



REPUBLIC OF KENYA



**Ndwiga v Republic (Criminal Appeal (Application) E281 of 2022)  
[2023] KECA 1410 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1410 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL (APPLICATION) E281 OF 2022  
JM NGUGI, JA  
NOVEMBER 24, 2023**

**BETWEEN**

**PETER NJERU NDWIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for leave to file an appeal out of time from the Judgment of the High Court of Kenya at Siaya (Cherere, J.) dated 18th April, 2018 in HCCRA No. 56 of 2016)*

**RULING**

1. The application before the Court is dated October 25, 2022. The main prayer is for leave to be granted to the applicant to appeal out of time against the judgment issued in High Court Appeal No 56 of 2016 on April 18, 2018.
2. The appeal in the High Court had arisen from a conviction and death sentence imposed on the applicant by the Magistrate's Court in Siaya for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The date of the original conviction and sentence is May 19, 2016.
3. The applicant's appeal to the High Court was dismissed on both conviction and sentence. The applicant failed to lodge his notice of appeal within the statutory-stipulated time of fourteen (14) days. His present appeal invokes rule 4 of the *Court of Appeal Rules* to enlarge the time he is permitted to file his appeal.
4. The application is opposed. The respondent filed written submissions in opposition.



5. Rule 4 of the *Court of Appeal Rules* governs the extension of time. The rule allows this Court to exercise discretion to extend the time limited by the *Rules* for the doing of any act authorised or required by the Rules. In *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA, this Court held as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

6. The applicant proffers two reasons for the delay in filing the notice of appeal. First, he says that he had no lawyer or finances to hire one. His family, he says, were incapable of helping him as they were also indigent and that it has taken the family this long to fundraise for a lawyer. Second, he says that he requested for, but never received the judgment and proceedings from the High Court. Being a layman, he says, he needed the documents to craft a notice of appeal.

7. The respondent argues that the delay is inordinate and that the applicant has not sufficiently explained it. Mr Okango, learned state counsel, impugns the ostensible excuse of lack of finances to instruct counsel as disingenuous because, he says, the court assigns pro bono lawyers for these sorts of cases.

8. It is true that four years is an awfully long delay. The first explanation given – that the applicant lacked finances to hire a lawyer – is objectively unpersuasive. Countless inmates file notices of appeal using forms freely supplied by the Prison’s Department’s Documentation and Welfare Unit. It would, perhaps, have been more persuasive if the delay was in filing the appeal.

9. However, the second explanation – that the applicant was never supplied with the High Court judgment or proceedings and that this incapacitated him – is a plausible one. It needed to be falsified by affidavit or other evidence to contest the applicant’s narrative that he was never given those crucial documents. As things stand, the respondent placed no material before the court to contest the applicant’s version. In the circumstances, considering the nature of the sentence the applicant is serving – death penalty – I would give the benefit of doubt to the applicant. Besides, I see no serious prejudice that would be suffered by the respondent if the application is granted. For this reason, I am moved to deploy the court’s discretion to allow the application dated October 25, 2022.

10. Consequently, the applicant is directed to file and serve a notice of appeal within seven days hereof. The record of appeal shall be filed and served within 30 days hereof and the appeal thereafter placed before the court for hearing.

11. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

