



**Director of Public Prosecutions v Nyaoke; Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 3 others (Interested Parties) (Miscellaneous Criminal Application E041 of 2021) [2022] KECA 833 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 833 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
MISCELLANEOUS CRIMINAL APPLICATION E041 OF 2021**

**M NGUGI, JA**

**MAY 13, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**AND**

**CHARLES HENRY NYAOKE ..... RESPONDENT**

**AND**

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION  
OF NATIONAL GOVERNMENT ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED  
PARTY**

**KENYA LAW REFORM COMMISSION ..... INTERESTED PARTY**

*(Being an application for leave to file an appeal out of time from the judgment of the High Court of Kenya at Kisumu (Lesiit, Kimaru & Kimondo, JJ) dated 27th November 2020 in Kisumu High Court Constitutional Petition No. 7 of 2020)*

**RULING**

1. In the application dated 26<sup>th</sup> February 2021, the applicant, the Director of Public Prosecutions (DPP), seeks leave to file an appeal out of time against the decision of the High Court dated 27<sup>th</sup> November 2020 in Petition No. 7 of 2018. The respondent and his co-petitioners, erroneously described in this appeal as ‘Interested Parties’, were charged with murder contrary to section 203 as read with section 204 of the Penal Code in High Court Criminal Case No. 13 of 2017 - Republic vs Stephen Walter Nyakwaka, Richard Nunda Nyaoke & 2 Others, Kisumu. They alleged in their Petition before the



- High Court that the initiation of murder trials at the High Court violates the Constitution and was discriminatory against them as they did not get an opportunity to file a second appeal in this Court.
2. Upon considering the respective arguments of the parties before it and making a historical analysis of the reasons why murder trials are initiated in the High Court, the trial court concluded that the fact that those charged with murder are still tried in the High Court is a historical accident without any legal justification or logic. Further, that it denied the petitioners and others charged with murder a vital step in the appellate chain. The trial court therefore directed the respondents to take all necessary steps, within 18 months of the decision, to align sections 3, 4 and 5 of the Criminal Procedure Code, subsidiary legislation, regulations and rules thereunder with the Constitution and in particular Articles 27, 48 and 50 thereof.
  3. The applicant states that it was dissatisfied with the decision and seeks to appeal against it out of time. Its application is premised on section 348(A) and 349 of the Criminal Procedure Code and is based on grounds set out in the application and in the affidavit in support sworn by one Victor Juma Owiti, a Prosecution Counsel with the applicant.
  4. The applicant states in these grounds that it did not file the appeal within 14 days as there was a need to consult and confer with various actors in the criminal justice system on the impact of the order of the superior court on the said system, and the best cause of action in response thereto. The applicant further argues that the intended appeal raises substantial questions of law as exhibited in the Draft Memorandum of Appeal annexed to its application. It is the applicant's case that its appeal is not only arguable but also raises important issues of fact and law with high chances of success.
  5. In the Draft Memorandum of Appeal, the applicant impugns the decision on the basis that the trial judges misdirected themselves in: failing to find that the Petition the basis of the impugned judgment was *res judicata*; allowing the Petition on the basis of a historical analysis which was not one of the grounds pleaded by any of the parties; allowing the Petition despite not agreeing with all the grounds on which it was founded; failing to consider relevant facts in reaching the impugned decision; and in taking into account irrelevant factors to reach the impugned decision.
  6. The applicant filed written submissions dated 23<sup>rd</sup> March 2022 which I have read and considered. There was no response or submissions from the respondent or the interested parties.
  7. Rule 4 of the Court of Appeal Rules gives this Court unfettered discretion to:  
... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act on such terms as it thinks just.
  8. The principles applicable in the exercise of the Court's discretion on an application under Rule 4 were set out in the case of *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA 231 in which the Court held that:  
“ the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”



9. In *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR this Court observed as follows with regard to the exercise of the discretion under Rule 4:

“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, 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.”

10. The decision that the applicant seeks leave to appeal against was rendered on 27<sup>th</sup> November 2020. The present application was filed in March 2021. The applicant submits that it had 14 days to file the Notice of Appeal, and readily concedes that it was three months late in so doing. The reason advanced for the delay is that the applicant is just one of the various actors in the criminal justice system. It therefore had to first consult with other stakeholders on the ramifications and impact of the decision before a decision was reached. It submits that the delay of three months, in the circumstances, is not inordinate.

11. I have considered this argument against the decision sought to be appealed against. The decision gave the applicant and the Interested Parties 18 months from 27<sup>th</sup> November 2020 to “take such steps as are necessary to align sections 3, 4 and 5 of the Criminal Procedure Code, and the subsidiary legislation, regulations and rules thereof to the Constitution, and in particular to Article 27, 48 and 50 thereof.”

12. In my view, noting the order given by the trial court and its implication on various actors in the criminal justice sector, it is a plausible explanation that the applicant took time to consult other stakeholders in the sector. Further, the matter raises issues of great public importance relating to which court should try cases such as murder and treason.

13. In the circumstances, I am satisfied that the application for leave to file an appeal out of time is merited. The applicant is granted 14 days from the date hereof to file its appeal.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MAY, 2022.**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

