



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAPENGURIA

MISC. CRIMINAL APPLICATION NO. 9 OF 2020

DOMINIC OKODOI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant, Dominic Okodoi, has approached this Court seeking leave to file an appeal in the Court of Appeal out of time and to appeal as a pauper from the judgement delivered on 10th November, 2016 by this Court (Githinji, J). The undated application is brought under Rule 113(1)(a) & (b) of the Court of Appeal Rules, 2010. The Applicant further relies on Rule 67 of the Court of Appeal Rules.

2. The Applicant's application is based on the grounds that he filed a notice of appeal at the Court of Appeal in 2016 and is yet to receive any response or update on the same; and that he has been ailing and has not been able to initiate and follow up on his appeal.

3. The application is supported by the Applicant's affidavit filed together with the application. Through his affidavit the Applicant avers that he was convicted of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act in Kapenguria Magistrate's Court Criminal Case No. 753 of 2013. Further, that he subsequently filed an appeal at the High Court at Kapenguria and upon dismissal of the same he lodged a notice of appeal at the Court of Appeal in Eldoret. It is his deposition that his appeal at the Court of Appeal is yet to be acted upon. The Applicant also avers that this application is guided by Article 27(1) of the Constitution which accords equal protection and benefit of the law to all persons and that his intended appeal to the Court of Appeal has high chances of success.

4. During hearing of this application, the Applicant informed the Court that an application he had filed at the Court of Appeal had been dismissed. He did not provide the particulars of the application.

5. In response to the application, counsel for the Respondent submitted during the hearing of the application that if the matter is before the Court of Appeal then this Court is *functus officio*.

6. In brief, the Applicant seeks to invoke this Court's power under Section 7 of the Appellate Jurisdiction Act, Cap. 9 which provides that:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

7. At the hearing of his application, the Applicant disclosed that he had filed an application in the Court of Appeal and the application had since been dismissed. The information that he had a pending application was not disclosed in his written application. What he had only disclosed in the application is that he had filed an appeal in the Court of Appeal but he had not been informed of its progress.

8. I have done a search on the Kenya Law website and I have come across a ruling delivered on 23rd July, 2021 by the Court of Appeal (Dr. K. I. Laibuta, JA) in **Dominic Okodoi v Republic [2021] eKLR; Misc. Criminal Application No. 8 of 2020**. Through the said ruling, the Court of Appeal dismissed the Applicant's application for extension of time to file an appeal out of time, and to appeal as a pauper, in respect of the judgment delivered by Githinji, J on 10th November, 2016. The instant application is also made in regard to the same judgement delivered by Githinji, J.

9. Although the instant application is not dated, a perusal of the file shows that the application was first placed before this Court (Sitati, J) on

24th June, 2020. This means that the Applicant is likely to have filed the applications before this Court and the Court of Appeal simultaneously. In such circumstances, since there was another similar application before the Court of Appeal, the power granted to this Court under Section 7 of the Appellate Jurisdiction Act had been rendered redundant.

10. The Court of Appeal considered the import of Section 7 of the Appellate Jurisdiction Act in **Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another [2000] eKLR** and stated as follows:

“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time.”

11. From the holding of the Court of Appeal, it is evident that the power donated to this Court under Section 7 of the Appellate Jurisdiction Act is only available to a litigant at the first instance. This Court is, however, deprived of such power once an applicant has made a similar application before the Court of Appeal as is the case in this matter. Once an applicant has moved the Court of Appeal in respect to an application to appeal out of time, the jurisdiction of this Court to hear and determine a similar application cease to exist.

12. In the circumstances of this case, the instant application has been heard and determined by the Court of Appeal and if this Court is to entertain this application it would amount to hearing an appeal against the decision of the Court of Appeal. This Court has no jurisdiction under the Constitution or any written law to entertain appeals from the decisions of the Court of Appeal.

13. The instant application cannot be entertained under the provisions of Section 7 of the Appellate Jurisdiction Act or rules 67 and 113 of the Court of Appeal Rules. In my view, those provisions only allow this Court to entertain an application for extension of time for filing an appeal before the Court of Appeal where a similar application has not been filed before the Court of Appeal. Once a party invokes the jurisdiction of the Court of Appeal, the jurisdiction granted to this Court by the cited provisions is extinguished. This Court has no authority to allow a party to initiate an appeal before the Court of Appeal where the Court of Appeal has already rejected the party’s request to appeal out of time.

14. The prayers the Applicant seeks in this application are the same prayers he was asking for in **Eldoret Court of Appeal Misc. Criminal Application No. 8 of 2020**. It is clear that when this application came for hearing on 14th March, 2022 the Applicant knew very well that a similar application which he had filed before the Court of Appeal had been rejected. In filing similar applications simultaneously before this Court and the Court of Appeal, the Applicant was gaming the court system in the hope that he could get a favourable result from one of the courts. By prosecuting this application when he already knew that the Court of Appeal had rejected his application, the Applicant was engaged in an abuse of the court process. What the Applicant is trying to do is to have this Court sit on appeal in a matter already determined by the Court of Appeal.

15. Although counsel for the Director of Public Prosecutions urged that this Court should find that it is *functus officio*, I am of the view that this Court is actually not *functus officio* in respect of the application. The correct position is that this Court has no jurisdiction to hear and determine the application at all. The Applicant’s application is therefore dismissed for want of jurisdiction.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 31ST DAY OF MARCH, 2022.

W. Korir,

Judge of the High Court