



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. CRIMINAL APPLICATION NO. 43 OF 2020

SILAS OKUMU DIANG'A/ODPP....APPLICANT

VERSUS

GEORGE ANYONA AREK.....RESPONDENT

(Being an Application for leave to appeal out of time under section 349 of the Criminal Procedure Code from the order of acquittal made on 22nd April 2020 by Hon. S.W Mathenge Resident Magistrate in Bondo PM's Court Criminal Case No. 203 of 2019)

RULING

1. By an Application under Certificate of Urgency dated 6/7/2020 and supported by an affidavit sworn by **Silas Okumu Anyona Rek**, the applicant through the ODPP Siaya seeks for orders of this court to grant leave to appeal out of time from the judgment of acquittal delivered on 22/4/2020 in **Bondo PM Cr. Case No. 203 of 2019 Republic Vs George Anyona Arek**, wherein the latter was the accused and the deponent herein **Silas Okumu Anyona** was the complainant in an assault case.
2. In the said Notice of Motion, the applicant also prays that the Petition of appeal in draft form as annexed be allowed to be filed out of court (sic). This court takes judicial notice of the typo error and reads in **"time"** in the place of (court) which error is merely technical and not substantive and it is curable under Article 159 (2)(d) of the Constitution.
3. The grounds upon which the application is predicated are mainly, that after the judgment in the trial court, the applicant /complainant sought for proceedings but that there was delay in typing and supplying the same for onward transmission to the ODPP for perusal and consideration to file an intended appeal.
4. In the supporting affidavit, the complainant in the trial court and intended appeal deposes that after judgment was pronounced on 22/4/2020, he applied for a copy of judgment which was only supplied on 16/6/2020 then he took them to ODPP Siaya on 29/6/2020 and hence the delay. In addition, he deposes that the intended appeal has high chances of success and that the Respondent will not suffer any prejudice if the applicant is allowed to file the intended appeal out of time.
5. The Respondent **George Anyona Arek** who was the accused person in the lower court where he was acquitted of the assault charge opposes the application and filed a replying affidavit sworn on 22/7/2020 contending that the application is incompetent and bad in law, that there was inordinate delay in making the application, that no Memorandum of appeal has been filed and that the applicant has only filed a "draft petition of appeal" not a memorandum of appeal as required by Order 42 Rule 13(4).(sic).
6. Further, that the main prayer is incapable of being granted as it reads leave to file an appeal "out of court," hence it is ambiguous and not clear. Further, it was deposed that the applicant has 5 different cases against the Respondent such as ELRC 29/2016 in Kisumu which is still pending in court.
7. The Respondent urged this court to dismiss the application herein with costs.
8. Directions were given that parties canvass the appeal by way of written submissions but only the Respondent filed and adopted his written submissions in opposition to the application. The Applicant's Counsel, Mr. Okachi made oral submissions in court at the hearing.
9. The oral submissions by Mr. Okachi mirrored the grounds and supporting affidavit sworn by the complainant whereas the written submissions filed by the Respondent's counsel and adopted as canvassing/opposing the application mirrored the Replying affidavit sworn by the Respondent, citing case law and Order 42 Rule 13(4) (sic) and stating that the applicant should have filed a Memorandum of Appeal and not draft Petition of Appeal. The Respondent contended that the delay was inordinate and therefore the application should be dismissed.

DETERMINATION

10. I have considered the application herein, the grounds supporting affidavit, annexure and the Replying affidavit and written as well as oral submissions canvassing the application. The main issue for determination is whether the applicant deserves the prayers sought.
11. First and foremost, the Respondent contends that the application is ambiguous and incapable of being granted as it reads, **“out of court.” He contends through case law that a party’s prayers must be clear and that it is not the duty of the court to imagine what the applicant is asking. See Southern Credit Banking Corporation Lts v Chareles Wachira Ngundo Milimani HCC 17 of 2000 cited in Joash Otieno Kongerere v South Nyanza Sugar Co. Ltd [2020]e KLR.**
12. I have read the main prayer and indeed I find it defective. However, the substance of the application must be considered as a whole as the affidavit in support and the grounds thereof clearly speak of the application for leave to appeal out of time.
13. In my view, there is a typo on the word ‘court’ which was intended to be ‘time’ which error is curable by invocation of Article 159(2)(d) of the Constitution to do justice to the parties.
14. On whether there is inordinate delay, the Respondent cited **Johnstone Ogechi v The National Police Service [2017] e KLR** where it was held that delay defeats justice and also in **James Kanyita Nderitu v Attorney General & another [2019]e KLR** where it was held that the onus is on the applicant to establish that the delay could not be avoided and that, the applicant had not discharged that burden of proof as he has not explained or given plausible reasons for the delay.
15. I observe that the impugned judgment was delivered on 22/4/2020 and there is no evidence that the proceedings were supplied within 14 days of the date of judgment.
16. Accordingly, as the complainant aggrieved person had to get the proceedings and approach the ODPP who had to peruse the same and advise on whether an intended appeal was viable, he cannot be faulted for the delay which delay is explained and in any event, it is not inordinate.
17. Furthermore, this court finds no prejudice being occasioned to the Respondent if the application is granted. Access to justice under Article 48 of the Constitution is a guaranteed right and it means according every person an opportunity to ventilate their grievances fully. The applicant too has a right to a fair hearing under Article 50(1) of the Constitution which right is to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or other independent body. As such, the applicant should not be curtailed by mere technicality and purported delay that was substantially not occasioned by him.
18. In my humble view, this is not the type of case where this court can invoke the maxim of indolence on the part of the applicant. There is ample evidence that the complainant was active from time of delivery of the judgment to be impugned leading to the filing of this application on 7/4/2020.
19. On whether a Memorandum of appeal and not a draft Petition of appeal should have been filed, the Respondent cites Order 42 Rule 13(4) (sic) [law not disclosed] which is irrelevant as this being an application and an intended appeal in criminal proceedings, the applicable law is the Criminal Procedure Code and not the Civil Procedure Act and Rules assuming that they are the ones being cited herein by the Respondent’s counsel in ambiguity.
20. Section 349 of the Criminal Procedure Code grants an intended appellant, from judgment of a conviction or acquittal, 14 days of the date of the order or sentence appealed against to lodge an appeal.
21. The proviso thereof allows an aggrieved person to seek for extension of time and the High Court is vested with discretion - for good cause being shown, to admit an appeal out of the stipulated 14 days.
22. Under Section 350(1) of the Criminal Procedure Code, an appeal shall be in the form of a Petition in writing presented by the Appellant accompanied by a copy of judgment impugned.
23. The Applicant herein annexed a draft Petition of appeal just to demonstrate to this court that the intended appeal is not frivolous, because he has not been granted leave to file the main Petition of appeal.
24. Accordingly, I find the objection by the Respondent misconceived.
25. On the whole, I find the application meritorious. I grant leave to the applicant to file a Petition of Appeal within 14 days of today and serve the Respondent’s advocate on record.
26. This file is hereby marked as closed.
27. Orders accordingly.

Dated, signed and Delivered at Siaya this 30th Day of July, 2020

R.E. ABURILI

JUDGE