



REPUBLIC OF KENYA



KENYA LAW
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**Njau v Republic (Criminal Application E030 of 2024)
[2024] KECA 993 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 993 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E030 OF 2024**

A ALI-ARONI, JA

JULY 26, 2024

BETWEEN

ANTONY NDICHU NJAU APPLICANT

AND

REPUBLIC RESPONDENT

(An Appeal against the conviction and sentence in the High Court of Kenya at Naivasha (Meoli, J.) delivered on 5th October 2017 in HCCRA No. 14 of 2016)

RULING

1. Before the court is an application by way of a notice of motion dated 8th August 2023 brought under Section 68(3) of the [Appellate Jurisdiction Act](#) seeking an extension of time to file an appeal out of time.
2. The application is predicated on the grounds on the face of the application that the learned appellate judge erred in law and fact; by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved, that is, the age of the complainant, penetration of the complainant's genitalia and identification of the appellant; that under [the Constitution](#) of Kenya under Article 50 (2)(p) and (q) an applicant has a right to benefit from the least severe sentence and have his sentence reviewed; that the life sentence contravenes Section 216 and 389 of the Criminal Procedure Code on mitigation and the values of sentencing as captured in the Sentence Policy Guidelines 2016.
3. The application is further supported by the affidavit of the applicant in which he deposes that he was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) vide Sexual Offence Case No. 14 of 2015 at Chief Magistrates Court in Naivasha and sentenced to life imprisonment; that he appealed against the trial court's decision in HCCRA No. 14 of 2016 at the High Court at Naivasha and the same was dismissed; that the applicant withdrew his appeal to the Court of Appeal to pursue a resentencing at the High Court and that the High Court



made a ruling dismissing the applicant's application for resentencing based on the recent Supreme Court's direction on the Muruatetu Case.

4. Further grounds are that the prayer to restore the applicant's appeal is premised on the following grounds; that the High Court had advised the applicant to withdraw his appeal from the Court of Appeal; that following this advice/order, the appellant had applied for withdrawal from the Court of Appeal which was received by the Court of Appeal; the Court of Appeal has not constituted for a bench to call the appellant in person to formally make the withdrawal; that due to the dismissal of the appellant's petition for resentencing, the applicant begs leave of the appellate court to restore the original appeal; that the respondent shall not suffer any prejudice if the orders sought herein are granted; that the application is brought in good faith and the interest of justice.
5. The applicant requests the following relief:
 - a. that the appellant's earlier filed appeal be restored and be heard on a priority basis;
 - b. that the appellate court supplies the appellant with the record of appeal and any other relevant testimonials to enable the appellant to prepare for his appeal;
 - c. that the appellate court be pleased to furnish the appellant with a mention date and the same be communicated to the appellant for expedient disposal of this matter and that the appellant requests this appeal to be heard at the Nakuru Court of Appeal and wishes to be present at the hearing of this appeal.
6. The respondent has filed submissions dated 5th July 2024 and submits that though the delay in filing his appeal is inordinate, due to the nature of the sentence; being life imprisonment, the respondent does not oppose the application for leave to lodge a notice of appeal out of time.
7. Rule 70 of this Court's Rules provides that:
 1. An appeal may be withdrawn at any time before hearing by notice in writing to the Registrar signed by the appellant and, upon such notice being given, the appeal shall be deemed to have been withdrawn.
 2. When any appeal is withdrawn under sub- rule (1), the Registrar shall forthwith notify the respondent and the Registrar of the superior court.
 3. 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.
 4. An appeal may be withdrawn by an informal application in court at any time before the hearing is concluded.
8. The applicant informs the court that he applied for withdrawal of his appeal as at the time he had applied for resentencing at the High Court which did not succeed in the end, as a result, he now wishes to have his withdrawn appeal restored. This application appears to be an ancillary application under Rule 55(2)(a) of the Court Rules and therefore ought to be listed before a full bench for consideration. I therefore direct that it be so listed.

Orders accordingly.

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

ALI-ARONI



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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

