



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL MISC. APPLICATION NO. 1 OF 2017

AGNES SEBASTIAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

AGNES SEBASTIAN hereinafter referred as the applicant was indicted with the offence of trafficking in narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substance Act No. 4 of 1994. The brief facts relied upon by the prosecution were that on the 20th day of November 2016 at Imbirikani Police Barrier in Loitokitok Sub-County within Kajiado County the applicant trafficked in narcotic drugs by conveying 6kgs of bhang with a street value of Ksh.10,000 in motor vehicle registration No. KBR 472A make Toyota Sienta in contravention of the said Act.

On 21/11/2016 the applicant pleaded guilty to the charge before the principal magistrate court at Loitokitok. The trial magistrate convicted the applicant on her own plea and sentenced her to six years imprisonment. The applicant was informed of a fourteen days window to lodge an appeal in the event she is not satisfied with the judgement.

The applicant through Mr. Nyarango Advocate filed a certificate of urgency and a notice of motion dated 3/1/2017 seeking leave to appeal against the judgement of the trial court. The application addressed to this court was grounded on the following reasons:

- 1. That the applicant a Tanzanian national was not represented at the trial which was held at Loitokitok on 21/11/2016 where she was convicted and sentenced to six years imprisonment.**
- 2. That the 14 days period granted by the trial court for lodging an appeal against the judgement lapsed on 7/12/2016.**
- 3. That the applicant could not file the appeal without certified copies of the typed proceedings of the trial court the time which the applicant was to file the appeal lapsed.**
- 4. That the delay was occasioned by the failure of the trial court to supply the applicant with the certified copies of the record and judgement.**

In support of the notice of motion the counsel Mr. Nyarango also filed an affidavit with supporting annexures to buttress the application. In replying Mr. Akula the Senior Prosecution Counsel filed an affidavit objecting to the application to have the applicant be allowed to file her appeal out of time. According to Mr. Akula, the learned senior prosecution counsel the applicant is guilty of laches, the applicant has not shown that the intended appeal does not disclose chances of success. In his contention

Mr. Akula urged this court to dismiss the application.

I have considered the notice of motion and the affidavit in support together by the applicant and the replying affidavit by the respondent. Mr. Nyarango learned counsel for the applicant also submitted on this issue of seeking leave to appeal out of time. This application falls under section 349 of the Criminal Procedure Code on limitation of time which provides as follows:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against. The same code provides a proviso that allows an applicant to an intended appeal to seek leave to appeal outside the limitation period of fourteen days. The reasons upon which an application for leave out of time can be entertained include of the failure or inability of the applicant’s advocate to obtain a copy of judgement or order appealed against and a copy of the record within a reasonable time of applying to the court.”

In consideration of the matter I bear in mind that under section 349 the court is clothed with discretionary powers to be exercised for the interest of justice to the parties in a litigation. The guiding principles to guide the court can be borrowed from the decision in the case of *Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997 UR*. The court stated as follows:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay.

Secondly, the reason for the delay;

Thirdly possibly the chances of the appeal succeeding if the application is granted; and

Fourthly the degree of prejudice to the respondent if the application is granted.”

Comparatively in a persuasive authority by the Supreme Court of Appeal of South Africa in the case of *S.V Smith [2012] 1SACR 567* the court set out the test to be applied on applications for leave to appeal in the following passage:

“What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion difference to that of the trial court. In order to succeed, therefore the applicants must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for the conclusion that there are prospects of success on appeal.”

Applying the above principles to the instant application I am satisfied that the applicant has brought herself within the proviso of section 349 of the Criminal Procedure Code. The court is satisfied that the accused was unrepresented at the trial court. She did not have an opportunity to consult with a lawyer. The applicant in lodging an appeal requires a certified copy of judgement or order issued by the trial court. That was not in the case at Loitokitok Magistrate’s Court.

The principles set out above in the cited cases can be described as overriding and applicable even to criminal cases. In all the circumstances of this case I am satisfied that the application has merit and the following orders shall abide:

1. That leave be and is hereby granted to the applicant to file an appeal out of time.

2. That the annexed draft petition of appeal be deemed as duly filed.
3. That the Deputy Registrar ensures that the lower court prepares the record of appeal to be served upon the applicant and the respondent.
4. That upon compliance with the order the matter be set down for directions.
5. Further mention on 10/2/2017 to monitor compliance.

It is so ordered.

Dated, read and signed in open court at Kajiado on 30/1/2017.

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R. NYAKUNDI

JUDGE

In the presence of

The accused

Mr. Akula for the Director of Public Prosecutions

Mr. Nyarango Advocate for the accused

Mr. Mateli Court Assistant