



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 10 OF 2015**

**KENNETH KIRUI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from Criminal case No. S.O 1 of 2014 Bomet PM's Court – Hon Karanja – SRM)***

**JUDGMENT**

The appellant was convicted and sentenced to fifteen years imprisonment in respect of count 1 and a further 15 years imprisonment in respect to count II. The sentences were ordered to run concurrently.

In the first count he was charged with the offence of attempted defilement C/S 9) (1) (2) of the Sexual Offences Act No. 3 of 2006. Those particulars were that on the 19<sup>th</sup> day of January 2014 at [particulars withheld] village within Bomet County Intentionally attempted to cause his penis to penetrate the vagina of F.C a child aged 3 /12 years.

On the second count the Appellant was charged with Indecent Act with a child C/S 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 19<sup>th</sup> day of January 2014 at Taganda village within Bomet County intentionally touched the vagina of F.C a child aged 3 ½ yeas with his penis

ication dated 22<sup>nd</sup> October 2015 and which is expressed to be brought under Order 50 Rule 6 of the Civil Procedure Rules, S.1A 1B, 3A and 79(a) of the Civil procedures Act; seeks the following order:-

- (i) That the court do grant the appellant leave of file appeal out of time against the judgment and decree of the lower court issued in Sotik SRMCC No. 31 of 2003.
- (ii) Necessary direction be given

The grounds are (i) that the applicant being aggrieved by the

judgment and decree of the lower court in Sotik SRMCC No. 31 of 2003 which was delivered on 10<sup>th</sup> September 2015 intends to prefer an appeal against the judgment and decree to this court.

(ii) Though the applicant received notification of delivery of the said judgment its advocates on record inadvertently failed to file appeal within the 30 days stay of execution granted.

(iii) The applicants intended appeal is arguable thus it would only be fair and just if this court grants leave to the applicant to lodge its appeal out of time.

(iv) This application has been made in pursuant of the interests of justice and without unreasonable delay.

This application is opposed on the grounds that there was inordinate delay in filing the appeal which delay is not explained sufficiently.

That the applicant was properly briefed by a letter dated 14/9/2015 and from the information on 24/9/2013

That there was no certificate of delay from the trial court as regards the time spent in preparation and delivery of the record of proceedings and judgment.

### The Law

Section 79(a) of the Civil Procedure Code provides :- “ Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding, from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order”.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The applicant also relies on the provisions of order 50 rule 6 of the Civil Procedure rules which provides :- “where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application, to extend such time and of any order made thereon, shall be borne by the party making such application unless the court orders otherwise”.

In the present case its not in dispute that judgment was delivered on 10<sup>th</sup> September 2015. Counsel for the applicants had 30 days within which to file an appeal which time lapsed on 9/10/2015.

It's not denied that instruction to file appeal was received on 24/9/2015. Counsel had 15 days to file appeal after instructions within prescribed time. The application to file appeal out of time was filed on 23/10/2015 which is 14 days after the time for lodging the appeal had expired.

The applicant concedes that orders for extension of time pursuant to order 50 rule 6 are not granted as a matter of right but at the discretion of the court. It relies on the authority of the case of *Mwangi –V- Kenya airways Ltd (2003)* eKLR cited in *Co-operative Bank of Kenya –vs- Peter Alandi Nyabuti (2007)* eKLR case. Where it was held that the court has to take into consideration when deciding whether or not to grant an extension of time

- (i) The length of the delay
- (ii) The reason for the delay
- (iii) The chances of the appeal succeeding if the application is granted
- (iv) The degree of prejudice to the Respondent if the application is granted.

In the instant case the reason for not filing the appeal in time is

said to have been occasioned by the inadvertent delay in seeking further instructions from the applicant upon advise on the legal and cost implications of the appeal.

I have considered that the delay of two weeks cannot be termed as inordinate. I have also considered the fact that the appellant would suffer prejudice if it would be condemned unheard on its intended appeal.

Leave to file appeal out of time is accordingly granted. Appeal to be filed and served within 14 days from the date of delivery of this ruling.

In respect of the 2<sup>nd</sup> application dated 11/12/2015 which is expressed to be brought under order 22 rules 22, 25, 42 order 42 rule 6 of the civil procedures rules it seeks the following orders.

- (i) That there be a stay of execution of the judgment delivered on the 10<sup>th</sup> day of September 2015 in Sotik SRMCC No. 31 of 2003 and all consequently orders pending the filing hearing and determination of the applicants intended appeal.

The grounds being that 30 days stays of execution granted lapsed On 16/10/15.

That the applicant is apprehensive that the Respondent may levy execution any time against it.

Further that the Respondent is a person of low means and if the decretal sum and costs are paid to her it would be difficult to recover same if the appeal is allowed.

That the appeal has overwhelming chances of success and the application has been made without unreasonable delay.

This application is opposed on the grounds that the application is Res Judicata as a similar application was heard and determined by the trial court.

Secondly that the application is brought in bad faith and its intended to frustrate the Respondent from enjoying the fruits of her judgment.

That there is already a stay of execution granted by the trial court on 12/11/2015 and which the applicant has deliberately refused to comply on its terms and conditions.

Further that there is no appeal filed yet and the court should not assist an indolent party.

### **The Law**

Order 42 rule 6 provides "No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may, for sufficient cause order stay of execution of such decree or order, and whether the application for such stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under Sub rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay ; and

(b) such security as the court orders for due performance if such decree or order as may ultimately be binding on him has been given by the applicant".

A clear perusal of the above does clearly indicate that the fact that the applicant did file an application for stay in the lower court does not preclude it from filing an appeal on the same in the superior court.

In the present case its submitted that the decretal sum and costs is a substantial sum and the Respondent does not have the means to refund in the event the intended appeal succeeds and the appeal would be rendered nugatory.

I am satisfied that the application for stay has been made without unreasonable delay and that substantial loss may be occasioned to the applicant unless an order for stay is made.

The applicant has undertaken to deposit the decretal sum plus costs in a joint interest earning account in the names of both counsels.

The application dated 11/12/2015 seeking stay of execution is allowed but on the condition that the applicant do deposit the whole of the decretal sum in an interest earning account of a reputable bank to be opened in joint names of counsels for both parties . Same to be done within 30 days from today.

The costs in both applications to the respondent.

Ruling delivered dated and signed in open court this 23<sup>rd</sup> day of November 2016 in the present of counsel for the applicant Margaret Kyalo holding brief for Bett. Counsel for the Respondent Rono for the applicant . Court Assistant

**M. MUYA**

**JUDGE**

**23/11/16**