



**Ochenge v Republic (Criminal Miscellaneous Application
E001 of 2024) [2024] KECA 414 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 414 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E001 OF 2024**

WK KORIR, JA

APRIL 26, 2024

BETWEEN

JOSHUA OTANCHO OCHENGE APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for extension of time to file a notice of appeal against the decision of the High Court at Kericho (A.N. Ongeru, J.) dated 9th April 2021 in HCCRA 27 of 2019)

RULING

1. Before me is a notice of motion dated 20th November 2023 brought by the applicant, Joshua Otancho Ochenge, under rule 4 of the *Court of Appeal Rules*. The applicant seeks an order enlarging time for filing an appeal and an order admitting as duly filed, his notice of appeal dated 8th November 2023. The motion is supported by the applicant's affidavit sworn on the date of the application.
2. The applicant avers that the delay occasioned in lodging his application is attributable to lack of funds to instruct counsel, as well as his failure to appreciate the consequences of not filing a notice of appeal in time because he was acting in person. He also avers that after the High Court delivered its judgment, he lodged an application before the same Court seeking to have the time he was in custody during the trial factored into his sentence. It is also his deposition that it was not until 1st September 2023 when his advocates now on record advised him that his intended appeal was likely to succeed and that is when he applied to the High Court seeking to withdraw his application and subsequently lodged the present application.
3. When the matter came up for hearing on 17th April 2024, both parties had filed written submissions. For the applicant, Messers D.C. Ngeno & Co. Advocates filed submissions dated 16th April 2024. Therein, counsel reiterated the contents of the applicant's motion and further submitted that the application not being opposed meant that the respondent will not suffer any prejudice. Counsel relied



on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR to highlight the principles guiding extension of time. Counsel consequently urged the Court to allow the application.

4. The application was not opposed by the respondent. In submissions dated 15th April 2024, the Senior Assistant Director of Public Prosecutions, Mr. Omutelema, indicated that the respondent was not opposed to the application due to the length of the sentence imposed on the applicant.
5. This application was brought under rule 4 of the *Court of Appeal Rules*. In determining an application such as the one before me, I am guided by certain well-established principles which have received judicial approval. Some of the principles that govern the exercise of discretion in an application for extension of time were elaborated in *Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others* [2018] eKLR as follows:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

6. In discharging my mandate in respect to this application, I will consider whether the applicant has satisfactorily explained the delay and whether the intended appeal is arguable.
7. The judgment the applicant intends to appeal was delivered on 9th April 2021 while the present application is dated 20th November 2023. The delay period therefore is about 2 years and 7 months. The applicant explains that he acted in person before the High Court and that thereafter, he filed an application before the same Court seeking to have the time spent in custody prior to sentencing be factored into his sentence. He avers that since he was acting in person, he did not appreciate the consequences of not filing his notice of appeal within the prescribed time.
8. Although the length of the delay is a factor to be considered in the determination of an application for extension of time, it does not play a major role as was explained in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR that:

“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.”

9. In my view, considering that the applicant had initially pursued a revision of the sentence before the High Court, the delay is excusable. I also note that the application is not opposed and the applicant is currently serving a term of 40 years’ imprisonment. In the circumstances of this case, I find that the applicant has satisfactorily explained the delay.



10. The other issue as to whether the applicant has an arguable appeal should be approached from the understanding that as a single judge it is not my role to make a determination on merits of the applicant's intended appeal. However, on the face of the averments made in the application with regard to the reliefs that the applicant had sought before the High Court, it is my view that the intended appeal is arguable and not frivolous. Additionally, it is in the interest of justice to allow the applicant to pursue his intended appeal considering the length of the 40-year jail term he is serving.
11. The upshot of the foregoing is that the notice of motion dated 20th November 2023 has merit and is hereby allowed. The orders of the Court will therefore be as follows:
 - a. Time for filing the notice of appeal is hereby extended;
 - b. The notice of appeal dated 8th November 2023 be and is hereby deemed as duly filed; and
 - c. The timelines for all the other activities consequent to the filing of the notice of appeal shall be in accordance with the *Court of Appeal Rules*; and
 - d. Time will run from the date of the delivery of this ruling.

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

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

