



**Tongoyo & another v Republic (Criminal Application
E024 of 2021) [2023] KECA 443 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 443 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E024 OF 2021
F SICHALE, LA ACHODE & WK KORIR, JJA
APRIL 14, 2023**

BETWEEN

WILLIAM TONGOYO 1ST APPLICANT

LEYIAN LANG'ISA CHACHA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

*(An application from the ruling of the High Court of Kenya at Narok
(Gikonyo, J.) dated and delivered and 4th September 2020 In HC Cr
Appeal No. 31A, 31B and 31C of 2018 and Cr Application No. 21 of 2021)*

RULING

1. Before us is a notice of motion which on the face of it is brought pursuant to rules 40 and 41 of the [Court of Appeal Rules](#), sections 361(2) and 379(b) of the [Criminal Procedure Code](#) as well as articles 27, 47, 50(1) & (2)(p) & (q) of the [Constitution](#). The applicant's prayers are as follows:

- “1. Spent;
2. This Honorable Court be pleased to give its interpretation of the commencement of the appellants' prison term who were remanded in prison by an order of the subordinate court on March 27, 2017 and later sentenced to serve 10 years by the same court on 4/9/2018 and which sentence was reduced to 5 years by the High Court on 30/9/2019;
3. A declaration that the appellants' sentence of 10 years reduced to 5 years commenced from March 26, 2017 when they were admitted in Prison remand and that the duration of 1 ½ years before sentence by the subordinate court on September 4, 2018 and 1 year before revision of their sentence from 10



years to 5 years by the High Court on September 30, 2019 formed part of their 5 years prison term based on section 333(2) Criminal Procedure Code, Criminal Procedure, Bench High Court normal practice and Court of appeal authorities filed and annexed herein.-

4. That the appellants be released from jail; their jail sentence having ended on June 26, 2020 after $\frac{1}{3}$ remission (1 Year 8 Months) of their prison term;
 5. Any other orders the Honorable court may find just, fair and beneficial to issue;”
2. It is not easy for one to establish the facts giving rise to the present application. However, we managed to glean the following facts from the application, which we recount herein as they will help explain our determination. The applicants were jointly charged before the Narok Chief Magistrate’s Court with the offence of stealing contrary to Section 278 of the Penal Code. They were found guilty and each one of them was sentenced to 10 years imprisonment. The applicants then lodged appeals No 31A, 31B, and 31C before the High Court at Narok where their appeals against conviction were dismissed. Their appeal against the sentences was allowed and the sentences reduced to 5 years imprisonment for each one of them. The applicants then moved the High Court at Narok vide Criminal Application No. 21 of 2020 seeking, among other reliefs, that the period spent in remand prior to the conviction and sentencing by the trial court be considered. The application was dismissed on September 4, 2020 by Gikonyo, J. It is against that decision that the applicants have moved to this Court with the present application.
3. The application is based on the grounds contained on its face, as well as the affidavit of the 1st applicant which gives it more flesh in the elaboration of the gist of the application. It is the applicants’ averment that, as per the letter addressed to the High Court on November 26, 2020 by the prison authorities, each one of them is entitled to remission of 1 year and 8 months of their prison terms which is one-third of the 5 years imprisonment. They also state that under the law and the Judiciary Sentencing Policy Guidelines, the period spent in remand prior to sentencing is taken into consideration and forms part of the sentence.
4. The applicants contend that the Judge of the High Court erred in law by failing to consider the duration they were in prison custody prior to their sentencing. They also fault the learned Judge of the High Court for failing to advise the prison authorities that the term already served prior to sentencing was to be considered. The applicants argue that this Court in its supervisory authority has the power to order the prison authorities to correct the perpetuated injustice and that this application is in the public interest and is meant to secure the rule of law.
5. The respondent filed grounds dated January 18, 2023 in opposition to the application. It is the respondent’s position that this Court is bereft of jurisdiction to hear the application as leave was not sought prior to the filing of this application. In the alternative, the respondent argues that the Judge took into consideration the period already served and that the application is frivolous and misconceived and should be dismissed.
6. When the matter came up for hearing on January 24, 2023, the advocates for the parties sought to rely on their written submissions and made brief oral highlights of the same. For the applicants, Mr. Ondiso submitted that the Judicial Sentencing Policy Guidelines, Section 333(2) of the Criminal Procedure Code, and the practice of the High Court provide that the period spent in custody prior to sentencing should be taken into consideration when passing sentence. Counsel urged that both the trial court and the High Court failed to take into consideration the duration the applicants spent in remand before



they were sentenced. In his view, the High Court ought to have guided the prison authorities on this issue. He further contends that the High Court in its decision of December 17, 2020 failed to give credence to the applicants' prayer for interpretation of the issue citing lack of jurisdiction but gave the applicants the leave to move to this Court for interpretation and other appropriate orders. Counsel also submitted that there was a Notice of Appeal on record and this Court therefore has the requisite jurisdiction to hear and determine this application. Counsel urged this Court to set the applicants free since they have fully served their prison terms.

7. On his part, Mr Ondimu learned counsel for the respondent submitted that this Court has not been properly moved by the applicants and therefore it lacks the requisite jurisdiction to entertain the application. In respect to the ruling in Criminal Application No 21 of 2020, counsel submitted that the applicants had not sought leave which was a prerequisite and without which no appeal stood as the matter involved was one of discretion by the High Court. Regarding Criminal Appeal Nos 31A, 31B and 31C of 2018, counsel submitted that there was no Notice of Appeal on record and therefore this Court was not seized of the matters yet. To buttress this line of submissions, counsel relied on the case of *Republic v Nuseiba Mohammed Haji Osman alias Umm Fidaa, alias Ummu Fidaa, alias Ummulxarb* [2016] eKLR. Counsel reproduced an excerpt of the trial court's ruling on sentence and submitted that the court indeed took into consideration the period the applicants had spent in custody before sentencing them to 10 years imprisonment despite the statutory sentence being 14 years. Counsel cited the case of *Lubanga Emmanuel v Uganda* Cr Appeal No 144 of 2009 as cited in *Mohamed Salim v Republic* [2020] eKLR to submit that the mathematical calculations of sentences is not a concern of this Court. Mr Ondimu ended his submissions by urging the Court to allow his preliminary objection and dismiss the application.
8. It is not in doubt that by virtue of article 164(3) of the *Constitution* this Court has jurisdiction to entertain appeals from decisions of the High Court. However, there are rules of procedure and Acts of Parliament put in place to ensure the realization of this right of appeal. The rules and laws also guide parties on how they should invoke the jurisdiction of the Court. In regard to criminal appeals, the relevant provisions of rule 61 of the *Court of Appeal Rules, 2022* state as follows:

“ 61.

(1) A person who desires to appeal to the Court shall give notice in writing, which shall be lodged in six copies with the registrar of the superior Court at the place where the decision against which it is desired to appeal was given, within fourteen days after the date of that decision, and the notice of appeal shall institute the appeal...

(4) Where an appeal lies only on a certificate that the case is a fit case for appeal, or with leave, or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such certificate or leave before lodging the notice of appeal.”

9. The cited rule requires that a Notice of Appeal be filed in order for this Court to be seized of a matter. Without the notice, a litigant cannot enjoy the right of appeal to this Court. It is also worth pointing out that even where leave is required, a Notice of Appeal would still be a foundational requirement.



On the importance of the Notice of Appeal, this Court in *Feisal Mohamed Ali Alias Feisal Shabbal v Republic* [2015] eKLR stated that:

“It is by lodging a notice of appeal that a party evinces intention to invoke the appellate jurisdiction of the Court under Article 164(3) of the *Constitution*. A person who has duly lodged a notice of appeal is an intended appellant and a duly lodged notice of appeal constitutes an intended appeal. By dint of rule 2 of the Court of Appeal Rules, “appeal” in relation to appeals to the Court, includes an intended appeal...

It is trite therefore that the device of the notice of appeal invokes the appellate jurisdiction of this Court. That is the case whether the appeal or intended appeal is civil or criminal. In *Joseph Limo & 86 others v Ann Merz*, CA No 295 of 1998 this Court emphasized that it is the notice of appeal, which initiates an appeal. Indeed, in terms of Rule 59(1) of the Court of Appeal Rules, “...the notice of appeal shall institute the appeal.” Further, in *Safaricom Ltd v Ocean View Beach Hotel Ltd. & 3 others*, CA No 325 of 2009, Omollo, JA observed that where there is no appeal or intention to appeal as manifested by a lodged notice of appeal, the Court has no basis for meddling in the decision of the High Court.”

10. In this present case, despite the appellant alleging that there was a Notice of Appeal on record, our perusal of the documents lodged before us reveals that no Notice of Appeal was lodged. In fact, the applicant alleged that he had filed a Notice of Appeal with respect to Criminal Appeals No 31A, 31B and 31C. The effect then would be that no Notice of Appeal was ever filed in respect to Criminal Application No 21 of 2020. Even so, we have no doubt that there is no Notice of Appeal on record in respect to any of the decisions mentioned by the applicants in their application. If there was any, the applicants would have tendered it as part of the exhibits in this case but this is not the case. This Court therefore lacks the basis upon which it can hold that indeed its jurisdiction has been properly invoked.
11. Having said that, we wish to point out, and we have already alluded to this, that even where leave to appeal is required, a Notice of Appeal would still be a requirement. That is the import of rule 61(4) of the *Rules* of this Court. This therefore means that our interrogation as to whether leave was sought can only be entertained once we are satisfied that there is a Notice of Appeal on record. There is no Notice of Appeal on record and we therefore do not have jurisdiction to proceed beyond this point. Before we conclude, we wish to observe in passing that the applicants have opted to pursue an application seeking an interpretation of the decision of the High Court. The application is not traceable to any particular provision of the *Rules* of this Court and they should have instead pursued a substantive appeal. In the circumstances, even if the applicants had a proper Notice of Appeal on record, their application would still have been destined for failure.
12. For the reasons stated above, we find that this court lacks jurisdiction to hear and determine the instant application. In so far as we are concerned, there is no appeal before this Court. That being so, the Notice of Motion dated October 24, 2022 is hereby dismissed.

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

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

