



REPUBLIC OF KENYA



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**Mwanjahi v Republic (Miscellaneous Criminal Application
E072 of 2021) [2022] KECA 167 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 167 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E072 OF 2021
P NYAMWEYA, JA
FEBRUARY 18, 2022**

BETWEEN

SOSPETER MWAMACHI MWANJAHU APPLICANT

AND

REPUBLIC RESPONDENT

(An application for extension of time to lodge a Notice of Appeal and file appeal out of time against the judgement of the High Court of Kenya at Mombasa (Majanja J.) delivered on 7th September 2018 in Mombasa Criminal Appeal no 102 of 2017 arising from the original conviction and sentence passed by the Senior Resident Magistrate Court, Shanzu in Criminal Case no. 1234 of 2015)

RULING

1. The application before this Court is a Notice of Motion dated 15th October 2021, brought by Sospeter Mwamachi Mwanjahi, the Applicant herein. The Applicant prays that the Court extends time to file and/ or lodge a Notice of Appeal and file the Appeal against the judgment of the High Court of Kenya, Mombasa in High Court Criminal Appeal No. 102 of 2017, and that further orders be granted as may be just and fit to grant in the circumstances.
2. The application is supported by two affidavits sworn on 27th September 2021 and 18th October 2021 by the Applicant, and a supporting affidavit by Oscar Mwamachi Mwanjewe, the Applicant's father, sworn on 27th September 2021. The grounds upon which the application is based are that upon one Mr. Jornah Mwaura Kabane who represented the Applicant in the High Court had assured the Applicant that he would lodge the documents in the Court of Appeal and the Applicant had duly signed the necessary pleadings. After a delay in doing so, and upon inquiry by his father, the Applicant was informed that the said Mr. Jornah Mwaura Kabane had died and further to that, he was not an advocate and had not filed any documents in Court. He averred that the delay in filing the appeal was caused by



the misrepresentation, misconduct and deceit of the said alleged advocate, and that it is in the interests of justice that he is permitted and granted leave to file a Notice of Appeal.

3. The Applicant annexed a draft memorandum of appeal; copies of the judgments delivered by the Magistrate's Court (hereinafter the "trial Court") on 17th May 2017 and by the High Court on 7th September 2018; and the burial permit and funeral programme for Mr. Jornah Mwaura Kabane. The Applicant also annexed a copy of the letter from the Law Society of Kenya to the effect that Mr. Jornah Mwaura Kabane was not an advocate to his supplementary affidavit dated 18th October 2021.
4. These facts were reiterated in the affidavit sworn by the Applicant's father, who in addition stated that Mr. Jornah Mwaura Kabane had been introduced to him as a criminal lawyer, and he had instructed him on behalf of the Applicant to lodge the appeal in this Court. He also confirmed that he attended the burial ceremony of Mr. Jornah Mwaura Kabane in Muranga. The Applicant's counsel likewise detailed the above facts in his submissions dated 12th November 2021, and urged the Court to allow the motion since he had an arguable case as demonstrated in the memorandum of appeal with a high chances of success and should be afforded a chance to access justice.
5. The hearing of the application was held on 15th December 2021, and Mr. Asige, the learned counsel for the Applicant, relied on the affidavits and submissions filed. Ms. Kambaga, learned counsel for the Respondent did not oppose the application, and stated that the Respondent did not file any pleadings or submissions in response thereto.
6. A brief background of the events giving rise to the application is that the Applicant was charged with, and convicted of the offence of defilement and sentenced to serve life imprisonment by the trial Court. On appeal to the High Court, the said conviction and sentence were upheld, with the result that the Applicant is currently serving his sentence at Shimo La Tewa prison. It is in this regard not in dispute that the judgement of the High Court intended to be appealed from was delivered on 7th September 2018. Rule 59(1) of the Court of Appeal Rules requires any person who desires to file a criminal appeal to this Court to give notice in writing, which shall be lodged with the registrar of the superior court at the place where the decision being appealed against was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal. Rule 59(9) also requires that two copies of the said notice are lodged with the Registry of this Court within twenty days of the decision being appealed against.
7. The power to extend time to file the Notice of Appeal is provided in Rule 4 of the Court of Appeal Rules, and under Rule 53(1) of the Rules, this power may be exercised by a single Judge of this Court. While the Court has wide unfettered discretion in this regard, it should act judiciously and according to the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, (1999) 2 EA 231* where the court stated;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

8. The Applicant has given a given a detailed account of the events leading to the delay in the filing of his appeal in this Court and provided the supporting evidence, which is not disputed by the Respondent. Even though there has been considerable delay since 21st September 2018, which was the last day of



lodging the Notice of Appeal, the Applicant has provided credible and justifiable reasons for the delay, and it is therefore not inordinate.

9. A perusal of the draft memorandum of appeal annexed by the Applicant demonstrates that there are legal issues raised as regards the High Court's findings having not been supported by any evidence, and of a defective charge sheet. In addition, the Respondent does not oppose the application and has not indicated that it will suffer any prejudice if the application is allowed.
10. I therefore find that arising from the above stated factors, the Applicant merits the exercise of this Court's discretion in its favour. I accordingly allow the Applicant's application by way of the Notice of Motion dated 15th October 2021 to the extent of the following orders:
 1. The Applicant herein is granted leave to file and serve a notice of appeal and memorandum of appeal within 21 days of the date of this ruling.
 2. There shall be no order as regards the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

