



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**MISC CRIMINAL APPLICATION NO. 10 OF 2019**

***(CORAM: F.M. GIKONYO J.)***

**EZEKIEL NABAALA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**Leave to appeal out of time**

1. Before me is a Notice of Motion brought pursuant to **section 349 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya** for leave to appeal out of time. The application is based on the grounds on the face of the Motion and the affidavit in support thereof sworn by the applicant.

2. The applicant was charged with the offence of burglary and stealing contrary to **section 304 (2) and 279 (b) of the Penal Code** in NAROK CMCRC No. 1915 of 2015. He was convicted and sentenced by Hon. W. Juma (C.M.) on 21<sup>st</sup> December, 2016. He did not enter appeal within 14 days. His reason was- "Nilichanganyikiwa". The applicant seems to attribute the failure to file the appeal within time to his confusion.

3. When the matter came up for mention on 23<sup>rd</sup> February, 2021, Ms. Koina for the State opposed the application on the basis of inordinate delay which cannot be excused. She insisted that the applicant should have filed the application at the earliest opportunity since he had the obligation to follow up on his case.

4. I have carefully considered the affidavit in support. Under **Section 349 of the Criminal Procedure Code CAP 75 of the Laws of Kenya** this court may grant leave to file, or admit appeal out of time if the applicant shows good cause. Good cause is defined by **Black's Law Dictionary 10<sup>th</sup> Edition** as a legally sufficient reason. The onus of showing good cause is on the applicant.

5.

6. Good cause, inter alia, may be that the failure to enter the appeal within the prescribed time has been caused by the inability of the applicant or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record, within a reasonable time of the applying to the court therefore.

7. See the proviso to section 349 which states as follows:

***"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 applicant or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record, within a reasonable time of the applying to the court therefore."***

8. I am aware that under Article 50 (5) (b) of the Constitution:

***"The accused has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in turn for a reasonable fee as prescribed by law."***

9. In the present case, the applicant merely stated that he did not file the appeal within time because he was confused. Is this a good cause in the sense of law?

10. Whereas conviction and sentence to a jail term ordinarily administers sudden shock on a person, it will be unrealistic that the shock or confusion should last for unreasonably long period of time. In this case, almost 3 years passed by. The applicant did not explain the delay to the satisfaction of the court. He did not even show that he applied for proceedings but were not provided. Such is deliberate inertia or lashes which is inexcusable.

11. Accordingly, I find the reasons advanced by the applicant not to be satisfactory and I dismiss his application.

**Dated, signed and delivered at Narok through Teams Application, this 21<sup>st</sup> day of April 2021**

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**F. M. GIKONYO**

**JUDGE**

**In the presence of Court Assistant Mr. Kasaso and Miss. Torosi for the state/respondent and the Applicant.**

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**F. M. GIKONYO**

**JUDGE**