



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPLICATION NO. 18 OF 2016

DUNCAN MWANGI NGATIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, Duncan Mwangi Ngatia filed a Notice of Motion dated the 19th April, 2017 under the provisions of Section 349 of the Criminal Procedure Code, the Constitution of Kenya 2010 and all other enabling provisions of the law and prayed for the following Orders;

a) That this Honourable Court be pleased to allow the applicant leave to file an appeal against the judgment in HCCRA No. 67 of 2010 out of time.

APPLICANTS SUBMISSIONS

2. The application is based on the grounds found on the face of the application and on the supporting affidavit made by the applicant on the 10th April, 2015.

3. The appellant averred that he was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code at the Senior Resident Magistrates Court in Karatina in Nyeri CMCRC No. 343 of 2007 and the sentence meted was the death penalty;

4. The appeal was dismissed on 30/05/2012 and thereafter he applied for certified copies of the typed proceedings and judgment to enable him file an appeal; the applicant contends that due to the unavailability of the proceedings and judgment he could not proceed to prepare the Record of Appeal within the stipulated time and that the time for filing the appeal lapsed on the 14/06/2012.

5. The appellant contends that the delay was occasioned because he was unrepresented both at the trial and at the appellate stages; he nevertheless proceeded to make an application to the Court of Appeal for enlargement of time in which to file his appeal; which applications were struck out for being incompetent; copies of the applications made were annexed to the affidavit to demonstrate that he was desirous of pursuing his appeal in the Court of Appeal;

6. Notwithstanding that the delay was for a period of over four (4) years but for the reasons cited the appellant urged the court to exercise its discretion and allow the application to afford him an opportunity to ventilate the grounds set out in the annexed draft Petition of Appeal which only touches on points of law;

7. The case law relied on is the case of **Agnes Sebastian vs R [2017] eKLR** where a similar application was made and though distinguishable is still relevant to the present circumstances;

8. The applicant prayed that the court exercise its discretionary powers in disregarding the undue technical procedures and that it allows the application.

RESPONDENTS SUBMISSIONS

9. In response Prosecuting Counsel for the State opposed the application;

10. The Applicant had lodged his appeal in the High Court in 2010 which appeal had been dismissed; this demonstrated that he knew the procedures; from 2012 to 2016 the applicant had slept on his rights for four (4) years; no good reasons were advanced for the delay;

11. The application is an afterthought and not based on delay occasioned by the court as no letter of application for the proceedings to be

supplied is annexed to the application; and also no Certificate of Delay is annexed;

12. The delay in the authority the applicant relies on was for four (4) months and it was a first appeal; that ignorance is no defence; the applicant has not demonstrated or given good reasons for the inordinate delay;

13. The application lacked merit and prayed that it should be dismissed.

REJOINDER

14. This was a pro-bono brief; the only proceedings available are from the trial court and none have been availed from the High Court;

ISSUES FOR DETERMINATION

15. Taking into consideration the rival submissions this court has framed the following issues;

i) Whether the explanation given for the delay is satisfactory;

ii) Whether to enlarge time in which to file the appeal;

ANALYSIS

16. Where an appeal is dismissed by the High Court by virtue of Section 361(1) of the Criminal Procedure Code an appellant has a right to file a second appeal to the Court of Appeal but litigants are required to file their intended appeals within the statutory appointed period of fourteen (14) days;

17. The High Court delivered its judgment delivered on the 30/05/2012; the explanation given by the applicant for the failure to enter his appeal within the stipulated time was his inability to obtain copies of the proceedings or judgment within reasonable time; it is noted that the applicant did not annex any letter to the court applying for the copies of the proceedings; neither is there any Certificate of Delay annexed that would demonstrate the period taken for the preparation of the proceedings and judgment; which would have guided the court on whether the delay was excusable;

18. The other reason given by the applicant was that he was unrepresented at the appellate stage in the High Court; and that notwithstanding that the delay was for a period of over four (4) years the appellant urges this court to exercise its discretion and allow the application to afford him an opportunity to ventilate the grounds set out in the annexed draft Petition of Appeal which only touch on points of law;

19. This court concurs with Prosecuting Counsels submissions that indeed there is indeed an element that the intended appeal is an afterthought; the real reason is that the appellant is seeking to benefit the right to legal representation under the recent Legal Aid Act enacted in 2016;

20. It is trite law each case ought to be considered according to its merits; and it is a well settled principle that the decision on whether or not to extend time for appealing is discretionary; the law also requires that the court must be satisfied that the failure or delay be attributed to inability by either the appellant or his advocate in obtaining the proceedings or judgment within reasonable time of applying; it is noted that the appellant was acting in person and was also incarcerated and therefore may not have been able to obtain the requisite documents to enable him to move forward;

21. It is further noted that he made several attempts to obtain leave at the Court of Appeal which applications were struck out as being incompetent as it was the wrong forum;

22. The enactment of the Legal Aid Act (2016) is the appellants saving grace as it entitles persons charged with capital offences to state appointed legal representation and one is assigned an advocate at the State's expense; it is also a fact that criminal cases particularly capital offences can be complex and without the help of counsel person(s) may be convicted for an offence they may not have committed;

23. Taking into account the instant circumstances this court will overlook the four (4) year delay due to the fact that the legislation was enacted four (4) years after the judgment of the High Court was rendered; the appellant now has an advocate;

24. This court is satisfied that the applicant was unrepresented at the time of the first appeal; he was also unable to obtain the court records within reasonable time; he was also unaware of the procedure for lodging an appeal until he had an opportunity to consult a state appointed lawyer; this court finds that there is good cause to intervene to ensure that the applicant is able to assert and enjoy the full benefits of his right to appeal and his right to legal representation.

FINDINGS AND DETERMINATION

25. For the forgoing reasons the application for enlargement of time within which to file the appeal is found to have merit and is hereby allowed.

26. The time for filing the appeal is hereby enlarged by fourteen (14) days from the date hereof.

Orders accordingly.

Dated Delivered and Signed at Nyeri this 25th day of January, 2018.

HON.A.MSHILA

JUDGE