



REPUBLIC OF KENYA



KENYA LAW
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**Ndwiga v Republic (Criminal Appeal (Application)
E282 of 2022) [2024] KECA 787 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 787 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL (APPLICATION) E282 OF 2022**

HA OMONDI, JA

JULY 5, 2024

BETWEEN

PETER NJERU NDWIGA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for leave to file and serve the record of appeal out of time from the Judgment of the High Court of Kenya at Kakamega (D. S. Majanja, J.) dated 15th November 2017 in HCCRA NO.82 of 2014 Consolidated with HCCRA 83 of 2014)

RULING

1. The applicant was convicted of robbery with violence in the magistrate's court; and sentenced to death; his appeal to the High Court vide High Court Appeal Nos. 82 of 2014 consolidated with appeal Nos. 83 of 2014, was dismissed via a Judgment delivered in 15th November, 2017 (Majanja, J; Sitati, J). He is desirous of appealing against that decision and seeks leave be granted to appeal out of time.
2. He explains that the delay in filing the appeal was occasioned by a good cause, owing to ongoing financial constraints that left him financially crippled and unable to afford payment of the legal fees; that he has now been able to source funds from well-wishers and friends, and can now support the cost of filing this appeal. The applicant had also filed the appeal on the basis of the case of *Francis Muruatetu* [2021] KESC 31 (KLR), set aside the position affecting resentencing in matters of robbery with violence, thereby barring the applicant from filing the said appeal [it is not very clear what he means by this last part]. He contends that the delay occasioned was not due to indolence, but was by circumstances beyond his control; and the appeal has high chances of success as it raises cogent triable issues.
3. In objecting to the extension of time within which to file the appeal, the Senior Principal Prosecution Counsel, on behalf of the DPP points out that judgment having been delivered in 2017, the delay in



filing the Notice of Appeal is an inordinate given that sufficient reasons have not been adduced to support the application; that the directions in *Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR)(6 July 2021) which clarified the issue regarding the unconstitutionality of the mandatory sentence as being only applicable to murder cases, was given way back, and cannot be used as an excuse for the delay. Further, that judgment having been delivered in 2017, the delay in filing the Notice of Appeal is an inordinate and does not redeem the applicant.

4. What I understand the applicant to be saying, that riding on the wave of the initial decision by the Supreme Court in *Francis Karioko and Anor v Republic* [2017] eKLR, where the general understanding had been that all minimum and maximum mandatory sentences were unconstitutional, he had hoped to benefit on that approach on sentence only, and had not zealously pursued his appeal on conviction. Now that the Supreme Court made a clarification, he realizes he is caught up with the effluxion of time, hence his prayer for leave to appeal out of time. That appears to be a rational explanation. His other storyline about financial constraints is a sob story that does not sell. Ultimately, I am persuaded that the applicant deserves to pursue the appeal, and is granted leave to file his appeal out of time. The said appeal be filed and served within 14 (fourteen) days of this ruling.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

