



**JSN & 5 others v Sambu & 5 others (Criminal Appeal (Application)
E004 of 2020) [2022] KECA 1331 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1331 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL (APPLICATION) E004 OF 2020
MSA MAKHANDIA, JA
DECEMBER 2, 2022**

BETWEEN

JSN & 5 OTHERS APPLICANT

AND

VICTOR SAMBU & 5 OTHERS RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal out of time from the Ruling delivered on 29th September, 2020 by the High Court of Kenya (L. Kimaru J.) dated 24th February, 2011 in Milimani Criminal Revision No. 4 of 2020)

RULING

1. By a notice of motion dated October 21, 2020 lodged pursuant to rules 4, 41, 42 and 47 of the [Court of Appeal Rules](#) and a supporting affidavit of JSN hereinafter “the applicant”. The applicant prays, that the time to lodge the notice of appeal and serve the same upon the respondents be extended.
2. The background to this application is that the applicant filed an application before the Chief Magistrate’s Court for leave to institute private prosecution against the respondents. This was after the police had failed to act on his several complaints that the respondents, either jointly or severally, were planning or had the intention to kill him. The respondents robustly opposed the application on the grounds that the applicant lacked the requisite mental capacity to prosecute them. That it had been established by a Consultant Psychiatrist that the applicant suffered from paranoid schizophrenia. He also suffered from hallucinations that made him imagine that his co-workers (the respondents) were intending or were plotting to kill him.
3. After hearing the application, the Chief Magistrate (Hon E Andayi) allowed it holding, *inter alia*, that the applicant had satisfied the court that the police had failed to act on his numerous complaints despite the fact that the applicant had evidence.



- 4 The respondents, aggrieved by the decision of the Chief Magistrate's Court, filed an application seeking the court to review its decision. They annexed to the application, three medical reports prepared on various dates within a span of three years which showed that the applicant suffered from paranoid schizophrenia and had been under medication since 2013. This application was dismissed by the Chief Magistrate (Hon Martha Mutuku,) who held that the court did not possess jurisdiction to review its own decisions. This led to the respondents filing a criminal revision application before the High Court over the decision.
- 5 On considering the application, the learned judge held thus:
- "In the present application, having read the pleadings filed by the parties and considered the submission made before court, it was clear to the court that the respondent's application to be granted leave to institute private prosecution did not meet the legal threshold. In the first place, neither the police nor the Director of Public Prosecution were enjoined as parties to the proceedings. How did the trial court verify the allegation of inaction by the Police or the Director of Public Prosecution if they were not given a chance to respond to the allegations made against them? A cardinal principle of the law is that no one can be condemned without being given a right to be heard. The allegations made by the respondent against the Police accusing the police of inaction is just that; allegations. Without the Police being given a chance to respond, this court cannot reach a definitive finding that the Police are guilty of inaction or dereliction of their statutory duty without having been given the chance to respond."
- 6 The judge proceeded to allow the respondents' application and set aside the order of the trial court of February 12, 2019.
- 7 Being aggrieved by the said decision, the applicant lodged the instant application. The grounds in support thereof are that: the applicant was not able to get a certified copy of the ruling in time and only received it on October 4, 2020; the delay in filing the application is not inordinate; and, that the intended appeal is arguable hence the court should exercise its discretion in his favour.
- 8 The application is opposed by the respondents through the affidavit of Mr Stephen Bore sworn on his own behalf and on behalf of the other respondents. He deposes that: despite the applicant receiving a copy of the ruling on the October 4, 2020, he did not to file the notice of appeal immediately as he was still within time but waited until October 21, 2020 to file the current application; and that the ruling was delivered virtually before both parties.
- 9 Parties thereafter filed written submissions in support of their respective positions. The applicant submitted that the extension of time under rule 4 of this court's Rules is discretionary. That the approximate delay of slightly over a week after the lapse of 14 days should not be taken as inordinate delay and should be excused. Further, the delay was occasioned by the advent of Covid-19 pandemic which resulted in the applicant suffering financial constraints. That the intended appeal is arguable and that if the application is not granted, the applicant will suffer great prejudice.
- 10 It is the respondent's submissions on the other hand that the delay is clearly not inordinate. However, the applicant had not proffered any reasons for the delay. That the ruling was received five days after delivery thus pointing to indolence on his part. Further, the applicant has not attached in the application, a draft memorandum of appeal which would have helped the court to determine whether if the application is allowed, the intended appeal has reasonable chances of succeeding which omission is not an inadvertent but clear sign of indolence. They thus pray that the application be dismissed.



- 11 Extension of time is provided for under rule 4 of the *Court of Appeal Rules* which provides, *inter alia*:
- "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."
- 12 I have considered the application, the affidavits on record and the submissions of counsel. The principles applicable in an application for extension of time under rule 4 of the *Court of Appeal Rules* were stated by Waki, JA 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 vs Wainaina* (No 4) [1982] KLR 38."
- 13 The court, therefore, has the ultimate discretion in allowing or disallowing an application for extension of time as long as it deems just.
- 14 In the present case, the ruling was delivered virtually and in the presence of all the parties on October 4, 2020 and the applicant did not take any further steps after delivery of the ruling within the 14 days required to file a notice of appeal. The ruling was later received by the applicant after a period of 5 days after delivery. However, the applicant waited until October 21, 2020 to bring the current application. I agree with the applicant that the period of delay is not inordinate per se. The reason for the delay has been alluded to the fact that there was the pandemic of Covid-19 which curtailed the applicant in terms of finances to enable him move accordingly.
- 15 However, it is interesting how a single page of a notice of appeal would require such finances that the applicant was unable to find. However, I am at a loss as to how the intended appeal is arguable. There is nothing on record, either by way of draft memorandum of appeal, in the affidavit or even in the submissions to show what the applicant intends to present before this court so that I can make an inference that the intended appeal is arguable. This leaves this court with nothing to conclude on one of the requirements that the intended appeal is arguable.
- 16 In my considered view, failure to do so and considering the facts of the case before the trial court and the ruling of the High Court, I hold that failure negates the exercise my discretion in his favour.
- 17 Accordingly, the application fails and is dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

