



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 55 OF 2015

ALFONCE KYALO NZAZA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 64 OF 2015

ALFONCE KYALO NZAZA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. In these two consolidated applications the applicants seek leave of the court to amend their petitions of appeal under section 350(2)(b)(iv) and (v) of the Criminal Procedure Code(Cap 75) Laws of Kenya. The original petitions of appeal were filed by the applicant acting in person and were filed in this court on 1st July, 2015.
2. Ms Mbae for the respondent does not object to the applications being amended.
3. The two applications were brought under certificate of urgent and were certified as such. Counsel for the applicant filed an notice of motion supported by an affidavit in support of each application. The two applications raise common issues of fact and law. Firstly, the applicant is the same in both applications. Secondly, the applicant was sentenced to an aggregate period of 85 years for offences of defilement under the Sexual Offences Act, but by two different trial magisterial courts. The grounds in support of each motion is that the applicant had filed his petition of appeal in person dated 1st July 2015 and was not in a position to fully comprehend and articulate his grounds of appeal. Counsel for the applicant has submitted that the applicant in his petition of appeal does not indicate with clarity the particulars of matters of law and facts in regard to which the trial court erred on both issues of fact and law.
4. Furthermore counsel has also submitted that the applicant's original petition of appeal does not fully capture the real questions and issues in controversy between him and the respondent. It is counsel's contention that the proposed amendments to the original petition of appeal will enable the court to determine the real questions and issues in controversy. According to him the grant of leave to amend the petitions do not cause any prejudice to the respondent.
5. In his supporting affidavit, counsel has submitted that the applicant is a lay person, who was advised to file a formal application for leave to amend his original petition of appeal to enable the

- court to determine the real questions and issues in controversy. It is for this reason that the parents of the applicant instructed counsel to act accordingly.
6. The applicable law is found in section 350(2)(b)(iv) of the Criminal Procedure Code states that: *“save as provided in paragraph (1), a petition of appeal may only be amended with leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;”*
 7. I have considered the submissions of counsel, the grounds on the face of the notice of motion and the supporting affidavit. I have also perused the “home made” “petition of appeal that was filed by the applicant. I find that the applicant was sentenced to 45 years imprisonment in criminal appeal no. 55 of 2015. He was also sentenced to 40 years imprisonment in criminal appeal no. 64 of 2015. Counsel did not attach the proposed amendments to the original petitions of appeal. This notwithstanding, I find that there is merit in both applications. I agree with counsel for the applicant that the proposed amendments will fully capture the real questions and issues in controversy between the parties. I also find that the original petitions of appeal do not indicate with clarity the particulars of matters of law and facts in regard in which the trial court erred.
 8. In the light of the foregoing matters, I find that it is in the interest of justice to grant leave to appeal the petitions of appeal. This will enable the court to effectively and efficiently deal with the issues of both law and fact in respect of the two appeals.
 9. The upshot of the foregoing is that leave is hereby granted to the applicant to file amended petitions of appeal in the two consolidated appeals. The amended petitions of appeal should be filed with two weeks. There will be no order as costs although they are permitted by section 171 (1) of the Criminal Procedure Code. According to *Johnson v R (1904) A.C.*, costs should not normally be given to or against the Crown (now the the Republic) in criminal cases even if the statute so permits except in exceptional circumstances. This is in accordance with the long standing practice of the common law.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **MAY 2016**

In the presence Mr. Otieno for the applicant and Ms Mbae for the State/Respondent

Court clerk Njue

J.M BWONWONGA

JUDGE

19.05.16