



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Republic (Criminal Application E078 of 2024)
[2024] KECA 1450 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1450 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPLICATION E078 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
OCTOBER 17, 2024**

BETWEEN

JAMES MWANGI NJUGUNA APPLICANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nyeri (Ong’udi & Ngaah, JJ.) dated 15th December 2015) in HCCRA No. 77 of 2013)

RULING

1. Before the Court is an application by way of a notice of motion dated May 31, 2024 seeking leave to restore the appeal which the applicant withdrew vide a letter to the Deputy Registrar dated 4th September 2020, and which withdrawal was granted by the Court on 16th September 2020. The application is brought under Rules 42 and 68(3) of the Court of Appeal Rules (Now Rule 70(3) of the Court of Appeal Rules 2022) and Article 50 of the Constitution.
2. The application is predicated on grounds that: the applicant was charged with robbery with violence, convicted and sentenced to suffer death in Nyeri C.M.C. Criminal Case No. 56 of 2012; dissatisfied with the decision of the trial court the applicant appealed to the High Court in Nyeri in HCCRA No. 77 of 2013; the appeal in the High Court was dismissed; hence the second appeal to this Court against both conviction and sentence.
3. The application is further supported by the affidavit of the applicant dated 31st May 2024, wherein he deposes that while the appeal was pending, he learnt of the Supreme Court’s decision in the case of Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others [2017] KESC 2 (KLR), which he believed allowed him to apply for resentencing at the trial court since he had been condemned to suffer a mandatory sentence; as a result, he applied to the trial court for resentencing; however upon the withdrawal of the appeal he was caught up by the second decision of the Supreme Court in the



case of *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 4 Others* [2021] KESC 31 (KLR) (Directions), as the trial court declined to resentence him citing the said decision.

4. He deposes further, that the withdrawal of the appeal was occasioned by the mistaken belief that he could get reprieve from the trial court; in the circumstances, he is desirous of having the appeal restored to enable him proceed with the same and this can only be accomplished if the order to withdraw is set aside and the appeal restored. Further, he stands to suffer immense prejudice given the sentence meted out to him if he is not granted an opportunity to canvass his appeal before this Court.
5. The applicant has filed undated submissions wherein he rehashes the averments in his affidavit and states further, that it is in the interest of justice that the withdrawn appeal be restored, and heard on its merits in line with this Court's jurisdiction to hear appeals from the High Court under Article 164(3) of the *Constitution* of Kenya; and Article 20(1)(q) of the *Constitution* of Kenya.
6. The respondent did not oppose the application.
7. We have considered the application, the affidavit in support, and the submissions filed by the applicant. The issue for determination is whether the applicant deserves to have his appeal restored. 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.
8. In a similar situation in the case of *Abdi Rashid Aden Hussein v Republic* [2020] eKLR, this Court stated; -

“Having given the application before us due consideration, we think it falls within the sub-rule. Seeing as mistake is defined in Blacks Law Dictionary as “1. An error, misconception or misunderstanding; an erroneous belief...” , we think that in the circumstances of this case, whether on his own, or upon advice of counsel then on record, the applicant was induced by mistake to withdraw his appeal.

But mistake is not enough. For the sub-rule to apply, we must be satisfied that the interests of justice require that the appeal be heard. And we are so satisfied. The appellant is facing the ultimate penalty of death imposed on him by the court to which he had appealed against conviction and a 10-year sentence that he would have long completed but for that turn of events. We think that the appeal is patently deserving of hearing on merit, to deny the applicant that opportunity would be highly prejudicial to him.

Added to this is the State's non-objection, with the result that the application is for allowing.” (Emphasis added)

9. The applicant has explained to the Court that he acted on a misconception. It is common knowledge that the same issue caught many inmates, lawyers, and courts similarly, necessitating the *Supreme Court Directions* (*supra*). We cannot, therefore, fault the applicant. The mistake can be deemed as having been a genuine one. We agree with the decision of this Court in *Abdi Rashid's case* (*supra*). The applicant



herein was similarly sentenced to suffer death. Given the gravity of the sentence, we agree that it will be in the interest of justice that we allow the applicant to ventilate his case before this Court. This may probably be his last court of recourse.

10. The application is allowed.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF OCTOBER, 2024.

S. ole KANTAI

JUDGE OF APPEAL

.....

J. LESIIT

JUDGE OF APPEAL

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ALI-ARONI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

