



REPUBLIC OF KENYA



KENYA LAW
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**Mathenge v Republic (Criminal Application E014 of 2020)
[2023] KECA 447 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 447 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E014 OF 2020
MSA MAKHANDIA, JA
APRIL 14, 2023**

BETWEEN

BENSON WAHINYA MATHENGE APPLICANT

AND

REPUBLIC RESPONDENT

(An application for enlargement of time to file the Notice of appeal in respect of the Judgment of the High Court of Kenya at Nairobi (Wakiaga, J.) dated 7th October, 2020 in Nairobi Criminal Appeal No. 5 of 2020)

RULING

1. The appellant was charged with the offence of stealing by servant contrary to section 281 of the [Penal Code](#). The particulars of the offence were that on the June 24, 2016 at Equity Bank Kilimani Branch in Nairobi County, being a servant to Equity Bank, to wit, a Clearing Officer, stole Kshs 5,000,000.00 (Kshs five million) the property of the said Equity Bank which came to his possession by virtue of his employment. He pleaded not guilty, was tried, convicted and sentenced to a fine of Kshs 1,000,000.00 (Kshs one million), in default one (1) year imprisonment.
2. Being dissatisfied with the said conviction and sentence, the applicant appealed in the High Court, which appeal was dismissed on October 7, 2020 and the trial court's determination thereon was affirmed.
3. The applicant is now before this court vide an application dated December 17, 2020, seeking for orders that this court do extend the time for lodging the notice of appeal dated October 19, 2020 (lodged on October 22, 2020) and the same be deemed as filed within time.
4. The application is premised on the grounds that though judgment was delivered on the October 7, 2020, the applicant was late in lodging the notice of appeal by one (1) day on account of technical challenges with the Judiciary e-filing platform. It is further supported by the affidavit of the applicant's



advocate, one, Nick Omari dated December 17, 2020. He depones that at the time of delivery of judgment, a copy thereof was not available for collection hence he was only able to access a copy thereof, a week after its delivery. That on or about October 19, 2020, he was instructed by the applicant to lodge the notice of appeal against the High Court's judgment. That though he made frantic efforts to file the notice of appeal between 20th and October 21, 2020, he was unable to do so because of technical challenges at the judiciary e-filing portal which hindered him from uploading the notice of appeal on the system and generating a payment slip. He was only able to lodge and pay court fees for the notice of appeal on October 22, 2020, which date by then, the timelines for lodging the notice of appeal had lapsed by one day.

5. The applicant further filed submissions dated March 8, 2023 in which he states that the delay in filing the application is not inordinate. He relied on the case of *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR for the proposition that a delay of one day in filing a notice of appeal cannot be said to be inordinate.
6. The respondent by a letter dated March 13, 2023 indicated that it was not opposed to the application.
7. Extension of time is provided for under rule 4 of the *Court of Appeal Rules* which provides *inter alia*:

“The court may, on such terms as it thinks 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.”
8. The case of *Leo Silla Mutiso v Rose Hellen Wangari* Nairobi Civil Application No 251 of 1997 confirmed that the decision on whether to extend time for appealing is essentially discretionary taking into account length of delay and reason for the delay. It is clear therefore that the court has the ultimate discretion in allowing or disallowing an application for extension of time as long as it deems the terms thereof just.
9. In considering an application for extension of time, several key issues are to be considered as was pointed out in the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR, and I take cognizance of the fact that extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court. Further, a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, and the court needs to consider whether there is a reasonable reason for the delay.
10. In addition, the court needs to consider whether the application has been brought without undue delay, and due regard must be taken as to whether there will be any prejudice suffered by the respondents if the extension is granted. I have considered the application and the reasons advanced for failing to file the notice of appeal in time. It is undisputed that the period of one day is not inordinate delay. I am satisfied that the applicant's failure to file his intended notice of appeal within the required time frame was not deliberate, neither was the delay inordinate, as he moved with speed in less than a year to ameliorate the situation through this notice of motion.
11. The applicant was diligent enough but was prevented by the e-filing system of the court which was beyond his control. Moreover, the respondent has confirmed that it will suffer no prejudice.
12. Consequently, the application is merited, and the notice of appeal dated October 19, 2020 is deemed as duly filed upon payment of the requisite court fees. The memorandum and record of appeal shall be filed within 30 days from the date hereof.



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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

