



**Odongo v Republic (Criminal Appeal (Application)  
E027 of 2024) [2024] KECA 813 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 813 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL (APPLICATION) E027 OF 2024**

**JM NGUGI, JA**

**JULY 5, 2024**

**BETWEEN**

**GAFAR IDI ODONGO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for leave to file an appeal out of time from  
the judgment of the High Court of Kenya at Kisumu, (Ochieng, J.)  
dated 9th November, 2021 in H.C.CR. Petition No. 005 of 2020)*

**RULING**

1. The applicant, Gafar Idi Odongo, was arraigned, and tried at the Kisumu Chief Magistrate’s Court in Criminal Case No. 431 of 2005 of the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#). He was found guilty and mandatorily sentenced to death as the statute provides.
2. The applicant’s appeals to the High Court and the Court of Appeal were dismissed as to both conviction and sentence.
3. The applicant had reached the end of his appellate journey with the Court of Appeal’s decision on his appeal when the famous [Francis Karioko Muruatetu & Another v Republic](#), Petition No. 15 of 2015 [2017] eKLR (Muruatetu 1) was decided. It stirred him to new action. Using it as a pivot, he filed a Petition, being Kisumu High Court Criminal Petition No. 005 of 2020, seeking for resentencing under the then emerging jurisprudence that the Muruatetu 1 applied to all sentences mandatorily imposed under a statute. Of course, that aggressive prong of Muruatetu 1 was pruned by the Supreme Court in [Muruatetu & another v Republic; Katiba Institute & 4 others \(Amicus Curiae\)](#) (Petition 15 & 16 of 2015)[2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2). However, the jurisprudential reach of Muruatetu 2 is not the concern of this Court at the moment: the applicant is enthused that he will persuade the Court of Appeal that Muruatetu 1 applies to his case despite Muruatetu 2.



4. In any event, the applicant presented his petition to the High Court and although he succeeded in having his death sentence imposed under section 296(2) of the Penal Code set aside, the learned Judge imposed the sentence of life imprisonment in its stead.
5. The applicant is aggrieved by that decision. His self-crafted Draft Memorandum of Appeal lists grounds challenging the constitutionality of the life imprisonment sentence as well as its propriety in the circumstances of his case. One cannot say that the grounds raised are idle or flippant given that the applicant faces spending the entirety of his natural life in prison.
6. However, the applicant did not timeously file his Notice of Appeal as required under Rule 61 of the *Court of Appeal Rules*. Consequently, the applicant has brought the present application under Rule 4 of the *Court of Appeal Rules* seeking, in essence, leave to file an appeal out of time. The application is undated but indicates that it was drawn in April, 2024 at Kamiti Maximum Prison where the applicant is held.
7. The applicant says that the delay was caused by the fact that he did not have a copy of the judgment of the court; and being incarcerated, he needed it in order to craft his grounds of appeal. Of course, one does not need to list detailed grounds of appeal at the point of instituting an appeal. However, one must have sympathy to a pro se litigant like the applicant who is not legally literate.
8. The respondent did not file any response to the application.
9. Rule 4 of the *Court of Appeal Rules* governs the extension of time. The Rule allows this Court to exercise discretion to extend the time limited by the Rules for the doing of any act authorised or required by the Rules. In *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA 231, this Court held as follows:

“It is now well settled that the decision whether or not to extend the 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”.
10. I have considered the application and the supporting affidavit and the respondent’s submissions in concession of the motion. I have also read the attached Draft Memorandum of Appeal setting out grounds which, as I have said above, cannot be said to be inarguable. Although the delay is long, I have considered the fact that the applicant has been incarcerated throughout; is acting in person; and is not legally literate. I have also considered that the applicant faces a lifetime in prison and is, in my view, entitled to pursue every possible legal avenue before resigning himself to that sentence. Consequently, I hereby allow the applicant’s undated application which was received in the Court’s registry on 3<sup>rd</sup> of May, 2024.
11. The applicant shall file a Notice of Appeal within fourteen (14) days hereof. The Record of Appeal shall be filed within sixty (60) days hereof and the appeal thereafter placed before the Court for hearing.
12. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF JULY, 2024.**

**JOEL NGUGI**  
**JUDGE OF APPEAL**



I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

