



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPLICATION NO. 5 OF 2020

JOSEPHAT WASWA NYONGESAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An application for extension of time to file record and appeal out of time against the judgment of the High Court of Kenya at Bungoma (Aroni, J) dated 10th June 2019)

RULING

1. **JOSEPHAT WASWA NYONGESA** (the applicant) was jointly charged with two others, with murder contrary to **section 203 as read with section 204 of the Penal Code**. He was tried, convicted and sentenced to death on 10th June 2019. The Applicant being dissatisfied with the decision of **Hon A. Aroni (J) at the High court at Bungoma** which was delivered on 11/02/2019, filed a Notice of Appeal dated 22/06/2019. He however was not able to file his appeal within the required period. It is thus by this notice of motion dated 12th March 2020, sought to be granted leave to file his intended appeal out of time frame.

The application is supported by the annexed affidavit of **PAUL KASSIM SIFUMA** dated 12th March 2020, in which he explains that on 24/06/07, the applicant instructed him to pursue the appeal, and he filed a Notice of Appeal on 24/06/2019 and served the same on 03/07/2019. (See annexure marked PKS-3). Counsel then applied and paid for the court certified copy of Proceedings concerning this matter (as confirmed by annexure marked PKS - 4(a) & (b)).

Apparently, the said proceedings took long to be typed and they were only made available on 17/02/2020. However, the same were incomplete, leading to a request for correction, which was done on 28/02/2020.

In conceding the application, the respondent is of the view that the Applicant has availed reasons for this undue delay which reasons do not prejudice the Respondent

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.

The case of **Leo Silla Mutiso v Rose Hellen Wangari Nairobi Civil Application No 251 of 1997** confirmed that the decision on whether to extend time for appealing is essentially discretionary taking into account length of delay and reason for the delay. It is clear therefore that the court has the ultimate discretion in allowing or disallowing an application for extension of time as long as it deems the terms thereof as just.

In considering an application for extension of time, several key issues are to be considered as was pointed out in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others Supreme Court Application No. 16 of 2014[2014] eKLR**, and I take cognisance of the fact that extension of time is an equitable remedy that is only available to a deserving party at the discretion of the Court. Further, a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, and the court needs to consider whether there is a reasonable reason for the delay. In addition, the court needs to consider whether the application has been brought without undue delay, and due regard must be taken as to whether there will be any prejudice suffered by the respondents if the extension is granted;

The applicant further to filing the Notice of Appeal on 22/6/2020 also has availed proof of his request for the record of appeal to be supplied and demonstrated the reasons for his failure to meet the 14-day legal requirement (which get support from the annexed documents). The documents clearly show that the Applicant made deliberate efforts timeously to kick-start the process of appeal. The copies of proceedings when availed had errors, and the same were corrected and availed on 17/02/2020 by which date, it was practically not possible for the Applicant to prepare record of Appeal and file the appeal within the time prescribed by the law.

I am satisfied that the Appellant/Applicant's failure to file his intended appeal within the required time frame was not deliberate, nor was the delay inordinate, as he moved with speed in less than a year to ameliorate the situation through this notice of motion. The Applicant was diligent enough but was prevented by the non-availability of the court proceedings. Moreover, the respondent has confirmed that it will suffer no prejudice.

Consequently, the Application is merited, and the applicant is granted leave to file appeal out of time within 14 days hereof. The costs of this application shall be in the appeal.

DATED THIS 23RD DAY OF JULY 2021 AT NAIROBI

H.A. OMONDI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR