



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC APPLICATION NO. E015 OF 2020

WASHINGTON MUTEMBEI JUSTUS..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. What is before the court is an application by the appellant filed on 30/10/2020, pursuant to Section 349 of the Criminal Procedure Code, and all enabling provisions of the law. The only prayer sought in that application is leave to appeal out of time. The grounds advanced in support thereof are that, the appeal has overwhelming chances of success. The delay in filing the appeal in time is attributed to the appellant's transfer to Naivasha prison from Meru.

2. The respondent filed grounds of opposition against the application on 26/2/2021. It termed the application as incompetent, unmerited, an abuse of the court process, frivolous and an afterthought. The appellant is faulted for his failure to demonstrate that the inordinate delay in lodging his appeal was not of his own making.

3. Even after the court directed on 25/5/2021 that the application be canvassed by way of written submissions, only the respondent filed. It submitted that the delay of 2 years was totally inordinate and unreasonable. In its view, the application was bad in law, unmerited and a waste of the court's valuable time which ought to be dismissed.

4. The appellant in his oral submissions faulted the trial court for disregarding his evidence. He went on to state that he was sentenced erroneously to 20 years when the complainant was aged 13 years' old.

5. Section 349 of the Criminal Procedure Code stipulates, while granting the power to extend time, that **“ 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.”**

6. I have considered the applicant's application, the grounds of opposition, as well as the written and oral submissions. The appellant was sentenced on 18/1/2019 and filed this application on 30/10/2020. That gives a period of about 20 months of delay which I find to be manifestly inordinate and inexcusable.

7. The explanation given by the appellant for the delay to the effect that he was transferred to Naivasha Prison may not itself be a sufficient reason. The applicant ought to have given more reason why the transfer militated against his ability to file the appeal. He did not. He equally needed more candour in stating when the transfer was effected to enable the court relate it with the delay. Nothing was said in that regard. While the transfer could disrupt his ability to lodge the appeal, without saying more the appellant left the court with no material to exercise its discretion in its favour.

8. Without plausible explanation for delay, I find no merit in the application which is hereby dismissed.

9. A draft copy of the Petition of appeal has been annexed to the application which raises issues on conviction and sentence. Although I do not deem the issues raised in the draft petition of appeal to be frivolous, I deem the reason advanced for the delay to be not only unconvincing, but also implausible.

10. I find the appellant's application dated 30/10/2020 to be meritless and the same is accordingly dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 29TH SEPTEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Maina for the respondent

Applicant in person

Patrick J.O Otieno

Judge