



REPUBLIC OF KENYA



KENYA LAW
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**Mwamuya v Republic (Criminal Application E020 of 2021)
[2022] KECA 1270 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1270 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E020 OF 2021
S OLE KANTAI, JA
NOVEMBER 18, 2022**

BETWEEN

GIFT JIRANI MWAMUYA APPLICANT

AND

REPUBLIC RESPONDENT

(An application for leave to appeal out of time against the Judgment of the High Court of Kenya at Machakos (Kemei, J.) dated 17th March, 2015 in HC. CR.A. No. 120 of 2012)

RULING

1. The applicant, Gift Jirani Mwamuya, in the Motion brought under articles 25 (c), 50 (2), 159 (2) of the *Constitution of Kenya, 2010*; section 349 of the *Criminal Procedure Code* and all other enabling provisions of law prays in the main that I be pleased to allow him to file an appeal out of time against the dismissal of his appeal at the High Court of Kenya, Machakos (HC Criminal Appeal No. 120 of 2012) delivered on March 17, 2015 where the appeal was not only dismissed but sentence was enhanced to life imprisonment. In grounds in support of the Motion and in his supporting affidavit he says inter alia that he failed to file an appeal within the required time because he was immediately incarcerated at Kamiti prison, then transferred to Naivasha prison and thereafter to Manyani prison and that he was unable to obtain copies of proceedings of the High Court and Judgment on time to enable him appeal; that he was unrepresented at the High Court (on first appeal) and his family were unable to get him legal representation until the lawyer who has filed this application was appointed when time for filing appeal had already run out; that the intended appeal has high chances of success and he will suffer injustice if not granted leave to appeal. He says at paragraphs 8 and 9 of the supporting affidavit:
 8. That no prejudice whatsoever or at all shall be visited upon the respondent if the orders sought herein are granted save that the correct position of the law and proper dispensation of justice shall be done once and for all.



9. That I am apprehensive that if the Court fails to grant me stay orders, my intended appeal shall be rendered nugatory.”
2. I have seen the draft Memorandum of Appeal where 9 grounds of appeal are set out. The appellant intends to argue on appeal (ground 8) that the High Court erred in law in altering sentence and enhancing it to life imprisonment; amongst other grounds.
3. Parties were served by the Registrar with a hearing notice on October 4, 2022 at 3.51 p.m. informing them of the hearing date and requiring them to file written submissions within time stated. I have seen and considered written submissions by the applicant but I have not seen any by the respondent.
4. The principles that apply in an application of this nature were well summarized in the oft-cited case of *Fakir Mohamed v Joseph Mugambi & 2 others*, Civil Application No. 332 of 2004 as follows:
- 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 (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 the 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 v Mwangi*, Civil Application No NAI 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR 496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No NAI 8 of 2000 (ur) and *Murai v Wainaina (No 4)* 1982 KLR 38.”
5. The Motion before me is dated August 13, 2021 and the Judgment intended to be appealed was delivered on March 17, 2015. There is a lapse or delay of more than 6 years. The explanation given for this delay is that the applicant, who was unrepresented at the first appeal, was immediately moved, first to Kamiti prison then to Naivasha prison and finally to Manyani prison. He says that it is only recently (year 2021) that his remaining family members were able to be in touch with him and engaged a lawyer to represent him in the
6. intended second appeal. Although the period of delay is long exceeding 6 years I am prepared to accept as reasonable the explanation given by the applicant that his lack of representation by a lawyer and the constant movement from one prison to another and loss of contact with his family could have affected his ability to take the necessary measures to file an appeal on time. I also note that the applicant’s first appeal to the High Court at Machakos was not only dismissed but his sentence was enhanced to life imprisonment. He should have an opportunity to challenge on appeal whether the action by the High Court was lawful. I do not think that grant of leave to appeal out of time will prejudice the respondent or any other person. I allow the Motion. Let the applicant file Notice of Appeal (if none was lodged) within 7 (seven) days of today and lodge record of appeal within 14 (fourteen) days thereafter. I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

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



DEPUTY REGISTRAR

