



REPUBLIC OF KENYA



**Lutta v Republic (Criminal Appeal (Application) E262 of 2022)
[2023] KECA 1409 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1409 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL (APPLICATION) E262 OF 2022
JM NGUGI, JA
NOVEMBER 24, 2023**

BETWEEN

JOEL OGOLLA LUTTA “ALIAS” DADDY APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for waiver of fees to file an appeal Against the Judgment
of the High Court of Kenya at Siaya (Aburili, J.) dated 31st March, 2021)*

RULING

1. The applicant herein was convicted of the offence of murder in a Judgment delivered on 31st March, 2021 at the Siaya High Court (Aburili, J.). He was subsequently sentenced to 35 years imprisonment in a sentence ruling delivered on 21st April, 2021.
2. The applicant has filed an undated application which was lodged in the Court registry on 18th August, 2022. The application is expressed to be brought under Rule 113 of the *Court of Appeal Rules*. Though inelegantly phrased since it is drafted by the applicant pro se, it seems that the applicant seeks for the waiver of fees applicable for preparation of his record of appeal. He says his family abandoned him since his incarceration and he therefore cannot afford the fees. He also implies that this is the reason for the delay in filing the application. He says that that his constitutional rights will be denied if the application is not granted because he is desirous of filing an appeal against the judgment delivered on 31st March, 2021 and he has an undoubted right of appeal.
3. Although the applicant cites Rule 113 of the Court of Appeal Rules, it seems obvious that he is referring to the new Rule 118 of the *Court of Appeal Rules*, 2002. In the earlier iteration of the *Court*



of Appeal Rules, what is now retained in material particulars as Rule 118 was Rule 113. It provided as follows:

1. If, in any appeal from a superior court acting in its appellate jurisdiction in any criminal matter, a judge of the superior is satisfied on the application of the appellant –
 - a. That the appeal raises one or more questions of law proper for determination by the Court; and
 - b. That the appellant ought not, by reason of poverty, to be required to pay the whole of the fees ordinarily payable, including the fees for preparing the record of appeal.
2. An application under sub-rule (1) may be made informally at any time but not later than seven days after the appellant has been informed of the amount which, in the absence of the order, he or she would be required to pay as fees or to deposit in respect thereof:

Provided that a judge of a superior court may entertain any such application out of time if it appears that there was sufficient cause for the delay in making the application.

4. The respondent is opposed to the application primarily for the reason that it has been filed in the wrong court. The respondent, correctly in my view, argues that an application under Rule 118 is to be made before the High Court and not the Court of Appeal. However, the respondent's counsel, Mr. Okango notes that there is a surfeit of applications under this Rule made to this Court which he says, again correctly in my view, indicates that this Court may have to give directions on the application of the Rule. This is because, learned counsel argues, it is not in the interest of justice that an appellant in a criminal case should be required to pay for the preparation of a record of appeal. Once again, in my view, Mr. Okango is right: it would seem unduly restrictive of a convicted intending appellant's rights to require them to pay filing fees for their criminal appeals arising from their convictions.
5. It is important to point out that Rule 118 applies to intended second appeals to this Court. The Rule only talks of an appeal "from a superior court acting in its appellate jurisdiction in any criminal matter." The implication is that the Rule has no application for first appeals. This must be because, for first appeals, convicted inmates have an undoubted right of appeal on both facts and law. One would imagine that the corollary to this would be that for first appeals there should be no imposition of any fees for the preparation of the Record of Appeal or for the lodgment of any documents filed by an inmate. It would appear from the present application, however, that there is, at least in certain High Courts, a practice of administratively requiring inmates intending to appeal – including those intending to exercise their undoubted right to first appeal – to pay fees for the preparation of the Record of Appeal.
6. Consequently, while the proper court to lodge a Rule 118 application would be in the High Court, I must observe that import of the Rule is potentially injurious to the rights of convicted persons to appeal especially where, as here, they are incarcerated and have no means of generating income or otherwise raising the required fees to prepare the record of appeal. It is not entirely clear that inmates are being routinely asked to pay fees to have their records prepared. If that is the case, I would venture to direct High Court registries and Prison authorities to stop the practice. Indeed, my understanding of Rule 64 of the Court of Appeal is in this regard. It requires the Registrar of the High Court to prepare a Record of Appeal within 60 days of the Notice of Appeal being lodged. The Rule does not mention any fees



to be paid by the appellant. If any administrative challenges emerge in implementing these directions, the requests should be placed before the Deputy Registrar of the Court of Appeal for resolution.

7. In the case before me, I would simply declare that the applicant has a right to have his Record of Appeal prepared without the imposition of any fine. If, as is likely, he was delayed in filing his appeal or Notice of Appeal, the applicant shall file an appropriate application for extension of time to be considered by this Court under Rule 4 of the *Court of Appeal Rules*.

8. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

