



**Mucheru & another v Republic (Criminal Appeal (Application)
99 of 2021) [2023] KECA 623 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 623 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL (APPLICATION) 99 OF 2021**

S OLE KANTAI, JA

MAY 26, 2023

BETWEEN

JANE MUTHONI MUCHERU 1ST APPLICANT

ISAACK NG'NG'A WAMBUI ALIAS GIKUYU 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal from a Judgment on conviction and sentence of the High Court of Kenya at Nakuru (Joel Ngugi, J.) dated 22nd April, 2021 and 3rd June, 2021 in HC. CR.C. No. 45 of 2018)

RULING

1. The applicants, Jane Muthoni Mucheru (the 1st applicant) and Isaack Nganga Wambui alias Gikuyu (the 2nd applicant) pray in the Motion on Notice brought under Section 3, 3A of the [Appellate Jurisdiction Act](#), Rules 4, 41, 42 and 47 of the [Court of Appeal Rules 2010](#) (since replaced by the Court of Appeal Rules 2022) in the main that time for filing and serving the 1st applicant's Notice of Appeal be extended; that Notice of Appeal and Memorandum of Appeal filed by the 1st Applicant be deemed as duly filed; that the 1st and 2nd Applicants' appeal be heard and determined together and that the Court make such other orders, directions or reliefs as it may deem fit and expedient. In grounds in support of the Motion and in a supporting affidavit of the 1st Applicant it is said amongst other things that the applicants were convicted for the offence of murder under Section 203 as read with Section 204 of the [Penal Code](#) by Joel Ngugi, J (as he then was) in a Judgment delivered on April 22, 2021 and sentenced to serve 30 years imprisonment in a ruling on sentencing delivered on June 3, 2021; that the applicants were represented by the same lawyer during trial but that immediately after the ruling on sentencing only the 2nd applicant retained counsel as the 1st applicant had terminated the services of the lawyer; the 2nd applicant filed a Notice of Appeal on June 14, 2021 but the 1st applicant, who was unrepresented



did not challenge the appeal on time as required by The Court of Appeal Rules and that it was not until February 14, 2022 that the 1st applicant engaged the services of a new lawyer on pro bono basis who found that Notice of Appeal lodged late by the 1st applicant had led to the Court Registry assigning a Criminal Appeal No 99 of 2021. Further, that for the 2nd applicant he had terminated his relationship with his previous lawyer and that despite lodging a Notice of Appeal no record of appeal had been prepared by the Registrar of the High Court from where the proceedings had originated; that the applicants would like their appeals, if granted leave to file out of time, to be heard together for they arose out of the same Judgment on conviction and sentence; that the applicants believe that they have an arguable appeal with high chances of success and that no party will be prejudiced if the application is allowed.

2. I have not seen any replying affidavit from the respondent in this matter who was served by our Registrar with a Hearing Notice on April 25, 2023 at 7.44 am.
3. I have had the benefit of perusing written submissions and list of authorities filed for the applicants by their lawyers M/S Mohammed Muigai LLP. They cite in support of the application on the principles to be applied in an application of this nature this Court's decision in the case of [*Stanley Kaboro Mwangi & 2 Others v Kanyamwi Trading Company Limited*\[2015\] eKLR](#) where this Court stated:

' The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.'

The applicants also cite the oft-cited case of [*Fakir Mohammed v Joseph Mugambi & 2 Others Civil Application No Nai 332 of 2004*](#) where it was held that the Court has unfettered jurisdiction in exercising its discretion under rule 4 of the Court of Appeal Rules.

4. I have considered the application and what has been said in the same, the affidavit in support of the Motion and written submissions by the applicants.
5. The applicants were convicted for the offence of murder on April 22, 2021. They were sentenced to imprisonment on June 3, 2021. I have seen a Notice of Appeal lodged on June 14, 2021 by the law firm of FN Njanja & Company Advocates for the 2nd applicant which states that those advocates were retained only for purposes of filing Notice of Appeal. There is also an undated Notice of Appeal by the 1st applicant and I have seen Memorandum of Appeal drawn for the applicants by their new lawyers Mohammed Muigai LLP. The applicant's say that they were represented at the trial by a lawyer but that they terminated his services immediately after ruling on sentencing was delivered. That lawyer lodged a Notice of Appeal for the 2nd applicant but did not lodge one for the 1st applicant probably due to lack of instructions to do so. The 2nd applicant lodged Notice of Appeal within time. The 1st applicant filed an undated Notice of Appeal but this was done out of time.
6. I have seen Memorandum of Appeal where the applicants have set out grounds of appeal challenging the Judgment of the High Court. The grounds raised are not idle grounds, they are arguable. The respondent has not responded to the application and I cannot see any prejudice that the respondent could suffer if I allow the application. There is no inordinate delay in bringing the application and I note that the applicants are now represented by a new lawyer on pro bono basis.



7. The applicants have satisfied the principles that apply in an application of this nature. I allow the application for extension of time. Let the 1st applicant file Notice of Appeal within 14 days of today and Memorandum of Appeal within 14 days thereafter. The applicants may at the appropriate time apply to Court for their appeals to be heard together.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 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

