

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 61 OF 2013

CHRIS MUNYOKI MUSEE.....APPLICANT/ APPELLANT

V E R S U S

REPUBLIC RESPONDENT

RULING

The appellant herein Chris Munyoki Musee was tried in the magistrate’s court at Mwingi and convicted of incest and sentenced to serve life imprisonment. He appealed the decision of the trial court to the High Court at Garissa under Garissa High Court Criminal Appeal No. 61 of 2013. His appeal was dismissed on 17th September 2014.

From the record in the file, he filed a petition of appeal on 12th August 2016 in the High Court at Garissa, though the appeal is to the Court of Appeal at Nairobi. He also filed a Notice of Motion on the same date seeking leave to file the appeal out of time. He also asked that any payments to be made for appeal be waived as he was a poor man.

When the appellant was brought to this court, he stated that the application was to the High Court as a Constitutional matter, as he wanted his sentence reviewed under Article 159 of the Constitution of Kenya 2010. He said that he was pursuing relief under Article 159 (2)(c) of the Constitution.

The learned Prosecuting Counsel Mr. Okemwa submitted that the application filed had no bearing on Article 159 (2)(c) of the Constitution. According to counsel, it was an application for leave to file an appeal out of time. In addition, the said Article related to resolution of disputes and such issue of alternative dispute resolution should have been raised in the trial court, not in this court. Counsel submitted that the applicant or appellant is merely wasting precious judicial time.

In response the applicant stated that the documents relating to the Court of Appeal were already in the court file herein.

I have perused the documents filed by the applicant/appellant herein. His appeal in the criminal matter has already been determined by the High Court. The documents filed are a Petition of Appeal and a Notice of Motion for leave to file an appeal out of time to the Court of Appeal. There is no application filed for the exercise of this court’s powers under Article 159 (2)(c) of the Constitution. In any event that Article cannot be applicable herein after the appeal of the applicant has already been determined by the High Court on appeal. The said article provides as follows-

“159 (2) traditional dispute resolution mechanisms shall not be used in a way that –

(c) is inconsistent with the constitution or any other written law.”

The application I see on the file is an application for leave to appeal out of time as well as a petition of appeal to the Court of Appeal. In my view leave to appeal out of time should be sought from the Court of Appeal. This is because the appeal of the appellant is addressed to the Court of Appeal. In this regard, I rely on section 349 of the Criminal Procedure Code which states as follows -

“349 – an appeal shall be entered within 14 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 14 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 therefore.”

It thus follows, in my view, that the appellant should seek for leave to appeal out of time from the Court of Appeal. Otherwise this court has no objection to the appellant forwarding his appeal to the Court of Appeal for further progress. He should thus take the necessary steps to do so.

The oral request of the applicant thus to invoke alternative dispute resolution mechanisms under Article 159(2)(c) of the Constitution is dismissed.

Dated and delivered at Garissa this 11th day of October 2016

GEORGE DULU

JUDGE