



**Ngatia v Republic (Criminal Application E090 of 2024)
[2024] KECA 1361 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1361 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E090 OF 2024
PM GACHOKA, JA
OCTOBER 4, 2024**

BETWEEN

JOSEPH MWANGI NGATIA 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 Nakuru (Koome, J.) delivered on 15th May, 2008 in HCCRC No. 74 of 2005)

RULING

1. In his undated Notice of Motion, the applicant seeks leave of this Court to appeal out of time from the conviction and sentence of the High Court at Nakuru in HCCRC No 74 of 2005. In her judgment dated 15th May 2008, Koome, J. (as she then was) convicted the applicant of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. From the record before me, it is not clear what sentence was imposed as the applicant has made contradictory statements.
2. The application is supported by the grounds on the face of it and the supporting affidavit of the applicant. The applicant seeks leave to appeal out of time for the following reasons: that the ingredients to the offence of murder had not been established to the required standard; that he was not supplied with the proceedings and judgment of the trial court on time; and that the appeal has merit. Resultantly, he did not appeal on time. He annexed his undated memorandum of appeal and notice of appeal in support of the application.
3. The application was heard by way of written submissions.

Though the applicant did not file written submissions, I have considered the grounds on the face of the application and the supporting affidavit. On its part, the respondent filed written submissions dated 11th September 2014. The respondent, in not opposing the application, stated that it had considered the lengthy period of the sentence, the inordinate delay in filing the appeal, the applicant's incarceration



since the date of judgment and the fact that the applicant was unable to file his appeal on his own. For those reasons, the respondent urged this Court to allow the application.

4. Rule 4 of the Court of Appeal Rules 2022 gives this Court discretionary powers to extend time. In establishing whether or not to grant an extension of time, I 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.”

5. I have considered the reasons advanced by the applicant as set out in the Motion, the supporting affidavit and the respondent’s concession to the application. 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.
6. The applicant in the draft memorandum of appeal states that he pleaded guilty and was subsequently sentenced to 40 years’ imprisonment. However, in his Notice of Motion, the applicant at prayer 2, framed it as follows: “that I am convicted and sentenced to 20 years and the applicant herein seeking for review in criminal case file No 74 of 2005 at Nakuru High Court...” In the undated supporting affidavit, the applicant does not state the date when sentence was imposed. Further apart from stating that he was not supplied with the trial records and judgement, he does not state that he has sought the help of prison authorities.
7. For an applicant to succeed, it is important for one to be candid as to the reasons for the delay and what efforts were taken. In the instant application, the applicant did not take any action for 16 years. One is left wondering how an applicant, who is in prison, can sleep for a period of 16 years and only attempt to resurrect his constitutional right of appeal after so long. Such an applicant owes the court an explanation. The applicant is not even candid on what sentence he is serving; is it 20 years or 40 years’ imprisonment?
8. It is clear that the applicant has failed to give any good reason for the delay. In the circumstances, I am unable to exercise my discretion to extend the time. Accordingly, I am left with no option but to dismiss the undated Notice of Motion.

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

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original



Signed

DEPUTY REGISTRAR

