



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Republic (Criminal Application E011 of 2020)
[2023] KECA 446 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 446 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E011 OF 2020
MSA MAKHANDIA, JA
APRIL 14, 2023**

BETWEEN

BYRON ROBERT OTIENO APPLICANT

AND

REPUBLIC RESPONDENT

(An application for extension of time to file an appeal out of time against the ruling of the High Court of Kenya at Nairobi (Kimaru, J) dated 29th September, 2020. in Nairobi Criminal Appeal No. 82 of 2019)

RULING

1. The applicant, Byron Robert Otieno was charged with one count of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the May 9, 2013 at Kariobangi North, in Kasarani district within Nairobi County, he murdered Dennis Njenga Wambui. The applicant was convicted for the offence after a full trial and was thereafter sentenced to death. Aggrieved by his conviction and sentence, the applicant filed an appeal to this Court. Upon considering the appeal, the same was dismissed in its entirety.
2. The applicant was not satisfied with the decision of this Court especially in relation to the sentence that was meted out on him. He made an application to the High Court for resentencing having invoked the Supreme Court decision in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR. Kimaru, J (as he was then) in a ruling dated September 29, 2020, dismissed the plea.
3. This is the ruling that the applicant intends to appeal against on the ground that although leave was granted to him to file his petition of appeal within 14 days, he was unable to adhere to the timeline. That the delay was occasioned by factors beyond his control as he sought certified copies of the typed proceedings and the judgment but the same were delayed by the registry. That it was not until sometime in 2020 after procuring the services of an advocate that he was supplied with the same. That he is



desirous of appealing against the said ruling which had high chances of success as could be gleaned from the intended petition of appeal attached to the application.

4. The application is further supported by the affidavit of the applicant dated December 9, 2020 in which he merely reiterated and expounded on the grounds aforesaid.
5. The applicant further filed submissions dated February 23, 2020 which again is a mere regurgitation of the grounds aforesaid.
6. The application was conceded to by the respondent vide a letter dated March 13, 2023. In the letter, the respondent specifically stated 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.
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. 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 ground for the delay. In addition, NRB Criminal Application No E011 of 2020 ruling page 3 of 4 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 respondent if the extension is granted.
10. The applicant has not annexed any document to show that he had requested for the certified copy of the proceedings and judgment. Given that the ruling was rendered on September 29, 2020 and the current application made on December 9, 2020 coupled with the respondent’s letter that they are not opposed to the application, I am satisfied that the applicant’s failure to file his intended 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. The applicant was diligent enough but was prevented by the non-availability of the court proceedings. Moreover, the respondent has confirmed that it will suffer no prejudice.
11. Consequently, the application is merited, and the applicant is granted leave to file appeal out of time within 14 days 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

