



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC. CRIMINAL APPLICATION NO. 54 OF 2014

COSMUS MWANZIA MUTINDA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By Notice of Motion dated 7th April 2014, the Applicant seeks orders that the court be pleased to hear and consider his mitigating factors on an appeal
2. Upon hearing the applicant, it became clear that the appeal is intended to the Court of Appeal filed from the decision of the Hon. Lady Justice Jaden in High Court Criminal Appeal No. 22 of 2012.
3. The High Court's judgment dismissed the appellant's appeal from original conviction by the Makueni Principal Magistrate in Criminal Case No. 121 of 2011 wherein the appellant was convicted and sentenced to imprisonment term of 20 years for defilement contrary to section 8 (3) of the Sexual Offences Act.
4. The High Court's decision was delivered on 18th February 2014. In accordance with section 349 the appellant should have filed his appeal within 14 days:

“349. 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 period of fourteen days has elapsed, and shall so admit an 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 therefor.”

See also Rule 58 (1) of the Court of Appeal Rules.

5. When on 7th April 2014, the appellant filed his petition of appeal on 7th appeal together with what he entitled Appeal of Mitigation, the appellant was already out of time.

6. Counsel for the Director of Public Prosecution (DPP), Mrs. Saoli, does not object to the extension of time to file appeal.

7. In accordance with section 7 of Appellate Jurisdiction Act, the High Court has power to extend time for filing the Notice of Appeal:

“7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

8. However, in terms of section 361 (1) of the Criminal Procedure Code, it is the Court of Appeal to determine where it may consider the appeal. Section 361 of the Criminal Procedure Code provides that:

“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section -

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

9. For this Court, the appellant has leave of court to file his Notice of Appeal out of time, and for that purpose the Deputy registrar is directed to prepare, in terms of Rule 61 of the Court of Appeal Rules, the record of the court for transmission to the Court of Appeal.

DATED AND DELIVERED THIS 15TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Applicant present in person

Mrs. Saoli for the Respondent

Ms. Doreen - Court Assistant.