



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Faja v Republic (Criminal Application E013 of 2021)  
[2022] KECA 1226 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1226 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION E013 OF 2021  
S OLE KANTAI, JA  
NOVEMBER 4, 2022**

**BETWEEN**

**MAMUSH HIRBO FAJA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application from the Ruling of the High Court of Kenya at Nairobi  
(Lesiit, J.) dated 10th March, 2020 in HC. CR. Application No. 2 of 2020)*

**RULING**

1. I have read the “Ruling on re-hearing on sentence” by Lesiit, J. (as she then was) delivered on March 10, 2020 in Nairobi High Court Miscellaneous Criminal Application No. 2 of 2020 between the applicant, Mamush Hirbo Faja and the respondent. What emerges there is that the applicant was tried and convicted by the High Court and sentenced to death. He appealed to this court against those findings and the appeal was dismissed in its entirety in a Judgment delivered on October 25, 2019. The application before the said Judge requested that sentence be reconsidered. The Judge heard the application and declined the orders sought.
2. The motion before me is brought under section 349 of the *Criminal Procedure Code*, Rule 4 of the *Court of Appeal Rules* and all other enabling provisions of law. The applicant prays that he be granted leave to appeal out of time against the said ruling. He says in grounds in support of the application and in a supporting affidavit that he wants to appeal; he was granted leave to appeal but could not do so on time as he applied for proceedings and Judgment but the same were not supplied on time and were supplied on 10<sup>th</sup> June, 2021. He says that he has annexed “petition of appeal” to his affidavit but I have not seen it.



3. Parties were served by the Registrar with a hearing notice on October 4, 2022 at 3.45 p.m. informing them of the hearing date and requiring them to file written submissions. I have seen and considered written submissions by the applicant but there are none for the respondent.

4. The principles that apply in applications of this nature were well captured in the oft cited case of Fakir Mohamed v Joseph Mugambi & 2 others, Civil Application No 332 of 2004 as:

“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 applicant says that he was supplied with copies of proceedings of the High Court and Judgment on March 10, 2020. The Motion is dated June 25, 2021. This is a period of more than 13 months. I have not been told why that delay occurred. I consider it inordinate particularly considering that the applicant was represented at the High Court by the same lawyer who has lodged this application. More important, however, is the history I have traced of this matter set out at the beginning of this ruling. The applicant was convicted and sentenced to death by the High Court after mitigating factors were considered. Judgment of the High Court was considered by this court and the same was upheld both on conviction and sentence. The applicant went back to the High Court asking for a re-sentence hearing but that court found no merit in the application. This history persuades me that the intended appeal has no chance of success.

6. In the end I find the application to have no merit and I dismiss it with no order as to costs.

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

**S. OLE KANTAI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

