



**Mwawughanga v Republic (Miscellaneous Criminal Application
3 of 2021) [2022] KECA 1428 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 1428 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION 3 OF 2021
A MBOGHOLI-MSAGHA, JA
JUNE 10, 2022**

BETWEEN

HERMAN MWERU MWAWUGHANGA APPLICANT

AND

REPUBLIC RESPONDENT

*(An application to file a Notice of Appeal and Memorandum of Appeal out of time from
the judgment of the High Court at Voi (Kamau, J.) In Voi HCCRA NO. 163 of 2014)*

RULING

1. The applicant/proposed appellant seeks orders granting him leave to file a notice of appeal and memorandum of appeal against the judgment in Criminal Appeal No 163 of 2014 in the High Court at Voi delivered on December 21, 2015; and orders that the proposed appellant be granted leave to file the said notice of appeal and memorandum of appeal out of time.
2. The grounds forming the basis for the application are as follows: The applicant was initially convicted by the Resident Magistrate's Court at Wundanyi in Criminal Case No 317 of 2013 for the offence of defilement contrary to section 8 (1) as read with section 8(2) of the [Sexual Offences Act](#) No 3 of 2006.
3. On December 21, 2015 the High Court at Voi in Criminal Appeal No 163 of 2014 upheld the decision of the lower court. The applicant immediately prepared a petition of appeal to the Court of Appeal through the documentation office at Manyani Maximum Prison which was delayed up to July 14, 2016, and subsequently erroneously filed in the High Court at Malindi instead of the Court of Appeal. From the lower court to the High Court, the applicant remained unrepresented and at no time was he ever informed of his right to legal representation.
4. During one of the visits by Hon Justice Reuben Nyakundi to the Manyani Maximum Prison, the applicant raised his predicament and was advised to file the petition/notice of appeal afresh, which he



did immediately through the documentation office at Manyani Maximum Prison but is yet to receive any feedback, hence the present application after securing legal representation on *pro-bono* basis.

5. If the applicant is denied the opportunity to appeal to the Court of Appeal against the decision of the High Court which confirmed the sentence of life imprisonment, it will amount to an affront and curtailment his fundamental freedoms and basic human rights, more so access to justice and he stands to suffer irreparably. The respondent did not file any response to the application.

6. Rule 4 of the [Court of Appeal Rules](#) provides that:

“The court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

7. The applicant is seeking extension of the time limited for the filing of the notice of appeal and memorandum of appeal as provided under rules 59 and 64 respectively. This court is guided by the principle enshrined in article 159 of the [Constitution](#) that justice shall be administered without undue regard to procedural technicalities. This court is also required to uphold the overriding objective of the [Appellate Jurisdiction Act](#) which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the [Act](#).

8. The approach of this court is, therefore, that of enabling an aggrieved party the opportunity to fully ventilate their grievances on appeal, in the absence of indolence or bad faith on the part of the aggrieved party. In applications for leave to appeal out of time, the considerations to be made are whether there has been any unreasonable delay in filing the application, that good cause has been shown for an extension of time, and whether the respondent will be prejudiced in any way. See, for example, [Zaidi Bin Sulaimani v R](#) [1958] 1 EA 65.

9. The record reveals that the applicant had from the outset been keen on lodging an appeal against the decision of the High Court to uphold his conviction and sentence, but his documents were not lodged timeously and were lodged in the wrong court. This was not of the applicant’s doing and was out of his control. It would therefore be in the interests of justice to allow the present application and give the applicant an opportunity for his intended appeal to be heard and determined by this court. The respondent, in any case, will not be prejudiced in any way should the applicant be granted leave to appeal out of time.

10. Accordingly, I allow the application and order that the notice of appeal shall be filed within 14 days from the date of this ruling, and thereafter the record of appeal be filed within 30 days of service of the said notice of appeal.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

A MBOGHOLI MSAGHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

