



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 69 OF 2017**

**(CORAM: R. E. ABURILI - J.)**

**MICHAEL ONYANGO OWALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(An appeal against both conviction and sentence in Ukwala SRM Cr Case No 351 of 2016 on 26<sup>th</sup> July 2016 by Hon. G. Adhiambo, SRM).*

1. This appeal arises from judgement, conviction and sentence meted out on the appellant **Michael Onyango Owala** in **Ukwala SRM Cr. Case No. 351 of 2016** by Hon. G. Adhiambo SRM.
2. The Appellant was arraigned in court charged with the offence of robbery with violence contrary to **Section 295 as read with Section 296(2) of the Penal Code**.
3. It was alleged that in the 20<sup>th</sup> October 2014 at Rangala area in Ugunja District within Siaya County jointly with others not before court while armed with a dangerous weapon, namely a firearm robbed Joseph Makau Mwangangi of a motor vehicle registration No. KCA 160J FRR Isuzu Canter while loaded with 700 nets of onions all valued at Kshs. 4 million and immediately at the time of such robbery used actual violence to the said Joseph Makau Mwangangi.
4. The Appellant pleaded not guilty to the charge on 10.6.2016 and the trial commenced and concluded before Hon. G. Adhiambo SRM. The appellant was throughout the trial represented by an Advocate.
5. At the conclusion of the Prosecution and Defence hearing, the trial magistrate was satisfied that the appellant's guilt had been proved beyond reasonable doubt. She accordingly convicted him and sentenced him to death on 26.7.2017 and a right of appeal within 14 days was explained to him.
6. Being dissatisfied with conviction and sentence meted out on him, the appellant filed this appeal on 17/8/2017 by way of a Petition of Appeal dated 1<sup>st</sup> August 2017, setting out 7 grounds of appeal.
7. The said appeal was filed by the appellant in person via Siaya G.K. Prison on 17/8/2017. Simultaneous with the filing of the said Petition, the appellant also filed an application by way of Notice of Motion seeking to be released on bail pending the hearing and determination of the appeal and secondly, for stay of execution of the sentence pending the outcome of the appeal.
8. On 21/2/2018, the Appellant's Advocate Wakla & Co. Advocates filed supplementary grounds of appeal dated 21<sup>st</sup> February 2018 and also filed a bound record of appeal. They also filed written submissions on 11/10/2018 which were adopted as canvassing the appeal on 31/10/2018 when the appeal came up for hearing.
9. The appeal was admitted to hearing by Hon. Makau J. on 30/1/2018 before he was transferred to Nairobi.
10. Before delving into the arguments on the merits or demerits of this appeal, my attention has been drawn to the statutory timelines for lodging of appeals in criminal matters. The judgment and sentence was pronounced in open court by the trial court on 26/7/2017. She clearly stated that the time for appeal which was a right conferred on the appellant was 14 days. Fourteen (14) days from 26/7/2017 elapsed on 9/8/2017. However, the appellant filed the appeal on 17/8/2017 which was the 22<sup>nd</sup> day after judgment was pronounced excluding the date of judgment and sentence.

11. Section 349 of the Criminal Procedure Code Cap 75 Laws of Kenya provides:

***“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 periods of fourteen has elapsed and shall so admit on 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 therefrom.”***

12. What the above provision stipulate is that an appeal from the trial court to the High Court must be filed within 14 days but the proviso thereof stipulates that the court appealed to, may extend the time for filing of such appeal if sufficient reasons are given for the delay or failure to file the appeal within the 14 days.

13. In the instant case, it is clear that the appeal was filed 22 days after the judgment and sentence were pronounced by the trial court. No application was ever made to seek this court’s discretion to enlarge the time for filing of the appeal herein or to deem this appeal as duly filed within time as stipulated in **Section 349 of the Criminal Procedure Code** above.

14. Albeit the appellant initially filed his appeal in person and even sought to be released on bond pending appeal and to stay execution of the death sentence, he later instructed an advocate who even filed supplementary grounds of appeal with leave of court on 19/9/2017 when he appeared before Hon. Makau J. Counsel for the appellant never sought for leave to enlarge time for filing of the appeal and proceeded to argue the appeal which was filed out of time without leave of court.

15. Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to **Section 349 of the Criminal Procedure Code** to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an ‘appeal’ is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.

**16. Accordingly, I find and hold that the ‘appeal’ before me is no appeal at all. I proceed to strike it out for incompetence. The same is hereby struck out.**

*Dated, Signed and Delivered in open court at Siaya this 18<sup>th</sup> Day of December 2018.*

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr Ngetich prosecution Counsel for the Respondent

CA: Brenda and Modestar