



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbiuki v Republic (Criminal Appeal 186 of 1986)  
[2022] KECA 432 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 432 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 186 OF 1986  
KI LAIBUTA, MSA MAKHANDIA & S OLE KANTAI, JJA  
MARCH 4, 2022**

**BETWEEN**

**WILFRED MBIUKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application to set aside the orders of the Court of Appeal dated 8th June 1988 dismissing the applicants appeal in Criminal Case No. 186 of 1986 in the Court Appeal at Nairobi (J.O. Nyarangi, F.K Apaloo & J. R. O. Masime, JJ.A)*

**RULING**

1. The applicant herein, Wilfred Mbiuki, and one Simon Kipsang Yator were charged with the offence of stealing by persons employed in the public service contrary to Section 280 of the Penal Code. The particulars thereof were that on 11<sup>th</sup> January 1985 in Nairobi, being persons employed in public service as a police inspector and police constable respectively in the Kenya police jointly stole 239gms of gold valued at Kshs. 34,000/=, the property of Daniel Kokwo, and which came to their possession by virtue of their employment. Apparently, the applicant and Daniel Kipsang Yator stopped the two complainants in the case, who were gold prospectors outside a gold smith shop in Nairobi. The complainants had come to Nairobi looking for a better market for their gold. The applicant and his co accused threatened them, saying that they were police officers and that they had guns in their pockets underneath their jackets, and that they were to arrest them and take them to a police station. However, the applicant suggested that the gold could be sold and its proceeds shared between the complainants, the applicant and his cohort. After passing a few shops they found a goldsmith shop that agreed to pay Kshs. 150 per gram. David Kipsang Yator took the gold inside the shop leaving the complainants in the company of the applicant outside. Shortly thereafter, Yator came out and said that the shop owner had sent his son to the bank to get the money, and that he would pay for the gold later. The two complainants were left in a hotel and the applicant and his co-accused disappeared. However, the



duo were later arrested and charged as aforesaid. The two denied the charge against them. Following a full trial, they were found guilty of the offence, convicted and sentenced to 5 years' imprisonment each on 1<sup>st</sup> of October 1985. Being aggrieved by their conviction and sentence, the applicants filed an appeal in the High court of Kenya at Nairobi on 15<sup>th</sup> of October 1985. Upon hearing the appeal, the High Court was satisfied that the applicants were properly convicted and dismissed both appeals on conviction. However, the High Court allowed the appeal from the sentence and reduced the term to 2 years imprisonment each on 30<sup>th</sup> April 1986.

2. Dissatisfied by the High Court decision, the applicants lodged a second appeal to this court. The appeal was subsequently dismissed on account of want of attendance by the applicant on the day it was scheduled for plenary hearing under Rule 70 of the Rules of this Court on 8<sup>th</sup> June 1988.
3. The applicant filed the instant application on 21<sup>st</sup> of September 2021 seeking to revive and or restore the appeal that was dismissed as aforesaid for hearing on the grounds that he was never notified to attend court for hearing of the appeal. The applicant further avers that if any notice was issued to attend court, he had not received it to date. It was averred further that the delay in making the application was caused by the fact that he was a man of straw. He therefore prayed that the application be allowed.
4. In response, Ms. Matiru, learned prosecution counsel apart from pointing out that there had been inordinate delay in the filing and prosecution of the application, nonetheless opted to leave its fate to us.
5. Having carefully considered the application, the affidavit in support of the respondent's position as well as the law, we take the following view.
6. Under the proviso to Rule 71 of the *Court of Appeal Rules* the appellant whose appeal has been dismissed pursuant to the Rule may have it restored for hearing if he satisfies the Court as to why he was unable to attend court when the appeal was called out for hearing. It is couched inter alia "provided that where an appeal has been dismissed under this sub-rule, the court may restore it for hearing if it is satisfied that the appellant was prevented by any sufficient cause from appearing when the appeal was called for hearing." The applicant alleges that he was prevented from attending court for the hearing of the appeal because he was unaware of the hearing date. We are not persuaded by this reason. It has been 33 years since the appeal was dismissed by this court on account of non-appearance of the applicant. We also note that the applicant is a former police officer, and we do not believe that it could have taken him 33 years to find out the fate of his appeal whether or not he was a man of straw. As a former police officer, one would expect more diligence from him. It cannot be said that it could have taken the applicant 33 years to write a letter to this court regarding the fate of his appeal which elicited the response that the appeal had been dismissed, his limited resources notwithstanding. We think that the applicant is being less than candid in his grounds and affidavit in support of the application. This Court cannot act in favour of the applicant on the basis of deliberate falsehoods.
7. Tied to this is the delay in mounting the instant application. Although there is no precise measure of what amounts to inordinate delay, nevertheless, inordinate delay, should not be difficult to ascertain once it occurs, the litmus test being that it should be such that it leads the court to an inescapable conclusion that it is inordinate and, therefore, inexcusable. It should be one which is beyond acceptable limits in the prosecution of cases. See the case of *Allen vs. Alfred Mcalphine & Sons [1968] 1 All ER 543*: There is no doubt at all that the applicant has delayed in the mounting of the instant application, even though he has been deliberately evasive on the exact date when he received the letter from this Court. This is yet one reason why this application should not see the light of day.



8. It is also our considered view that it would not foster the cause of justice for such a matter to be reinstated 33 years after its dismissal. The upshot is that the application is devoid of merit and is accordingly dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

