



Director of Public Prosecutions v Maj Erastus Hezbon Otieno (Criminal Application E031 of 2022) [2023] KECA 421 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 421 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E031 OF 2022**

S OLE KANTAI, JA

APRIL 14, 2023

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

MAJ ERASTUS HEZBON OTIENO RESPONDENT

(An application for leave to file an appeal out of time from the Judgment of the High Court of Kenya at Nairobi (Chepkowny, J.) dated 24th May, 2022 in HC. CR.C. No. E001 of 2021)

RULING

1. The respondent Major Erastus Hezbon Otieno was charged with certain offences before the Court Martial at Kahawa Garisson and was convicted. He appealed to the High Court of Kenya and in a Judgment delivered on May 24, 2022 (Chepkwony, J) his appeal was allowed, the conviction was quashed and the sentence set aside. It was ordered that he be set free unless detained for some other lawful cause. An order dismissing the respondent from the defence forces was set aside and the same was substituted with an order directing that the respondent be reinstated to the position he held or another position related to the same rank.
2. In a Notice of Motion brought under Section 3A and 3B of the [Appellate Jurisdiction Act](#), rule 4, 38, 42 and 43 of the [Court of Appeal Rules](#) and Article 22(1) (2), (3), 23, 35, 48, 50 and 159 of the [Constitution](#) of Kenya, 2010 I am asked to be pleased to grant leave to the applicant (Director of Public Prosecutions) to file and serve a record of appeal out of time against the said Judgment and to give any other orders in the interest of justice. In grounds in support of the application and in an affidavit of Ishamel Kiragu an Advocate in the office of the applicant it is said amongst other things that Judgment was delivered on the said May 4, 2022 but that the applicant only managed to get a copy of the typed Judgment on July 7, 2022; that being a matter involving third parties(the Kenya Defence Forces) Judgment was communicated to them without delay and a response was awaited but that the Kenya Defence Forces is a hierarchical institution.; that the Kenya Defence Forces after consultation within their ranks wrote



to the applicant a letter dated August 30, 2022 asking the applicant to review the Judgment and prefer an appeal and that the applicant after extensive consultations preferred an appeal.

3. It is urged that delay is reasonable given that extensive consultations were required and that the appeal has merit and has high chances of success, the applicant attaches to the motion a petition of appeal.
4. I note that the Registrar of this Court served a hearing notice to Odera Were advocates (oderawereadvocates@gmail.com); Vincent Juma (vinijuma@gmail.com) on March 7, 2023 at 2.23 pm. The parties were in that hearing notice informed of this hearing date of the motion and were required to file written submissions within stated periods.
5. I have seen written submissions by the applicant dated March 22, 2023 but I have not seen either a replying affidavit or written submissions from the respondents.
6. The principles that govern an application for extension of time are well settled and have been the subject of various judicial pronouncements by this Court. In the case of *Karny Zabarya and Another vs Shalom Levi Civil Application No 80 of 2018* those principles were stated as follows:

' 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.'

7. See also *Leo Sila Mutiso v Rose Wangari Mwangi CA No Nai 255 of 1997*. I am told here that after Judgment was delivered by the High Court the same was communicated to the Kenya Defence Forces but it took time for a decision to be made on preferring an appeal. It is stated that Kenya Defence Forces is a large institution with a hierarchy where decisions are made within that hierarchy that it takes time before such decisions can be made and communicated. I note also that a Judgment was delivered on May 24, 2022 and that the motion before me dated October 13, 2022 meaning that it was filed less than 5 months after the judgment. That is not unreasonable delay and I so find.
8. I have also looked at the petition of appeal where 7 grounds of appeal are set out on an application of this nature and I think they deserve the attention of the Court of Appeal on appeal. I am satisfied that the applicant has satisfied the principles which I have set out and I allow the motion. Let the applicant file an appeal within the next 14 days. I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

