



REPUBLIC OF KENYA



KENYA LAW
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**Mitei v Republic (Criminal Application E084 of 2024)
[2024] KECA 1371 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1371 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E084 OF 2024
PM GACHOKA, JA
OCTOBER 4, 2024**

BETWEEN

PHILIP KIPNGENO MITEI APPLICANT

AND

REPUBLIC RESPONDENT

(An application for leave to appeal out of time against the conviction and sentence of the High Court of Kenya at Bomet (Muya, J.) delivered on 4th October, 2018 in HC)

RULING

1. By Notice of Motion dated 13th June 2024, the applicant seeks leave of this Court to file a second appeal out of time from the conviction and sentence of the High Court at Bomet in HCCRA No. 47 of 2017. The first appeal arose from the conviction and sentence of the Principal Magistrate's court at Sotik in Cr. Case (SO) No. 3 of 2013.
2. The application is supported by the grounds on its face as well as the supporting affidavit of the applicant. The brief facts giving rise to the application are that the applicant was charged with the offence of defilement contrary to section 8 (1) as read together with section 8 (3) of the [Sexual Offences Act](#). After a full hearing, the applicant was convicted of the offence and sentenced to serve 20 years imprisonment. Dissatisfied, the appellant moved to the High Court seeking to appeal against that decision. However, his appeal was found to lack merit and was dismissed.
3. The applicant now seeks leave to appeal to this Court albeit out of time for the following reasons: the ingredients to the offence of defilement had not been established to the required standard; and that he was not supplied with the judgment of the High Court on time. Therefore, he could not appeal on time. He annexed his memorandum of appeal dated 13th June 2024 together with his undated notice of appeal.
4. The application was disposed of by way of written submissions.



The respondent adopted its written submissions dated 11th September 2014. The respondent states that taking into account the lengthy period of the sentence, the delay in filing the appeal and the applicant's incarceration since the date of conviction, the application was merited. The application was thus unopposed.

5. Rule 4 of the Court of Appeal Rules 2022 gives this Court discretionary powers to extend time limited by this Rules or any decision of the court. In establishing whether or not to grant extension of time, we shall adopt the findings of this Court in *Mungatu v Republic* [2023] KECA 671 (KLR). Citing the decision in *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR, the Court held as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its' dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In considering the last principle, it must be borne in mind that it is not the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

6. I have considered the reasons advanced by the applicant as set out in the Motion, the application and the respondent's concession to the application.
7. I have also considered the draft memorandum of appeal annexed to the application. Although the application is not opposed it has to be considered on merit and it must satisfy the principles that have been laid down over the years. I note that the first appeal was dismissed by the High Court (Muya J) on 4th October 2018. This application has been filed after a delay of 6 years. The delay of 6 years is inordinate and though the rules do not give the number of days that should be considered, it is expected that any applicant, whether in custody or not must give some plausible reasons for the delay. The applicant has not explained to my satisfaction the delay of six years. While he stated that he was not availed of a copy of the judgment and the proceedings, the applicant did not demonstrate the efforts he took to obtain the said judgment from the prison authorities or even state that the prison authorities refused to assist him. In any event, a casual look at the grounds annexed to the memorandum of appeal are issues of fact and it is trite that a second appeal is only limited to points of law.
8. Accordingly, I am inclined to dismiss the said application for the reasons given forthwith.

DATED AND DELIVERED AT NAKURU THIS 4TH DAY OF OCTOBER 2024.

M. GACHOKA C.Arb, FCI Arb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

