

REPUBLIC OF KENYA

High Court at Garissa

Miscellaneous Criminal Application 14 of 2012

MOHAMED SHEHE MARO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted and sentenced by the Resident Magistrate Hola to 10 years imprisonment for the offence of indecent act with a girl less than 18 years on 23rd November 2010. He is late in filing the appeal for over 2 years. He raises the usual reasons for delay that his family had promised to hire a lawyer for him but this did not happen. In court during the hearing of this application, he submitted that he lost his father immediately he was jailed and soon thereafter he lost his child as a result of which he got confused. There is no telling what the truth for the delay is in most of the applications for leave to appeal out of time.
2. The application was opposed by the learned State Counsel who submitted that the reasons advanced by the applicant in his oral submissions are different from the ones in his supporting affidavit.
3. Section 349 of the Criminal Procedure Code (CPC) allows appeals within 14 days of the date of order of sentence appealed from. The proviso to that section gives courts discretion to extend that time where good cause is shown. The section addresses situations where the applicant has failed to obtain copy of the judgement or order appealed against and copy of record within reasonable time. The section does not address other situations where delay to appeal occurs. With that lacuna in law, the court is left to use its discretion to determine if an applicant who is late for reasons other than the ones stipulated in section 349 of the CPC can be allowed to put in his appeal out of time. That discretion is informed by other provisions of the law especially the constitutional provisions that courts ought to lean more on substantive justice as opposed to technicalities and also rights to fair trial. It would be, in my view, a miscarriage of justice if the court were to shut out an appellant who has come to court late especially when such an applicant had no services of legal counsel.
4. Having considered the application and the grounds adduced in support, and having considered objection by the learned State Counsel, I am of the view that it would serve justice better to allow the applicant more time to put in his appeal. This will give the court the opportunity to scrutinize the judgement/order of the trial court and satisfy itself that the trial was free from error. For this reason I do hereby allow the application. The appellant is ordered to file his appeal within seven (7) days of today's application. Since there is in record a grounds of appeal, this court will and does hereby deem them to be duly filed. I note that the applicant has already amended the grounds of appeal and filed written submissions. I hereby order that the same be deemed to be duly filed. The Deputy Registrar is directed to open another file for appeal and list the matter for taking a hearing date. Those are the orders of this court.

S. N. Mutuku, Judge

Dated, signed and delivered this 14th day of February 2013 in open court.