



**REPUBLIC OF KENYA**

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

**CRIMINAL MISC. APPLICATION NO.17 OF 2016**

**FRANCIS MASAI MUASYA.....APPLICANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**RULING**

The application before this court dated 17/12/2015 is for leave to file an appeal out of time. The application was brought under Section 349 of the Criminal Procedure Code. It was based upon the grounds that:

- (1) The applicant did not manage to file his appeal within the prescribed period of time.
- (2) The applicants intended the appeal has high chances of success.
- (3) The applicants' sentence is excessive.

The application was supported by an affidavit of one Francis Masai Muasya intended appellant. In the affidavit the applicant depones that he was charged at the Senior Principal Magistrate at Mavoko Law Courts and convicted for the offence of rape and indescant act. The trial court on conclusion of the case found him guilty and sentenced him to 8 years imprisonment on the 1<sup>st</sup> Count and 2<sup>nd</sup> Count 1 year imprisonment. Both sentences were ordered to run concurrently.

That due to the confusion the applicant avers that he did not manage to appeal within the prescribed period of 14 days. That he was desirous of engaging legal services of counsel but failed to raise money and was caught up with lapse of time provided in the law. That further the applicant deponed that the intended appeal has high chances of success hence the prayer for leave to file it out of time.

The respondent was served with the application who raised no objection to the leave sought by the applicant. The application of this nature is governed by the provisions of Section 349 of the Criminal Procedure Code.

It is not in dispute that time to file appeals in criminal cases from a subordinate court to the High Court is set at fourteen days from the conclusion and final decision of the trial court. In the event a party fails to comply with the time limit of 14 days, the proviso to Section 349 provides a window of relief in the following terms:

**“Provided that the court to which the appeal is made may for good cause admit the 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 inability of the appellant**

**or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record within a reasonable time of applying to the court therefore.”**

I have considered the submissions by the applicant under Section 349 of the Criminal Procedure Code seeking to invoke the court’s discretion to grant leave to file his appeal out of time.

In exercising discretion, Section 349 provides the grounds upon which this court has to take into account to extend or deny the prayer for extension of time. I bear in mind the grounds set out under Section 349 and a further guidance to do justice to the parties being a primary duty of courts. The applicant has explained to this court in his affidavit the reason for the delay to file the appeal within time. The applicant has argued inter alia that the trial court sentenced him to a term imprisonment of 9 years which he intends to challenge on appeal as being excessive.

I take cognizance that the applicant was not represented by counsel. His argument that he was seeking to hire an advocate to represent him on appeal is not farfetched. The general principles governing matters of discretion conferred under the proviso of Section 349 can be reiterated in the decision of the case of **Leosila Mutiso v Hellen Wangari Mwangi No. 251 of 1997**. The court stated:

**“It is now well settled that the decisions whether or not to extend time for appealing is essentially discretionally. It is also well settled that in general the matters which this court takes into account in deciding whether to grant the extension of time are first, the length of the delay, secondly the reason given for the delay, thirdly (possibly) the chances of the appeal succeeding if the applicant is granted, and fourthly the degree of the prejudice to the respondent if the application is granted.”**

What I can take from Hellen’s Case herein is that the duty of the court is to hold the scales of justice and consider the circumstances of each case on the merits in exercising discretion under Section 349.

I have carefully considered the application and applying the above principles do grant the prayers sought by the applicant as follows:

- 1. That the applicant be allowed to file his appeal out of time.**
- 2. That the memorandum of appeal annexed be deemed as properly and duly filed within time.**
- 3. The Deputy Registrar do call for the lower court record together with typed proceedings in Cr. Case No. 593 of 2013.**
- 4. Further mention on 7/9/2016 before the Deputy Registrar to monitor compliance.**

It is so ordered.

**Dated, delivered in open court at Kajiado on 21<sup>st</sup> day of July, 2016.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Applicant – present

Mr. Akula for Director of Public Prosecutions

Mateli Court Assistant