



REPUBLIC OF KENYA



**KENYA LAW**  
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**Boru v Republic (Criminal Application E100 of 2024)  
[2024] KECA 1351 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1351 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPLICATION E100 OF 2024  
S OLE KANTAI, JA  
OCTOBER 3, 2024**

**BETWEEN**

**GALGALO DIDO BORU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the conviction and sentence of the High Court of Kenya at Marsabit (Kiarie, J.) dated and delivered on 18th December, 2017 in H. C. CRA. No. of 32 of 2016)*

**RULING**

1. By a motion on notice said to be brought under rule 68 of the *Appellate Jurisdiction Act*, the applicant Galgalo Dido Boru prays in the main that the court be pleased to allow him to file an appeal out of time arising from the judgment in H.C. CRA. No. 32 of 2016, Marsabit, delivered on 18<sup>th</sup> December, 2017. He asks that I extend time for him to appeal out of time.
2. In an affidavit in support he says that he was charged with an offence of defilement contrary to section 8 (1)(2) of the *Sexual Offences Act*; that the Judge at the High Court (on first appeal) failed to consider his mitigating circumstances; that new and emerging jurisprudence has shown the Judiciary declaring that mandatory sentences, including life sentences to be unconstitutional and the courts have been awarding lesser sentences; that the time he has spent in remand custody of six months be counted as part of his sentence under section 333(2) of the *Criminal Procedure Code*. Those are the reasons he advances for asking for extension of time to appeal.
3. He has, in a homemade memorandum of appeal, set out 7 grounds of appeal where he repeats what he has said in the affidavit as grounds of appeal.
4. I have not seen a replying affidavit from the respondent but there are written submissions by prosecuting counsel on behalf of Director of Public Prosecutions. It is submitted for the respondent that the applicant has not stated any reason for failure to file his appeal within time and the respondent



submits that the application is unmerited, but the respondent states in the final part of the submissions that “however, in the interest of justice and cognizant of the provisions of Article 159(2) of the Constitution, we are not opposed to the appellant’s being granted leave to appeal out of time.”

5. The principles that apply in an application for leave to extend time are well settled and were set out in the oft cited case of *Leo Sila Mutiso v 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. I note here that the homemade application by the applicant is undated but it was lodged in court sometime this year. I have not been equipped to know when the applicant was convicted by the subordinate court, but from the heading and the notice of appeal, it appears that the appeal at the High Court was delivered by Kiarie, J. on 18<sup>th</sup> December, 2017. The applicant says in the application that he was convicted and sentenced to life imprisonment. The respondent, however, concedes in the circumstances that the applicant should be allowed to appeal considering the circumstances where the appellant was sentenced to life imprisonment. I do not wish to shut the path for him to appeal.

7. In the premises, I allow the motion. Let an appeal be filed within twenty one (21) days of today.

**DATED AND DELIVERED AT NYERI THIS 3<sup>RD</sup> DAY OF OCTOBER, 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**

