

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR MISC CASE NO 20 OF 2018

JAMES GITONGA MBAKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion dated 22nd June, 2018 brought by **JAMES GITONGA MBAKA**, the Applicant herein seeking for leave to appeal against the judgment delivered against him in **Chuka Chief Magistrate's Court Criminal Case No.1042 of 2017** out of time.

2. The Applicant had been charged with the offence of store breaking and committing a felony contrary to **Section 306(a)** of the **Penal Code** and in count II the offence was neglect to prevent felony contrary to **Section 392** as read with **Section 36** of the **Penal Code**.

He was tried found guilty and convicted on 10th May, 2018 and sentenced to serve 3 years in count I and 1 year in count II. The two sentence to run concurrently.

3. The Applicant has raised grounds for this application in chief among them is that he was aggrieved by the judgment but that he was given the proceedings and judgment on 12th June 2018 and filed this application on 22nd June, 2018.

4. The Respondent through the Director of Public Prosecution has opposed this application citing the provisions of **Section 349** of the **Criminal Procedure Code** which states that an appeal should be filed within 14 days though the appeal may be admitted after 14 days if the Appellant satisfies the appellate court failure to enter appeal within 14 days was due to inability to obtain a copy of the judgment on time. In its view the Respondent contends that the applicant has failed to demonstrate the same as he has not demonstrated that he was not supplied with the copy of the judgment on time. The Respondent has further contended that the intended appeal is weak and is just an academic exercise with no chances of success.

5. I have considered the application and the opposition made. The applicant has deposed that he was supplied with the typed proceedings and judgment on 12th June, 2018. This application was filed 10 days after he was supplied with the copy of the Judgment and proceedings that period in my view is not unreasonable given that he had to get/instruct a counsel to bring this application. A right to access justice under **Article 48** includes a right to be accorded a chance to appeal especially where a party knows that the delay in getting access to justice is not inordinate and excusable like in this instance.

In the premises I find merit in the application dated 22nd June, 2018. The applicant is granted 14 days from today to file this appeal. The Respondent is not prejudiced in anyway as it has a chance to demonstrate whether the intended is indeed an exercise in futility for the applicant.

Dated, signed, and delivered at Chuka this 27th day of September, 2018.

R.K. LIMO

JUDGE