



**IW v Republic (Criminal Application E024 of 2024)
[2024] KECA 1821 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1821 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION E024 OF 2024
MSA MAKHANDIA, JA
DECEMBER 20, 2024**

BETWEEN

IW APPLICANT

AND

REPUBLIC RESPONDENT

(An application for extension of time to file an appeal out of time arising from the judgment of the High Court of Kenya at Bungoma (Achode, J.) dated 10th November 2021 in HCCRA No. 74 of 2020)

RULING

1. IW, (“the applicant”), was charged, tried, and convicted for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. Upon conviction by the Senior Principal Magistrate’s Court, he was sentenced to life imprisonment. His subsequent first appeal to the High Court at Bungoma was dismissed in its entirety.
2. The applicant then lodged a Notice of Appeal dated 17th April, 2024 evincing his intention to file a second and perhaps last appeal to this Court. The judgment of the High Court which he intends to appeal against was delivered on 20th November 2021. The Notice of Appeal under the Rules of this Court is required to be filed within 14 days of the judgment of the High Court. It would appear, therefore, that the instant Notice of Appeal was evidently filed way out of time. It is against this background that the applicant has initiated this application dated 17th April 2024, seeking leave to appeal out of time as a pauper.
3. The main reason advanced by the applicant for his failure to lodge the appeal within the statutory period was: “THAT, I was not supplied with a copy of the original trial court’s proceedings and its



judgment to enable me appeal on time but had intention to appeal. THAT, due to my earlier intention to appeal, I beg leave of this honorable (sic) court for an extension of time to appeal out of time.”

4. The respondent did not file any papers in opposition to the application. However, Ms. Nyambua Mwaniki, learned Senior Principal Prosecution Counsel, has through written submissions opposed the application on grounds that the delay was inordinate and has not sufficiently been explained.
5. We must at this juncture point out that submissions cannot take the place of pleadings. Cases are determined by the parties' pleadings, the evidence led or adduced, and the applicable law. Submissions, no matter how weighty and persuasive can only aid to bolster a case and not to prove it. See Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR.
6. In the circumstances of this case, there having been no replying affidavit filed in opposition to the application by the respondent, I will take it that whatever has been disposed to by the applicant is unopposed.
7. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & Others* [2014] eKLR stated as follows:

“ Extension of time being a creature of equity, one can only enjoy it if he acts equitably; he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the court which litigants have to lay a basis where they seek courts to grant it ...”

8. I have considered the application and the supporting affidavit and I am satisfied that though the delay is inordinate, it is nonetheless excusable, given the environment in which the applicant finds himself and operates from. He is serving a life imprisonment in prison and communicating with the outside world may be challenging. The delay in obtaining the proceedings was in my view inadvertent and beyond the control of the applicant therefor. I also note that the applicant has undoubted constitutional right to exhaust the appellate process. See Article 50 (q) of *the Constitution* of Kenya and section 347 of the *Criminal Procedure Code*.
9. In the end, I allow the application. The applicant is accordingly granted forty-five (45) days from the date of this ruling to file and

serve the Notice of Appeal as well as the record of appeal, failing which the leave hereby granted shall automatically lapse.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

