



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. APPLICATION CASE NO. E007 OF 2020

SAMMY FURAHA KALUME.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant Sammy Furaha Kalume filed a Notice of Motion in court on 1.12.2020 expressed under Section 349 of the Criminal Procedure Code and Article 47, 48, 50 (2) (h), 51 and 159 of the Constitution seeking the following orders:

(a) That this Honorable court be pleased to extend the time to file and serve the petition of appeal in the intended appeal against the judgment, conviction and sentence passed, in Criminal Case 888 of 2012 on 14.12.2016.

(b) That the annexed draft petition of appeal be deemed as duly filed once leave sought to file the petition of appeal and intended appeal has been granted.

Subsequently, the applicant averred in his affidavit that because of her incarceration following a conviction and sentence for the offences of Arson and malicious damage to property he was unable to file the appeal within time.

Determination

The Law

The time period for filing an appeal from the judgment or ruling of the subordinate court to the High Court is stipulated under Section 349 of CPC which states that;

“the period for filing an appeal is 14 days after the date of judgment and ruling of the Magistrate’s court. Additionally, in the proviso an aggrieved appellant may seek extension of time to file an appeal out of time. The court therefore enjoys unfettered discretionary powers to grant an extension of time”.

However, that discretion is only exercised, if sufficient and good cause has been placed before the court by the applicant. Notably, the Criminal Procedure code does not speak to the relevant factors that constitute sufficient or good cause when considering whether or not an extension of time should be granted.

(i) The court of Appeal of Tanzania on the registered trustees of the Archdiocese of Dare Salaam v the Chairman Bunju Village Government & others held:

“That it is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice when no negligence or inaction or wall of bonafides, is imputed to the appellant”

In the case of Charles Kangamiteto vs Uganda, Court of Appeal Criminal Application No. 1 of 1978, The Chief Justice Saied, held:

“Besides these matters, the learned counsel for the appellant has been unable to put forward a single valid reason why he should have time extended at this late stage except his belief that the appeal has reasonable prospects of succeeding. As has been consistently held by the Court of Appeal, that is a factor for consideration in applications in this nature but the main

factor, and the burden is on the applicant in this respect, is that the court must be satisfied that for sufficient reason it was not possible for the appeal to be lodged in the time prescribed. Likewise, it has been held in MrS Nyambura Kisoi v Wanjiku E.A.C.A Civil Application no. NAI.7 of 1976 that the question of prejudice does not matter at this stage. It is only after “sufficient reason” has been advanced that a court considers the question prejudice or the possibility of success and such other factors before it exercises its discretion whether to grant or refuse an application for extension”

Guidance and inspiration can be found in a plethora of cases i.e **Salt v Independence Electoral Commission & 7 others (2014) KLR (SCK)**. In that decision the court held that:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, whether there is reasonable reason for the delay. The delay should be expressed to the satisfaction of the court. Whether there will be any prejudice suffered by the respondents if the extension is granted. Whether the application has been brought without undue delay, it should be remembered that notwithstanding the absence of good reason for the delay, the court has unfettered discretion to extend time on the interest of administration of justice.”

From the record on 14.12.2016 the applicant was found guilty for the offence of Arson and malicious damage to property. The learned trial Magistrate convicted the applicant on both counts followed with a sentence of compensation in count (1) for Ksh. 50,000 in default to serve two (2) years imprisonment. With respect to count (2) the applicant should pay a fine of Ksh. 20,000 or serve equal (8) months imprisonment. The time to file an appeal expired on 31.12.2016 with the applicant having not filed any memorandum of appeal. Apparently, the applicant has already served the full term of his Sentence. The instant application for extension of time no doubt has been filed after a period of for (4) years from the time of conviction and Sentence. That delay is indeed, lengthy.

According to the applicant the reason for the delay is attributable to his inability to file an appeal while in prison custody and the advocate instructed to take up the matter failed to act under Section 349 of the Criminal Procedure Code.

As noted by the comparative court in **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd (2020) JMCA**. It was also served:

“That time requirements laid down by the rules are not mere targets to be attempted but there are rules to be observed. In achieving the overriding objective, litigants are entitled to have their case resolved with reasonable expedition, otherwise such delay as has been shown to have taken place. In the instant case will indeed cause prejudice to the other party in the litigation. The reason for the failure of the applicant to comply with the prerequisite time is highly material some reason for the delay must be advanced”.

This being an application for leave to appeal against a decision of the Magistrate court, the above principle do apply **Mutatis Mutandis** to the realm under criminal Law, in Section 349 of the Code.

This delay by the applicant is puzzling and the reasons advanced for the failure to file his appeal in time on the basis of incarceration difficult to apply as a good and sufficient cause for the court to exercise discretion in reference to the notice of Motion.

In Peter Haddad v Donald Sirvera SCCA No 31 of 2003, Smith JA opined:

“The Court has untrammelled discretion. This discretion must be exercised judiciously. There must be some material upon which the court can exercise its discretion. The question is, in what circumstances should the court extend time for compliance with a rule?”

That being the case I find that there was no possible reason as to why the applicant did not file his appeal in time or soon thereafter conviction and sentence by the trial court. It is strange for the applicant to claim that he could not file the appeal within time for reason of him serving sentence. The court takes judicial notice that there are many appeals from self-represented applicants which find their way to the High Court without undue delay and dilatoriness as they serve their respective sentences.

Accordingly, application for extension of time to lodge an appeal is hereby disallowed for lack of merit.

DATED, SIGNED AND DELIVERED BY EMAIL AT MALINDI THIS 21ST DAY OF JANUARY, 2021

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R. NYAKUNDI

JUDGE