



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CRIMINAL APPLICATION NO. 144 OF 2014

ROBERT KAPKAMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant prays for leave to lodge an appeal out of time. The intended appeal is against the judgment and decree of the lower court delivered on 13th January 2011 in Eldoret Senior Principal Magistrates Criminal Case 180 of 2011.

2. The applicant pleaded guilty to a charge of defilement of *N.N. [particulars withheld]*, a girl aged 15 years. He was sentenced to *twenty years* imprisonment. In his original application for leave filed on 10th June 2014, he averred that he was shocked by the sentence; and, that he fell ill. There is a subsequent notice of motion filed on 31st October 2014. In the latter motion, he avers that he failed to appeal within time “due to poverty and illiteracy”. He also claims he was not supplied with the proceedings and judgment in good time. At the hearing of the application, he said he was confused; out of pocket; and, he had been transferred to Naivasha Prison.

3. The motion is contested by the Republic. The learned Prosecution Counsel submitted that the delay in this case is inordinate and not well explained.

4. I have considered the application, deposition and the rival submissions.

The legal parameters in a matter of this nature are well settled. By dint of section 349 of the Criminal Procedure Code, this court has discretion to extend the time for lodging an appeal. That discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, and the nature of the intended appeal.

5. There is no dispute that the impugned plea of guilt; and, the sentence were entered on 13th January 2011. An appeal should have been lodged *fourteen days* thereafter. I have looked at the record of the lower court. The learned magistrate explained to the applicant that he had a right of appeal within fourteen days. The applicant did not obviously do so. The application for leave to appeal out of time was first made on 10th June 2014. That is a delay of *three and a half years* from the time of plea and sentence. The applicant states he was shocked, confused and fell ill. There is no evidence or particulars of the illness. He claims he was ignorant and was transferred to Naivasha Prison. Although he claims to have been out of pocket, I take judicial notice that the High Court admits appeals from indigent prisoners for free or at a nominal charge. There is no evidence the applicant asked for proceedings or that they were not supplied in good time. I have studied the original file from the lower court. The typed proceedings are on

the file. Since the applicant pleaded guilty, the proceedings are very brief. The delay in this case is too lengthy and ill-explained. I find it unreasonable and inexcusable.

6. I have also considered the nature of the intended appeal. I am alive that the liberty of the applicant is at stake. I have noted however that the applicant does *not* seek to impeach the plea of guilt. The annexed draft petition of appeal is *solely* a plea for *clemency*. He states that he is remorseful; that he has reformed, that he has learnt useful trades in custody; and, that he should be granted a non-custodial sentence. As noted by the lower court, section 8 (3) of the Sexual Offences Act provides for a minimum prison sentence of *twenty years*.

7. I have reached the inescapable conclusion that there has been *inordinate* and *unreasonable* delay in seeking leave to appeal out of time. The delay is *not* well explained. As a general rule, when delay is established, unless it is well explained, it is deemed to be inexcusable. See *Ivita v Kyumbu* [1984] KLR 441. For the reasons I have given, the intended appeal on sentence is on the face of it hopeless. Granted those circumstances, I am unable to exercise my discretion in favour of the applicant.

8. The upshot is that the application for leave to appeal out of time is devoid of merit. It is dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 17th day of May 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Applicant in person.

Ms. B. Oduor for the respondent.

Mr. J. Kemboi, Court Clerk.