



**Mohamed v Republic (Criminal Appeal (Application)
24 of 2022) [2023] KECA 830 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 830 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL (APPLICATION) 24 OF 2022**

S OLE KANTAI, JA

JULY 7, 2023

BETWEEN

ABDULLAHI OSMAN MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Nairobi
(Kimaru, J.) dated 23rd July, 2019 in HC. Misc. Case No. 124 of 2018)*

RULING

1. The applicant, Abdullahi Osman Mohamed, was charged with the offence of murder and was convicted and sentenced to suffer death in a judgment delivered on August 20, 2007. He filed criminal appeal No 37 of 2004 in this court which was dismissed in a judgment delivered on December 9, 2011. In view of the holdings in the judgment of the Supreme Court of Kenya in the case of [*Francis Karioko Muruatetu & another v Republic*](#) [2017] eKLR
 1. the applicant applied for resentencing by the High Court in High Court (at Nairobi) criminal revision No 124 of 2018. That review application was heard by Kimaru, J. (as he then was) who in a ruling delivered on July 23, 2019 found no merit in it and dismissed it. The applicant is now before me in a Motion said to be brought under articles 50(2) (q) and 164 (3) of the [*Constitution*](#), section 379(1)
 2.
 - (b) of the [*Criminal Procedure Code*](#) and section 7 of the [*Appellate Jurisdiction Act*](#) where he prays that he be granted leave to appeal against the sentence and that the proposed appeal already filed in this court be deemed as properly filed. In grounds in support of the motion and in a supporting affidavit of his lawyer Wilson Hassan Nandwa it is said amongst other things that the applicant is held in custody at Naivasha Maximum



Prison where he is suffering; that he is dissatisfied with the ruling of the High Court on resentencing; that he intends to appeal which appeal has high chances of success; that an appeal had been filed erroneously without leave which was an oversight on the part of his lawyer; that the proposed appeal is of great public interest in case law and development of jurisprudence and the respondent will not suffer prejudice if I grant leave to appeal out of time.

2. I have seen a document called “grounds of opposition” filed by the respondent but will not consider it as we have informed that office repeatedly that the [Court of Appeal Rules](#) have no provision for such a document.

I have seen and considered written submissions filed by both sides in support or opposition to the application.

I have also seen memorandum of appeal and record of appeal filed for the applicant out of time by his lawyer Prof Hassan Nandwa. It is proposed to be argued on appeal that the judge at the High Court erred in law in rejecting the applicant’s mitigation; that the judge erred in law and fact in upholding the sentence “... which was solely based on deterrent principle and neglecting the principle of rehabilitation of the convict”, and that the judge erred in law and fact by failing to find that death penalty was manifestly harsh and excessive.

The principles that apply in an application of this nature are old hat. They have been summarized in such cases as [Joseph Waswa Nyongesa v Republic](#) [2021] eKLR where it was stated by the single judge who was considering an application for extension of time:

“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 as long as it deems the terms thereof as just.

In considering an application for extension of time, several key issues are to be considered as was pointed out in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Supreme Court application No 16 of 2014[2014] eKLR, and I take cognisance 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 reason for the delay. In addition, 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 respondents if the extension is granted”

3. I started this ruling by re-tracing the history of the matter where the applicant was convicted and sentenced in the year 2007. His appeal to this court was dismissed in December, 2011. He applied for a review of the sentence and the High Court in a considered ruling dismissed the application on July 23, 2019. I am not told in the motion before me why an appeal was not filed within time as required by our rules. I am not told whether there was any difficulty in filing an appeal. No basis has been laid to equip me in exercising a
4. discretion in favour of the applicant and my consideration of the proposed appeal does not satisfy me that the same would have a chance of succeeding where this court has pronounced itself in a judgment and the High Court has considered all relevant factors in dismissing the application for review of the



sentence. All in all I am of the considered view that the applicant has not met the principles that apply in an application of this nature and I dismiss the motion dated March 30, 2023. I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 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

