



**Odhiambo v Republic (Criminal Appeal 7 of 2019)
[2022] KEHC 13184 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL 7 OF 2019
RE ABURILI, J
SEPTEMBER 23, 2022**

BETWEEN

RICHARD ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from Judgment, Conviction and sentence delivered on
13/12/2018 in Principal Magistrate’s Ukwala Criminal Case No.
556 of 2018 by Hon. G. Adhiambo, Senior Resident Magistrate)*

RULING

1. This appeal is before me for admission to hearing under section 352 of the Criminal Procedure Code. It is hereby summarily rejected as it was filed out of time without first seeking and obtaining leave of court to enlarge time for filing the appeal as stipulated in section 349 of the Criminal Procedure Code which provides as follows:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

2. The reasons for my summary rejection of the appeal herein are set out below.
3. The appellant was convicted and sentenced for the offence of maim and attempted rape on December 13, 2018 nearly four years ago. He was sentenced to serve concurrent prison terms of 6 years and 5 years



respectively by Hon GA Adhiambo Senior Resident Magistrate, Ukwala. Assuming his sentences were subject to remission owing to the appellant's good behaviour in prison, he may have left prison by now. The appellant filed this appeal on February 12, 2019 which was 60 days after sentence was imposed. The period for filing of an appeal from the Magistrate's court to the High Court is 14 days and with leave of court, the period can be extended.

4. In this case which has been pending in this court from 2018 for lack of the trial court record, the appeal as filed is not accompanied by an order granting leave to appeal out of time. This has only been discovered after arrival of the lower court file on July 1, 2022 after several requests since 2019.
5. The jurisdiction of this court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of court.
6. The Supreme Court of Kenya in SC Appl No 38 of 2014 between *TSC vs Simon Kamau and 19 Others*, adopted its earlier decision in Nicholas Kiptoo Arap Korir Salat vs the IEBC & 7 Others SC Appl No 16 of 2014 and stated:

“To file an appeal out of time and seek the court extending time is presumptive and inappropriate. No appeal can be filed out of time without leave of Court. Such filing renders the “document” so filed a nullity and of no legal consequences. Consequently, this court will not accept a document filed out of time without leave of the court. The SC further held that a document (Petition filed out of time without leave of court is irregular and unknown in-law and the same should be struck out. Where one intends to file an appeal out of time, what he can do is to annex the draft intended Petition of Appeal for the court's perusal when making his application for extension of time, and not to file an appeal and seek to legalise it.”

(66) Article 159 (2) (b) of the *Constitution* cautions courts against permitting injustice through delays, in the following terms:

- (a)
- (b) Justice shall not be delayed

(67) Thus, the stand point of the *Constitution* is that, delayed justice amounts to injustice and the courts which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time frame. This is the context in which article 259(8) of the *Constitution* is to be seen, it thus prescribes:

“If a particular time is not prescribed by this constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises.”

(68) From the record, it appears to us that the applicant had no intention of appealing, the appellant did take definite steps towards implementing the judgment of the Court. The desire on the appellant's part to lodge an appeal is not even evident, and hardly any initiative was taken to secure the right of appeal. The three-year period that elapsed is, in the circumstances, to be regarded as unreasonable delay, which is inconsistent with a quest for justice before this Court.” [Emphasis added].

7. Although the above decision related to civil litigation, the principles applicable in criminal cases as far as criminal appeals from the subordinate court to the High Court are concerned, a party who is



convicted and sentenced to serve prison sentence and who proceeds to serve that prison sentence must if he/she so wishes to challenge the decision of the court, file, at the earliest opportunity, an appeal or if for good reason they delayed in filing of the appeal, then they must first seek for leave extending the 14 days period. This is not the case here.

8. This court has no jurisdiction to hear and determine the merits of an appeal filed out of time without leave of court.
9. For the above reasons, this appeal is hereby struck out for being filed out of time without leave of court to enlarge such time.
10. The appellant and respondents to be notified.
11. File closed. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF SEPTEMBER, 2022

R.E. ABURILI

JUDGE

