



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Omar (Criminal Application E001 of 2021)
[2022] KECA 987 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 987 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION E001 OF 2021
SG KAIRU, JA
SEPTEMBER 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

KULTHUM ABDILLAHI OMAR RESPONDENT

(An application for leave to file memorandum of appeal out of time against the judgment of the High Court of Kenya at Mombasa (Majanja, J.) delivered on 6th September 2018 in High Court Criminal Appeal No. 64 of 2015)

RULING

1. In its application dated 20th April 2022, the Republic, applicant, seeks an order that the Court be pleased to grant it leave to file its memorandum of appeal out of time against the judgment of the High Court (Majanja, J.) delivered on 6th September 2018.
2. During the hearing of the application before me on 10th May 2022, learned prosecution counsel Alex Gituma for the applicant/appellant relied entirely on the affidavit sworn by Alloys Kemo, Senior Assistant Director of Public Prosecutions in support of the application and on the applicant's written submissions and authorities.
3. The applicant's case is that following the dismissal of its appeal by the High Court on 6th September 2018, a notice of intended appeal was filed on 12th September 2018 and the record of appeal prepared and served on the Office of the Director of Prosecutions "on or about the year 2020"; that the file was allocated to prosecution counsel Muthomi M. Benson for preparation of a brief for Alloys Kemo's review, who, after the brief was done, realized that the memorandum of appeal appearing in the record of appeal was the one filed during the lodging of the appeal from the Magistrate's Court to the High Court thereby creating confusion; that the confusion was exacerbated by the fact that the appeal from the Magistrate's Court to the High Court was by way of a memorandum of appeal as opposed to by



way of petition of appeal; that the record of appeal as compiled is erroneous as the memorandum of appeal is not amongst the documents contemplated under Rule 62 of the Court of Appeal Rules; that the mistake should not be visited on the applicant; that due to Covid-19 pandemic and its aftermath leading to lock down and downsizing of staff in the applicant's office, the applicant was not able to file its memorandum of appeal within 14 days of service of the record of appeal and that it is in the interest of justice that it be allowed to file its memorandum of appeal.

4. In its written submissions dated 24th September 2021, the applicant reiterated the contents of the supporting affidavit. It was urged, on the strength of the case of *Itute Ngui & anor vs. Isumail Mwakavi Mwendwa* (1994) eKLR that the nature and quality of mistake made in this case has been disclosed and that grounds for extension of time are bona fide. Also cited, is the case of *Raila Odinga and 5 others vs. IEBC & 3 others* [2013] eKLR, amongst other decisions, for the argument that leave should be granted in the interest of substantive justice.
5. Opposing the application, learned counsel Mr. Mohamed Khatib for the respondent relied on the respondent's replying affidavit and written submissions dated 8th November 2021 in urging that there are no sufficient grounds for extending time for the filing of the memorandum of appeal; that the filing of the wrong memorandum of appeal is not an excusable mistake and is a move calculated to delay justice; that there is no reasonable cause why the memorandum of appeal was not filed in time. Citing the decision of the Court in *John Karan Mwenda vs. Japhet Bundi Chabari* [2021] eKLR for the principles applicable in applications for extension of time, it was submitted that there is inordinate delay in lodging the memorandum of appeal and this being a criminal case, the respondent stands to suffer great prejudice on account of continuous litigation if the application is allowed.
6. I have considered the application, the affidavits and the submissions by learned counsel. The principles on which the Court exercises its discretion under Rule 4 of the Court of Appeal Rules are settled. Waki, JA expressed those principles in *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR as follows:

“The exercise of this Court's discretion under Rule 4... 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, (possibly) 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: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina (No 4)* [1982] KLR 38.”

7. The Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR stated that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. The authorities cited by learned counsel before me are to the same effect.



8. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Each case must be considered on its own facts. In the judgment the subject of the applicant's appeal, the High Court dismissed the appellant's appeal from a judgment of the Magistrate's Court at Mombasa given on 15th May 2014 acquitting the respondent on charges of forgery. In dismissing that appeal, and in upholding the judgment of the Magistrate's court, the High Court concluded that there was insufficient evidence to sustain the charges against the respondent. It is not in dispute that following the delivery of that judgment on 6th September 2018, the applicant filed a notice of appeal on 12th September 2018 which was within the 14 days provided for filing of a notice of appeal under Rule 59 of the Court of Appeal, 2010. In accordance with that rule, the applicant's appeal was thereby instituted.
9. Under Rule 64 of the Court of Appeal Rules, 2010, the applicant was required to file a memorandum of appeal within fourteen days of service on him of the record of appeal. It did not do so. The explanation by the applicant that the omission to file a memorandum of appeal was occasioned by the inclusion, in the record of appeal, of the memorandum of appeal in respect of the appeal from the Magistrate's Court to the High Court appears to me, with respect, to be a flimsy excuse for failing to file the memorandum of appeal in accordance with Rule 64 of the Rules. I say so because under Rule 62 of the Rules, it was incumbent upon the registrar of the High Court (and not the applicant) to prepare the record of appeal to include the petition of appeal. The record of appeal transmitted by the High Court could not therefore include a memorandum of appeal that was yet to be prepared in respect of the second appeal, and for which it was incumbent upon the applicant to prepare.
10. Rule 64(5) of the Court of Appeal Rules, 2010 provided that if no memorandum of appeal is lodged within the prescribed time, the Court may dismiss the appeal or may direct that it be set down for hearing. Evidently, the applicant's appeal, being Criminal Appeal No. 50 of 2018 within which this application should have been filed, is still pending and although the respondent states that allowing the application for extension of time to file the memorandum of appeal will be prejudicial, it is not demonstrated how that will be so.
11. It is noteworthy, and instructive, that under Rule 65(1) of the *Court of Appeal Rules*, 2010, the appellant "may at any time" with the leave of the Court lodge a supplementary memorandum of appeal. I see the present application in the same light. Although the applicant has given a rather unsatisfactory and weak explanation for the omission to file its memorandum of appeal, I am, in the circumstances of this case where the substantive appeal, being Criminal Appeal No. 50 of 2018 is pending, and where no prejudice has been demonstrated, inclined to exercise the Court's discretion in favour of the applicant.
12. Consequently, the applicant is at liberty to file and serve its memorandum of appeal within 14 days from the date of delivery of this ruling. The appeal, being Criminal Appeal No. 50 of 2018, shall thereafter be fixed for case management before the Deputy Registrar with a view to fixing a hearing date for the appeal on basis of priority.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

