



**Cheruiyot "A" Solo v Republic (Criminal Appeal (Application)
E114 of 2024) [2024] KECA 1541 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1541 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL (APPLICATION) E114 OF 2024
JM MATIVO, JA
NOVEMBER 5, 2024**

BETWEEN

BENARD KIPKEMOI CHERUIYOT "A" SOLO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for leave to file an appeal out of time from the Judgment of the High Court of Kenya at Bomet (M. Muya, J.) dated 21st November, 2017 in HCCRA No. 12 of 2016)

RULING

1. The application before the Court is dated 9th June, 2023. The main prayer is for leave to appeal out of time against the judgment issued in HCCA No. 12 of 2016, on 21st November, 2017.
2. The applicant, Benard Kipkemoi Cheruiyot, was arraigned before the Senior Resident Magistrate's Court in Criminal Case No. 2202 of 2014 at Bomet charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and the offence of possession of Cannabis Sativa contrary to section 3 (1) as read with 3 (2) of the *Narcotics Drugs & Psychotropic Substance (Control) Act* No. 4 of 1994. The trial magistrate convicted and sentenced the applicant to death as prescribed by law.
3. The applicant's appeal to the High Court was dismissed on both conviction and sentence. The applicant failed to lodge his notice of appeal within the statutory-stipulated time of 14 days. His present application invokes Rule 4 of the *Court of Appeal Rules* to enlarge to file his appeal.
4. It is the applicant's case that the reason for the delay in filing his appeal on time was because he was not supplied with the High Court's judgment on time to enable him appeal on time.
5. In response to the application, *vide* written submissions dated 30th October, 2024, Mr. Omutelema Senior Assistant Director of Public Prosecutions has amiably conceded to the leave application pointing to the serious offence charge and the death sentence.



6. An application under Rule 4 of the Court of Appeal Rules, 2022 is a request to a single judge of this Court to exercise a discretion to grant the relief of extension of time to do a particular act. The Rule states as follows: -

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

7. This Court in Karny Zabrya & Another vs. Shalom Levi [2018] eKLR stated the following as issues to be considered in an application under Rule 4 of this Court’s Rules:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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 taking into account the last consideration, it must be born in mind that it is not the role of a 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”

8. I have considered the application and the supporting affidavit dated 9th June, 2024 and the respondent’s submissions in concession of the motion. I have also read the attached memorandum of appeal setting out grounds which, for an intending appellant exercising their undoubted right of a second appeal, cannot be said to be unarguable. I am satisfied that the applicant has met the threshold for the exercise of discretion by this Court. Consequently, I allow the application dated 9th June, 2024 for the extension of time. The record of appeal shall be filed and served within 30 days from the date hereof and the appeal thereafter placed before the court for hearing

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF NOVEMBER, 2024.

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

