its discretion. Those matters, as was stated in the case of *Leo Sila Mutiso vs Helen Wangari*, (NRB) Civil Application No. 251 of 1997, include

“... 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.”

22. In this case, the High Court rendered its judgment on 26th October 2022. An appeal, if any, ought to have been lodged by the middle of the second week of November 2022.

23. By the time the applicant filed the present application, for extension of time, the period which had lapsed was almost 8 months.

24. I take note of the fact that immediately after the High Court had delivered its judgment, the applicant took steps to challenge a portion of the said judgment.

25. His conduct was a clear manifestation of the applicant’s intention to challenge the judgment of the High Court, albeit only in part.

26. However, considering that the extension of time is an equitable remedy, I still have to determine whether or not the applicant is deserving of it.

27. Having given due consideration to the application, I am satisfied that the respondent was right to have conceded that it will suffer no prejudice if the court extends the time for the lodging of the intended appeal.

28. I am also satisfied that the applicant has offered a plausible explanation for the delay in lodging the intended appeal. He could not have mounted an appeal whilst there existed a parallel challenge to the judgment. If he had sought an extension of time whilst his application was pending, for re-sentencing, that could have constituted an abuse of the court process.

29. Having chosen to withdraw the application for re-sentencing, on 6th July 2023, the applicant brought this application on 17th July 2023. In the circumstances, I find that this application was brought



without undue delay, after the applicant had removed the barrier that could have prevented him from seeking an extension of time. My said finding is informed by the uncontroverted statement of the applicant, that he had first sought an order for re-sentencing because that is the advice which he was given initially.

30. In the result, the applicant is granted leave to appeal out of time.

He shall file the notice of appeal within seven (7) days. Secondly, he will file and serve the memorandum of appeal within seven (7) days of filing the notice of appeal.

31. I make no order as to the costs of this application.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF APRIL, 2024.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

