



**Njoroge v Republic (Criminal Application E014 of 2023)  
[2023] KECA 672 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 672 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION E014 OF 2023  
PM GACHOKA, JA  
JUNE 9, 2023**

**BETWEEN**

**HARRISON KAMAU NJOROGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An application for extension of time and setting aside a ruling dated 20th March 2023 from the judgment of the High Court of Kenya at Nairobi (J. M. Bwonwong'a, J.) dated 15th March 2023 in HC. CR. Case No. 113 of 2013)*

**RULING**

1. Before me is an application by way of Notice of Motion dated April 4, 2023 expressed to be brought under Articles 1(1), 159, and 164 (3) of the Constitution of Kenya, Section 3 of the Appellate Jurisdiction Act, rule 1(2) of the Court of the Appeal Rules and all the enabling provisions of the law. The applicant seeks the following prayers:
  - (a) Spent
  - (b) That the ruling of the High Court, Criminal Division – Milimani in Criminal Case No 113 of 2013 delivered on the March 20, 2023, in which the court declined the applicant the right to appeal to this court the judgment dated March 15, 2023 be set aside.
  - (c) That the applicant herein be allowed to lodge an appeal to this Honourable Court against the judgment dated March 15, 2023.



- (d) That upon the granting of prayers 3 above that this Honourable Court be pleased to extend the time within which the accused person is to lodge his intended appeal against the judgment dated March 15, 2023 to this Court.
2. The application is premised on the grounds set out in the application and in the supporting affidavit of Harrison Kamau Njoroge dated April 4, 2023. The grounds which are rehashed in the supporting affidavit can be summarized as follows: that the denial of leave to appeal after the applicant was found guilty but insane is a denial of his constitutional rights to access to justice; that the right of appeal on conviction under Section 166(1) of the Criminal Procedure rule is not expressly restricted by statute; and that the respondent will not suffer any prejudice if the application is allowed.
  3. The respondent has not filed a replying affidavit but opposes the application in its written submissions dated May 24, 2023.
  4. In his written submissions, the applicant reiterates the grounds in the application and the supporting affidavit and I take the liberty to summarize them as follows: that the High Court has declared Section 166 of the Criminal Procedure Code unconstitutional to the extent that it takes away the Court's jurisdiction to determine the nature of the sentence to be meted out; that the right of appeal on a conviction under Section 166(1) of the Criminal Procedure Code has not been expressly restricted by the statute; that the denial to lodge an appeal is a breach of the applicant's constitutional right to access justice; and that the applicant has a right to lodge an appeal to the Court of Appeal.
  5. The applicant has cited the case of JCS vs Republic [2016] eKLR and Republic vs Jeffrey Okuri Pepela & 24 others [2018] eKLR which I have read and considered.
  6. The respondent's submissions can be summarized as follows: that Section 166(1) of the Criminal Procedure Code has not been declared unconstitutional; that the presidential order of detention of a person under Section 166(2) of the Criminal Procedure Code is a detention of safe custody on preventive measure thus it is a form of a sentence within Section 379 of the Criminal Procedure Code and that the Court should allow the application to the extent only that the applicant be granted leave to lodge an appeal.
  7. I have carefully read and considered the application, the affidavit, and the rival submissions. At the outset, I wish to point out that prayer 2 seeking the setting aside of the ruling dated March 20, 2023 in which the High Court declined to grant the applicant the right to appeal is prematurely sought. It is not a prayer that can be argued and order granted before a single Judge as per the Court of Appeal Rules. Indeed, this is the main issue that will be heard and determined in the appeal if I extend the time as per prayer 4. This also applies to prayer 3 in which the applicant prays that he be allowed to appeal against the judgment dated March 15, 2023 as the question that will be argued in the appeal, if I extend time is whether the trial Judge was right in declining to grant the applicant leave to appeal.
  8. The applicant has not invoked rule 4 of the Court of Appeal Rules which grants the Court the discretion to extend the time. In spite of this glaring omission and in the interest of justice, the Court will consider the prayer for the extension of time on the basis of the principles that have been laid down in many decisions of this Court. In Fakir Mohamed vs Joseph Mugambi & 2 others [2005] eKLR, Waki J expressed himself as follows:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding



if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors.”

9. In the present case, it is common ground that the applicant after the trial was found guilty but insane in accordance with section 166 of the *Criminal Procedure Code* in the judgment dated March 15, 2023. The learned Judge (JM Bwonwong’a, J) made an order as follows:

“It is only those who are convicted of an offence that are allowed to appeal to a higher court in terms of article 50(2) (q) of the 2010 *Constitution* of Kenya. And even then the appeal has to follow the prescribed law.

Furthermore, under Section 379 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, it is only those who have been convicted by the High Court in its trial capacity, that have a right of appeal to the Court of Appeal.

The accused person is not a convicted person. Therefore, he has no right of appeal. He was only found guilty of murder but insane under Section 166 *Criminal Procedure Code*.

There is no right of appeal against the order of this court that found the guilty of murder but insane. (sic) And I therefore do not agree with the prosecutor (Ms Dela) and Mr Amutallah for the accused that the accused has a right of appeal.

I therefore reject the application of the accused to appeal to Court of Appeal.”

10. As already noted, whether the learned Judge was right or wrong in denying the applicant leave to appeal will be the subject of the intended appeal. At this stage, I am only required to consider whether the applicant has satisfied the principles for extension of time and whether I should exercise discretion in his favour. It is important to note that the applicant lodged a notice of appeal against the ruling dated March 20, 2023, two days later, that is on March 22, 2023. Clearly, the applicant moved with speed and without any delay. The only barrier to filing the appeal is the denial of leave to appeal by the trial Judge.
11. The respondent, in its submissions, concedes that the intended appeal raises a serious constitutional issue and it is not opposed to the extension of time.
12. Each application has to be considered in its own circumstances as facts and issues of law are never the same. In the present case, there is no delay in the filing of the intended appeal but there is a clear legal barrier that prevents the applicant from continuing with his journey in the path of justice. Whether that barrier to wit; whether an appeal lies under Section 166 of the *Criminal Procedure Code* and indeed whether the applicant is a convict are issues that should be interrogated by the bench that will hear and determine the intended appeal.
13. In view of the foregoing, I am persuaded that the applicant has satisfied the conditions for the extension of time to file an appeal out of time. Accordingly, I order that the applicant shall file and serve the memorandum of appeal within the next 30 days. Orders accordingly.

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

**M. GACHOKA - CI Arb, FCI Arb**

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**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

