



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CRIMINAL DIVISION AT NAIROBI**

**MISC CRIMINAL APPLICATION NO. 451 OF 2019**

**HIPPALUS MBASU LEI.....APPLICANT**

**VERSUS**

**REPUBLIC OF KENYA .....RESPONDENT**

*(In the matter before Chief Magistrate' Kibera in Criminal Case No. SO 100/014 judgment dated 17/05/2019 before Hon Gianceni Chief Magistrate)*

**RULING**

1. The subject application herein is an undated chamber summons wherein the Applicant is seeking that, the Honourable court be pleased to allow him file an appeal against conviction and sentence, out of time. Further, that the court allows him to prosecute the appeal without paying court fees and/or be exempted from any costs of the appeal as he is a poor man who cannot afford to pay. Finally, he requests that, the Honourable court order that he be supplied with the trial court proceedings and judgment thereof to enable him prepare further grounds and submissions to be tendered during the hearing.

2. The application is supported by an undated affidavit sworn by the Applicant and the annexures thereto. The Applicant avers that, on 17<sup>th</sup> May 2019, he was convicted and sentenced to serve ten (10) years imprisonment for the offence of; sexual assault contrary to; section 5(1) as read with section 5(3) of the Sexual Offences Act No. 3 of 2006. That, pursuant to the conviction and sentence, he did not have any "legal guidance or technical expertise or knowledge" on how to move forward and this caused the delay in filing the appeal. Further, he does not have any economic ability to facilitate for the requisite fees.

3. The Respondent did not file any formal response to the application and informed the court that although the application had not been served, the Respondent had no objection to the grant of the orders sought therein. On being questioned by the court on how the Respondent could respond to the application, before being served, the learned State Counsel, Ms Kimaru said that, had perused the court file.

4. Be that as it may, I have considered the application in total and I find that, the Applicant has annexed to the affidavit in support of thereof grounds of appeal which states inter alia that: -

*a) The Learned Trial Magistrate erred in both law and facts by holding that, the offence he was charged with was proved against him to the required standard of proof of; beyond reasonable doubt;*

*b) The Learned Trial Magistrate erred in law and facts by putting reliance on the evidence adduced by the prosecution witnesses whereas the same was not supported in any material way;*

*c) The Learned Trial Magistrate erred in matters of law and facts by relying on prosecution evidence which was wholly contradictious throughout the trial;*

5. Indeed, the Applicant is the basically seeking for two (2) prayers; to file an appeal out of time and to prosecute the same as a pauper brief. As regards the first issue, I find that the conviction and sentence in the trial court is alleged to have been delivered and/or pronounced on 17<sup>th</sup> May 2019. Therefore, there has been a delay of about two and a half years. That is rather a long period of time.

6. However, pursuant to the provisions of; Article 48 of the constitution of Kenya, 2010, every person has a right of access to justice. The subject provisions state that: -

*"The state shall ensure access to justice for all persons and if any fee is required it shall be reasonable and shall not impeded access to justice"*

7. As a result, of the aforesaid, in the interest of justice and for the reasons advanced in support of that first prayer; I allow the Applicant's request to file the appeal out of time. However, I find no evidence to support the alleged inability to pay for the costs associated with the prosecuting the appeal and I disallow it unless more evidence is adduced.

8. It is so ordered

**Dated, delivered and signed on this 22<sup>nd</sup> day of February 2021 virtually.**

**G. L NZIOKA**

**JUDGE**

In the presence of:

Applicant - present in person

Ms Akunja for the State

Yusuf the Court Assistant