



IN THE NAURU COURT OF APPEAL  
AT YAREN  
CRIMINAL APPELLATE JURISDICTION

**Miscellaneous  
Appeal No. 1 of 2023  
Supreme Court  
Criminal Case No. 9  
of 2021**

BETWEEN

**BARRY CLIVE KIP  
QUADINA**

AND

**THE REPUBLIC**

APPLICANT

RESPONDENT

BEFORE:

**Justice R. Wimalasena,  
President**

DATE OF HEARING:

**18 April 2024**

DATE OF RULING:

**28 May 2024**

CITATION:

**Barry Clive Kip Quadina v  
The Republic of Nauru**

KEYWORDS: Application for leave to extend time; length and reasons for delay; prospect of success; proposed notice of appeal.

LEGISLATION: Section 105 of the Crimes Act 2016; Section 29 and 36 of the Nauru Court of Appeal Act 2018; Section 26 of the Nauru Court of Appeal Rules 2018

CASE CITED: Republic v Agege [2021] NRCA 2; Criminal Case 7 of 2021(19 November 2021)

APPEARANCES:

COUNSEL FOR the  
Applicant: V. Clodumar

COUNSEL FOR the  
Respondent: A. Driu

### RULING

1. The Applicant was convicted on 20 June 2023 by the Supreme Court for rape, contrary to section 105(1)(a)(b)(i) of the Crimes Act 2016. Consequently, on 31 July 2023, he was sentenced to 15 years of imprisonment.
2. On 27 September 2023, the Applicant filed a Summons pursuant to Rule 26 of the Nauru Court of Appeal Rules 2018 seeking the following orders:
  - a. The time for filing an appeal against the judgement of the Supreme Court delivered in the 31<sup>st</sup> day of July 2023 is extended; and
  - b. The application to appeal be filed within 7 days of the date if the grant of the order in paragraph (a) and
  - c. The cost of the application be cost in the cause.
3. The Applicant relies on his Affidavit sworn on 26 September 2023, and filed in support of the application. Subsequently, the parties filed written submissions,

and the application was taken up for hearing on 18 April 2024. The counsel for both the Applicant and the Respondent informed the court that they would rely on their written submissions, and no further oral arguments were made.

4. The Applicant stated in his affidavit that after his sentencing, he was aware that the last date to appeal was 30 August 2023. He had informed his mother of his desire to appeal his conviction and sentence within seven days and had advised her to approach his counsel. The Applicant further deposed that his mother met with the counsel on 19 August 2023, and the counsel visited him at the correctional center on or about 26 August 2023. He also averred that the counsel did not visit him again until 14 September, informing him that the appeal period had expired and that he would need to apply for an extension of time. The Applicant expressed in his affidavit that he could not explain why his counsel did not file the appeal within the stipulated period. It appears that the application for an extension of time was filed almost two weeks later, on 27 September 2023. There is no dispute that the Applicant is late by almost a month.
5. Section 29 of the Nauru Court of Appeal Act 2018 allows a person who is convicted and sentenced by the Supreme Court to appeal to the Court of Appeal from a final judgment, decision, or order of the Supreme Court. Furthermore, Section 36 of the Nauru Court of Appeal Act 2018 stipulates the time period for filing an appeal and provides options for extending the time before it expires and for seeking an extension of time after it expires as follows:

**Time for appealing**

- (1) Where a person convicted and sentenced desires to appeal under this Part, he or she shall file and serve a notice of appeal within 30 days of the date of the delivery of the judgment, decision or order of the Supreme Court.
- (2) ...
- (3) ...
- (4) The time for filing an appeal or an application for leave to appeal under this Section may be extended by:
  - (a) the Supreme Court before it expires; or
  - (b) the Court after it expires.

(5) ...

(6) ...

6. It appears that the Applicant's counsel had chosen not to make an application to the Supreme Court under Section 36(4)(a) to extend the time before the appealable period expired, even though, as per the Applicant's affidavit, he had been instructed to appeal well before the expiration of the appealable period.
7. Be that as it may, the manner in which an application for extension of time to appeal is clearly set out in Rule 26 of the Nauru Court of Appeal Rules 2018 and talks about the matters that should be addressed in the supporting affidavit:

**Extension of time to appeal or seeking leave to appeal**

- (1) The Court shall only extend the time for appealing in accordance with the Act, the Rules or any other written law.
- (2) Where an intended appellant or appellant who seeks leave of the Court to extend the time for filing or serving of an application for leave to appeal or notice of appeal out of time, the intended appellant or appellant shall file and serve to the respondents or other interested parties to the application or intended appeal:
- (a) a summons seeking an order to enlarge the time to file an application for leave to appeal or appeal out of time with any other appropriate orders in Form 16 in Schedule 1; and
- (b) one or more affidavits in support of the application for and on behalf of the applicant.
- (3) The affidavit in sub rule (2)(b) shall include:
- (a) the prospect of success of the intended appeal or exhibit a duly completed copy of the proposed notice of appeal in Form 8 in Schedule 1;
- (b) the explanation for the nature, length and reasons for delay; and
- (c) any other matters which the intended appellant may deem necessary.

(4) The Court shall give such directions or make such orders as it deems fit for the purpose of the hearing and determination of the application.

8. It is very clear that the Applicant is required to either attach a duly completed proposed notice of appeal in Form 8 or have the affidavit address the prospects of success. Moreover, the affidavit must include an explanation for the nature, length, and reasons for the delay.

9. In addition, Fatiaki CJ, as the President, discussed the established principles that are taken into account in the determination of an extension of time to appeal in *Republic v Agege* [2021] NRCA 2; Criminal Case 7 of 2021 (19 November 2021) as follows;

“24. Although the discretion to extend the time for filing of an appeal is unfettered, the Court have developed well-established principles and factors to guide the exercise of its discretion including the following:

(a) “ ... once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for an indulgence by the Court. The onus set upon him to satisfy the Court that in all the circumstances the Justice of the case requires that he be given the opportunity to attack the judgment from which he wished to appeal,” (per Richmond J in *Avery v No 2 Public Service Appeal Board and other* [1973] 2 NZLR 86 at 91) ;

(b) “Once the time for appealing has lapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of his entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would be the appellant. The classic statement of the elements of this equation is to be found in the judgment of Griffiths LJ in ....[1983] 1 ALL ER 699.... and are as McCowan LJ has set them out, namely: (1)The length of the delay; (2) The reasons for

the delay; (3) The chances of the appeal succeeding if an extension is granted (4) The degree of prejudice to the respondent if the application is granted. “(per Lord Donaldson MR in Norwich and Peterborough. Building Society v Steed [1991] 2 ALL ER 880 at 885) ;

(c) “The time limit for bringing an appeal from a final decision is imposed to bring about finality between the parties. Before the time limit will be extended, the proposed appeal has to show an acceptable excuse for the delay, and the Court must be satisfied that there is arguable merit in the proposed appeal. The power to extend is discretionary ...” ( Aru v Vanuatu Brewery [2002] VUCA 43);

(d) “ The rule of Court must, prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law is otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation” (per Lord Guest in Ratnam v Cumarasamy [1964] 3 ALL ER 933 (PC) at 935.”

10. It should be noted that the Applicant has not filed a duly completed proposed notice of appeal in Form 8 with his affidavit. Alternatively, the Applicant has not provided any evidence indicating the prospects of success for the intended appeal. Including either of these matters in the affidavit is a mandatory requirement under the Rules. Rule 5 clearly states that compliance with the Rules is mandatory unless waived by the court. The Applicant has only mentioned in his affidavit how the delay occurred to some extent, but it does not provide any specific reason for the delay from 14 September 2023 until the application was filed on 27 September 2023. The Rules are established for the parties to comply with, and they cannot be stretched for unexplained reasons or disregarded at the convenience of the parties. If an applicant seeks to extend the time, the delay must be justified with a valid explanation that accounts for the entire period of the delay. A mere reason for the

delay would not be sufficient to meet the criteria for an application for an extension of time. The reason for the delay must also be justifiable.

11. The Respondent also submitted that the Applicant fell short of complying with Rule 26(3)(a) by not addressing the prospects of success or attaching the proposed notice of appeal. Furthermore, the Respondent submitted that even the explanation for the delay is vague, and the court process should not be flouted.

12. The counsel for the Applicant stated in the written submissions that he was not the same counsel who defended the Applicant at trial, and thus needed additional time to study the judgment. It was also submitted that even by 14 September, the counsel was not convinced that the Applicant had a strong case for appeal. This, it should be noted, casts doubt on the prospects of success.

13. I am not satisfied that the Applicant has met any of the criteria that need to be considered by this court, at the least a justifiable reason for the delay, let alone the other criteria. The requirements stipulated in Rule 26 are mandatory, as discussed above, and non-compliance with these requirements can only result in the dismissal of the application.

14. In the circumstances, the Applicant failed to satisfy the requirements to successfully advance an application for an extension of time to appeal. The application is dismissed.

Dated this 28 May 2024

Justice Rangajeeva Wimalasena



The seal of the Nauru Court of Appeal is circular, featuring a central emblem with a sun, a star, and a shield, surrounded by the text "NAURU COURT OF APPEAL" and "ESTABLISHED 1977". Below the seal is a handwritten signature in black ink.

President