



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: KIAGE, JA (IN CHAMBERS))  
CRIMINAL APPLICATION NO. NAI. 6 OF 2018**

**BETWEEN**

**PHILLIP MAINGI MUEKE..... APPLICANT**

**AND**

**REPUBLIC..... RESPONDENT**

**(An application for extension of time for filing a notice of appeal and granting leave to appeal out of time from the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 8<sup>th</sup> October, 2015**

**in**

**Criminal Appeal No. 58 of 2012)**

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**RULING**

By the motion on notice dated 2<sup>nd</sup> March 2018 the applicant Phillip Mwangi Mueke prays that the time for the filing of a notice of appeal against the judgment of the High Court (Kimaru, J.) dated 8<sup>th</sup> October 2015 be extended. That judgment dismissed the applicant's appeal to that court against his conviction on the offence of defilement of a child contrary to Section 8(2) of the Sexual Offences Act, for which he was sentenced to life imprisonment. The trial court had found as proved the prosecution case that on 13<sup>th</sup> January 2009, the appellant had inserted his penis into the anus of KH, a girl then aged 9 years.

The grounds upon which the application are premised and which are expanded on in the applicant's affidavit sworn on 2<sup>nd</sup> March 2018, appear on its face as;

“(i) Time to lodge the Appeal in this matter expired on 22<sup>nd</sup> October, 2015 after judgment was delivered by the High Court on 8<sup>th</sup> October, 2015.

(ii) The applicant was unrepresented and indigent thus was unable to be aware of his right to appeal to this Honourable Court and instead lodged a constitutional review which was dismissed.

(iii) The applicant has an arguable appeal with a great chance of success.

(iv) The applicant has been imprisoned for life and it is in the interest of justice that he be allowed to canvass his final appeal before this Honourable Court.”

Those grounds and affidavit were the basis of the submissions made before me by Miss Ndegwa, the applicant's learned counsel. There was no replying affidavit filed by the Director of Public Prosecutions who was also not represented at the hearing though served. Counsel readily conceded that the delay of which the applicant is guilty is long, clear and undisputed.

She went on to plead, however, that the applicant did not sleep on his rights. He had been unrepresented before the learned Judge and when his appeal was dismissed he did not take that essential step of filing a notice of appeal to signify intent to challenge that dismissal. Mr. Ndegwa drew my attention to the supporting affidavit and I note that the applicant swears as follows;

“5.That after the first appeal was dismissed in 2012 (sic), my entire family and myself lost all hope and I was left with absolutely no way of pursuing justice any further. I was despondent and my family were not able or willing to again facilitate any further court process.

6. That I therefore languished at Kamiti until the year 2016 when I decided to attempt to go back to the High Court for a review of the said judgment. This was after advice I received from my fellow inmates and with no legal expertise or support or materials, I managed to draft a Petition No. 436 of 2016 hoping the same would be heard by the Criminal Division.

7. That it was too late when I realized that my Petition had been taken to the Constitutional Court and would proceed there and despite not being legally represented, I did my level best to articulate my case. Unfortunately the same was dismissed on 28<sup>th</sup> June, 2017. Annexed hereto and marked „PMM 3” is a copy of the petition judgment.

8. That all through I had never filed my appeal to the Court of Appeal as I was not aware of the procedure and upon learning late last year that I still had not exhausted my avenues of appeal,

I decided to exercise my constitutional right to appeal to the Court of Appeal.”

Pleading that the applicant has not exhausted his avenues of appeal and should thus be allowed to approach this Court, counsel besought me to consider that the life sentence imposed on the applicant is effectively the ultimate sentence and he should be afforded opportunity to challenge his conviction and the said sentence. She sought to persuade me that the intended appeal is a meritorious one for the grounds in the draft memorandum of appeal including that the voir dire on the complainant minor was not properly conducted; her age was not properly ascertained; the medical evidence was contradictory and inconsistent; and that the sentence was in the circumstances excessive and unfair.

I have given this application anxious consideration. As Miss Ndegwa readily concedes, it is quite obviously belated and I am tempted to dismiss it as an afterthought. Long though the delay is, however, I cannot ignore the fact that the applicant was for a significant period of time unrepresented by counsel and, much as I doubt that he is wholly ignorant in matters law, I am alive to the fact that to non-lawyers the procedural requirements which appear common place may prove to be tricky traps with far reaching consequences.

I have given much thought to the usual matters that must engage my mind on an application such as the one before me, namely the length of delay; (possibly) the merits of the intended appeal and; finally, the prejudice, (if any) of any that an extension would occasion the respondent. I do so while fully aware that my discretion in this matter is wide and unfettered. See MWANGI vs. KENYA AIRWAYS LTD [2003] KLR 486.

Much as the delay has been long and inordinate, I think that the explanations given by the applicant under oath and by his learned counsel in submissions before me are persuasive. The man did not go to sleep. Nor did he accept as his final fate the dismissal of his first appeal. The path he took in trying to challenge that dismissal by filing Constitutional Petition No. 436 of 2016 seeking a retrial under the provisions of Article 50(6) was patently misguided and failed, as it had to. What it does speak to, however, is the applicant’s intent to pursue his appeal.

I do not think that the intended appeal is an idle one and the right of appeal being an integral part of what constitutes fair trial, I

am of the view that it would be in the interests of justice to allow the appellant the opportunity to pursue his second and final appeal to this Court as opposed to banging the door shut to him on account of his delay and missteps. As I have not been furnished with any assertion or evidence that extension of time would in any way prejudice the Republic, I take it that it would not.

In the result, I allow the application and extend time for the filing of a notice of appeal. The applicant shall file and serve the same within TEN (10) days of the date hereof.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of December, 2018.**

**P.  
JUDGE OF APPEAL**

**O.**

**KIAGE**

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

**DEPUTY REGISTRAR**