Mungatu v Republic (Criminal Application E009 of 2023)
[2023] KECA 671 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 671 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPLICATION E009 OF 2023

PM GACHOKA, JA

JUNE 9, 2023

BETWEEN

JESCAH KALUMU MUNGATU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(An application for extension of time to file an appeal from the judgment of the High Court of Kenya at Nairobi (Ogembo, J) dated 2nd February 2022 in HC. CR. Case No. E042 of 2020)

RULING

1. In an undated application by way of Notice of Motion, forwarded by Lang'ata Women Maximum Prison on September 21, 2022, the applicant is seeking orders: that she be granted leave to appeal out of time; for the Court to fix a close hearing date for the determination of the matter in the interest of justice; and that the costs of the application be waived as she is in legal custody and without financial means.

2. There are no grounds set out in the application but it is supported by an undated affidavit which has the thumbprint of the applicant. In the affidavit, it is deponed: that she entered into a plea agreement in Criminal Case No E042 of 2020, High Court Milimani, and was subsequently sentenced to serve 15 years imprisonment for the offence of murder; that she did not have an advocate at the time of the plea agreement; and that she has been processing trial proceedings in vain which has caused the delay and as a result, she could not file the appeal within the stipulated timelines.

3. The applicant filed written submissions dated April 27, 2023, in support of the intended appeal and not the application. Upon noticing the mistake, she filed further submissions dated May 20, 2023 in support of the application. The submissions reiterate the averments in the supporting affidavit to wit: that she did not have an advocate to assist her; that she has not received the proceedings to enable her

to appeal; that even up to now, she does not have the proceedings; and that the intended appeal has a high chance of success.

4. The respondent in opposition to the application has filed written submissions dated May 26, 2023 which can be summarized as follows: that the delay of 14 months is unreasonable and there is no evidence that the applicant made any attempts to obtain the proceedings; that there is no evidence that the applicant sought for an advocate from the state after her advocate withdrew from acting for her; that criminal appeals are filed at no costs and therefore, her claim that she is a pauper and thus unable to file the appeal is not plausible; that the intended appeal has no chance of success; and that the sentence was passed after a plea agreement and the learned Judge had the discretion to impose the 15-year sentence after considering the mitigation.

5. I have carefully read and considered the application, the affidavit in support, and the rival submissions. They all expound on the question of whether I should exercise my discretion and allow the applicant to appeal out of time.

6. The principles applicable in an application for extension of time under rule 4 of the *Court of Appeal Rules* have been the subject of many decisions of this Court. In *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR Ouko J (as he then was) stated as follows:

> "Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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 considering the last principle, it must be borne in mind that it is not the role of the 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. The Supreme Court of Kenya pronounced itself in the question of extension of time in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, and stated as follows:

> "the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

8. I have anxiously considered the application because the applicant is acting in person and filing this application while in prison. It is common ground that the application was filed 14 months after the delivery of the judgment. The applicant's position is that the advocate who was acting for her withdrew her services and the family could not afford to hire a new advocate.

9. The respondent states as follows in answer to that issue:

> "...applicant having been in custody during her trial and having been incarcerated for all this while, must have had knowledge of criminal procedures especially by prisoners. It would not have been difficult for her to enquire about appeals by paupers in prison and follow the said procedure for lodging an appeal and requesting for the fees to be waived, if any."

10. With respect, I am not persuaded by the argument by the respondent, as it is speculative of what ought to happen to an applicant who is in custody. The delay of 14 months is undoubtedly long but each case has to be determined by its circumstances. Before me is an unrepresented applicant who is serving a 15-year sentence and she pleads that she has not been afforded the necessary facilities in prison to enable her to obtain the proceedings from the High Court. It would be draconian to apply the same standard as the Court would to a free person with the ability to visit or write to the High Court for proceedings. The respondent is the state. If there was a submission and a demonstration that indeed prisoners are afforded facilities to file appeals when in custody, I would have agreed with the respondent that the delay is inordinate. In the absence of such, the Court cannot on its' motion decide whether the applicant was indolent or not. On this ground alone, I will excuse the delay of 14 months.

11. The other ground raised by the respondent in opposing the application is that the intended appeal has no chance of success. Section 361 (1) of the *Criminal Procedure Code* states that an appeal against the decision of the High Court to the Court of Appeal shall be based on a matter of law only and severity of sentence is a matter of fact. At this stage, I will reject the temptation to interrogate whether the applicant intends to appeal the severity or legality of the sentence and leave it to the bench that will hear and determine the appeal.

12. In the circumstances, although there is a delay of 14 months, and considering that the applicant is in custody and the respondent will not suffer any prejudice, I find the scales of justice tilt in favour of the applicant. I am inclined to allow the applicant to go to the altar of justice but what will be served will depend on the merit of her intended appeal.

13. In conclusion, I allow the application for the extension of time.

    The applicant should file a notice of appeal within the next 14 days and the memorandum of appeal within 30 days thereafter. The other prayer that the appeal be heard on a priority basis is premature at this stage.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2023.

M. GACHOKA - CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR