



**Nyangi v Republic (Criminal Application E010 of 2024)  
[2024] KECA 1254 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1254 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPLICATION E010 OF 2024  
JM NGUGI, JA  
SEPTEMBER 20, 2024  
[IN CHAMBERS]**

**BETWEEN**

**HEZRON MACHUKA NYANGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for leave to file appeal out of time against the Judgment of the High Court of Kenya at Bungoma (Sergon & Kariuki, JJ.), dated 27th May, 2005 in HCCRA No. 59 of 2002)*

**RULING**

1. The applicant herein was charged, tried and convicted in Criminal Case No. 1492 of 1999 at Bungoma Law Courts. He was sentenced to death on 27<sup>th</sup> September, 1999 for the offence of robbery with violence as provided for under Section 296(2) of the [Penal Code](#).
2. Dissatisfied by the decision of the trial court, the applicant appealed to the High Court through HCCRA No. 59 of 2002 at Bungoma. His first appeal was dismissed in its entirety on 27<sup>th</sup> May, 2005 by Hon. J. K. Sergon (J) and Hon. G.B.M. Kariuki (J, as he then was).
3. The applicant says that he was dissatisfied with the decision of the High Court and that he duly submitted his notice of appeal through the Prison's authorities. However, he never received any information back. Frustrated by the incessant wait period, the applicant says he petitioned the High Court for resentencing under the new jurisprudence spawned by the Supreme Court's decision in [Francis Karioko Muruatetu & Another v. Republic](#) [2017] eKLR (Muruatetu 1). This was through



Bungoma High Court Criminal Petition No. 13 of 2019. A ruling in the matter was delivered on 31<sup>st</sup> January, 2024 with the learned Justice D. Kemei dismissing his application having found that

“it is also not in dispute that the Petitioner has lodged an appeal to the Court of Appeal but whose outcome is yet to be communicated to the Petitioner.”

The learned Judge advised the applicant to pursue his appeal before this Court. Upon further inquiry, however, the applicant says he has now been categorically informed that he has no pending appeal before this Court.

4. Consequently, the applicant’s present application, dated 5<sup>th</sup> March, 2024, is to seek leave to file his appeal out of time. His supporting affidavit of even date rehashes the facts above as does his written submissions.
5. The respondent graciously concedes to the application through a Notice to Concede dated 23<sup>rd</sup> April, 2024.
6. The application is governed by Rule 4 of the *Court of Appeal Rules* which provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these *Rules*, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these *Rules* to any such time shall be construed as a reference to that time as extended.”
7. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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.”
8. In the present case, there is no doubt that there is a very long delay – almost twenty years – since the impugned judgment was delivered. However, the appellant is not solely to blame for the delay: he did what was required of him for a person in custody. He filed his Notice of Appeal and expected to get more information from the Court. It is only much later that he discovered that no appeal was, in fact, filed on his behalf. I think, in the circumstances of this case, the respondent was correct to concede to this application. The applicant deserves his day in Court seeing as it is that he is facing the death sentence. He deserves every opportunity allowed by the law to argue his case. Indeed, the applicant he indicates that if permitted to appeal, he hopes to challenge the death penalty as unconstitutional. One can only hope that he preserved that question for a second appeal.
9. In the circumstances, the application is merited and is allowed as prayed. The applicant is granted fourteen (14) days to file and serve his Notice of Appeal.
10. Orders accordingly.

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

**JOEL NGUGI**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

