



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu v Republic (Criminal Application E041 of 2024)
[2024] KECA 1280 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1280 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E041 OF 2024
S OLE KANTAI, JA
SEPTEMBER 20, 2024**

BETWEEN

FREDRICK MACHARIA NDUNGU APPLICANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence from the Judgment of the High Court at Naivasha (C. Meoli, J.) delivered on 27th May, 2019 in H.C. Criminal Case No. 55 of 2015.)

RULING

1. Fredrick Macharia Ndungu, a convict at Nakuru Main Prison, has by Chamber Summons (this is a document unknown to this Court) applied that the application be certified urgent and be heard on priority "... basis as of the procedure of a pauper..."; that he be granted leave to appeal out of time against the conviction and sentence of death passed against him by the High Court of Kenya, Naivasha, in Criminal Case No. 55 of 2015. He says in an affidavit in support thereof that he was convicted of murder by that Court:
 3. That, I humbly urge this Honourable Court to consider my appeal out of time. That after my conviction and sentence, I did not appeal on time since I was not supplied with the original trial court records and its judgment to enable me appeal on time.
 4. That , due to my earlier intention to appeal, I pray you allow my appeal fitted (sic) out of time...."
2. He says that his appeal has overwhelming chances of success as

“...it raises candid points of law and facts...”



3. Attached to the affidavit is an undated notice of Appeal where it is indicated that the appeal will be against conviction and sentence and there is a homegrown Memorandum of Appeal with grounds of appeal where it is stated that the Judge erred in law and facts when he convicted and sentenced the appellant to suffer death but failed to note that the sentence awarded in form of mandatory sentence did not exercise discretion "... but failed to appreciate the recent two developments policy guidelines 2015 and the constitutional provisions article 50(2)(q), mitigation given under section 216 and 329 of the CPC chapter 75 laws of Kenya. I pray that may you find that the sentence is unconstitutional."
4. I have not seen any response from the respondent. I have seen hearing notice served on 4th July, 2023 at 10.03 a.m. on various parties including the Office of Director of Public Prosecutions and Nakuru Main Prison.
5. The principles that guide the court in an application for leave to extend time were well set out in the oft-cited case of Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 EA 231 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 stated 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."
6. The applicant here has not told me when he was convicted and sentenced. He has not told me when proceedings were applied for and when he received them. He says that he was convicted for murder and sentenced to death and he pleads:

... I beseech this honourable court to grant me leave to appeal out of time..."
7. The applicant is unrepresented, he starts his application by praying that he be treated as a pauper. I note that he is a convict at Nakuru Main Prison and it is possible that he does not have the best facilities and infrastructure to take steps in pursuit of an appeal within the timelines required by our rules. He was sentenced to death and he thinks his intended appeal has good chances of success.
8. The respondent has not opposed the application.
9. Let the applicant have his day in court. I allow the application and deem the same to be a Notice of Motion, not a Chamber Summons as indicated.
10. Let Notice of Appeal be lodged within fourteen (14) days of today.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

