



**Nyakundi v Republic (Criminal Application E121 of 2024)
[2024] KECA 1643 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1643 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E121 OF 2024
PM GACHOKA, JA
NOVEMBER 15, 2024
[IN CHAMBERS]**

BETWEEN

JOSEPH NYAKUNDI 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 Narok
(Bwonwonga, J.) delivered on 23rd February 2017 in HCCRA No. 84 of 2017)*

RULING

1. The applicant has filed a Notice of Motion dated 7th June 2024 seeking leave to appeal out of time against the conviction and sentence of the High Court sitting at Narok in HCCRA No. 84 of 2017. In Narok CM Criminal Case no. 1107 of 2017, the applicant was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. He was convicted of the offence and sentenced to death. On appeal, Bwonwonga, J. dismissed the appeal on conviction and sentence hence his intention to appeal.
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: the learned judge failed to take into account that the aspect of identification was relied on the evidence of a single identifying witness; the ingredients to the offence of robbery with violence were not proved to the required standard; the court failed to consider his defense; the sentence meted out was harsh and excessive against the dictates of Article 50 (2) (p) and (q) of *Constitution*; and he was not supplied with the judgment of the High Court in good time to enable him appeal. In further support of his application, the applicant annexed his notice of appeal and memorandum of appeal.



3. In its written submissions dated 30th October 2024, the state, through Senior Assistant Director of Public Prosecutions Mr. Omutelema submitted that it did not oppose the application as the sentence meted out was heavy.
4. Under rule 4 of this *Court's Rules* 2022, discretion is given to extend time for the doing of any act provided for under the *Rules*. In *Fabir Mohammed v. Joseph Mugambi & 2 others* [2005] eKLR, this Court summed up the following principles when considering an application invoked in this rule:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso v Mwangi* Civil Appl. Nai. 255 of 1997 (ur), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (ur) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

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 have also considered the draft memorandum of appeal annexed to the application. I am satisfied to hold that the application has met the threshold for the exercise of discretion by this Court. Consequently, the application dated 7th June 2024 is allowed as follows: 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 to fast track the disposal of the appeal.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF NOVEMBER 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

