



REPUBLIC OF KENYA



**Gitau v Republic (Criminal Application E147 of 2024)
[2024] KECA 1649 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1649 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E147 OF 2024
PM GACHOKA, JA
NOVEMBER 15, 2024**

BETWEEN

MOSES WAMUMBE GITAU APPLICANT

AND

REPUBLIC RESPONDENT

(An application for leave to appeal out of time against the conviction and sentence from the judgment of the High Court of Kenya at Naivasha (Mwongo, J.) delivered on 27th September 2018 in HCCRA No. 16 of 2014)

RULING

1. The applicant has filed a Notice of Motion dated 21st December 2022 seeking leave of this Court to appeal out of time against the conviction and sentence of the High Court sitting at Naivasha in HCCRA No. 16 of 2014. The applicant was in Naivasha CM (SO) no. 406 of 2012 charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#). Upon full trial, the applicant was convicted of the offence and sentenced to 20 years' imprisonment. On appeal, that conviction and sentence were upheld by the High Court (Mwongo, J.) (as he then was) in its judgment dated 27th September 2018.
2. According to the grounds espoused in the body of the application and the applicant's supporting affidavit dated 24th June 2024, the applicant had initially lodged an appeal before this Court but later abandoned the same to pursue re-sentencing before the High Court. However, his pursuit for re-sentencing was unsuccessful as it was dismissed. His notice of appeal and memorandum of appeal were annexed to the application.
3. The application was disposed of by way of written submissions.

The applicant's written submissions dated 1st November 2024 argued that his application ought to be allowed as it met the threshold for exercise of discretion as set out in rule 4 of the Court of Appeal rules



and Article 50 (2) (q) of *the Constitution*. The state filed its written submissions dated 31st October 2024. Senior Assistant Director of Public Prosecutions Mr. Omutelema exposted that on dismissal of his appeal in the High Court, the applicant filed Naivasha HC Misc. Criminal Application No. E176 of 2021 for re-sentencing. That application was dismissed on 5th January 2023. He submitted that since the applicant was sentenced to life imprisonment, the application ought to be allowed.

4. The discretion set out in rule 4 of the Court of Appeal Rules 2022 is wide and unfettered. This Court in *Wasike vs. Swala* [1984] KLR 591 stated:

“ As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

- a. That there is merit in his appeal.
- b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
- c. That the delay has not been inordinate.”

5. I have considered the reasons advanced by the applicant as set out in the Motion, the supporting affidavit, the respondent’s concession to the application and the law. I must first point out that from the judgment of the High Court at Naivasha in HCCRA No. 16 of 2014 in and Naivasha HC Misc. Criminal Application No. E176 of 2021, the applicant was sentenced to serve 20 years’ imprisonment and was not sentenced to life contrary to the respondent’s submissions. I also note that the application seeking re-sentencing was dismissed preliminarily as the court found that it was without jurisdiction to hear and determine the subject matter. This Court appreciates and considers that confusion that arose following the decision in *Muruatetu*. Taking into account those pronouncements by the High Court, as well as the draft memorandum of appeal, I am inclined to dispense justice by giving the applicant an opportunity to ventilate his appeal. Resultantly, the applicant shall file his notice of appeal within 14 days from the date of this order. Thereafter, the record of appeal shall be filed and served within 30 days from the date hereof.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF NOVEMBER 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

