



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Criminal Appeal 13 of 2009**

**ELISHA M'MUDI INGOSI ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

The applicant was convicted for the offence of removing forest produce contrary to **section 52 (1)** as read with **section 52 (2)** of **Forest Act, 2005**. He was then sentenced to a fine of Kshs.50,000/= or in default, imprisonment for six months.

It is common ground that the conviction and the sentence were handed down on 15<sup>th</sup> September 2008. The applicant was then given 14 days within which to appeal, if he was so minded. However, the applicant did not appeal within the time allowed.

He has now moved this court with an application for leave to appeal out of time. He explains that immediately after he had paid the fine of Kshs.50,000/=, he applied to the trial court, for a copy of the proceedings.

According to the applicant, the proceedings were delivered to him on 19<sup>th</sup> November 2008, by which time, it was too late to lodge an appeal, unless the court first granted him leave so to do.

After getting the proceedings, the applicant next sought legal advice on his intended appeal. And when his advocate advised him that his intended appeal has high chances of success, the applicant filed the application for leave to appeal out of time.

As far as the applicant was concerned, he did come to seek the leave of the court promptly. He therefore asked the court to grant him the requisite leave.

In answer to the application, the state has pointed out that the applicant has not provided particulars of the dates when he applied to the trial court for the proceedings.

Secondly, even after the applicant had obtained copies of the proceedings, he is faulted for waiting for 3

months before filing this application for leave to appeal out of time. The applicant is also said to have failed to explain the delay of 3 months. Therefore, the state is of the view that the applicant never intended to appeal.

He did not act diligently or with speed, once he received the proceedings; and because of that, this court was asked not to grant him leave.

Finally, the intended appeal was said to be anything but arguable.

In reply to the submissions of the learned senior state counsel Mr. Daniel Karuri, the applicant submitted that a period of 3 months cannot be deemed as constituting inordinate delay. I was invited to bear in mind the fact that the applicant had just paid Kshs.50,000/= as a fine, and that he should therefore be given an opportunity to appeal, especially if the court takes into account the economic conditions prevailing in Kenya currently.

Having given due consideration to the application, I note that the applicant has failed to provide this court with information on the following;

- i. The date when he paid the fine of Kshs.50,000/=;
- ii. The date when he applied to the trial court for a typed copy of the proceedings;
- iii. The reasons why he received the proceedings on 19<sup>th</sup> November 2008, yet they had been certified on 4<sup>th</sup> November 2008;
- iv. The date when he sought advice from his lawyers, on his intended appeal;
- v. The date when he received the advice of his lawyers.

In effect, this court has not been provided with sufficient factual information as would enable me make an informed evaluation as to whether or not there was an acceptable reasonable explanation for the delay in lodging the appeal, and also in applying for leave to appeal out of time.

It must be borne in mind that each case is supposed to be determined on the basis of the circumstances prevailing. It is not good enough for an applicant to say that a period of 3 months is not long enough to be construed as constituting inordinate delay. That period of time must be assessed within the totality of the facts of the case.

For example, when an accused person is not taken to court within the period prescribed in the provisions of section 72 (3) of the Constitution, the period of 3 months is an extremely long period of time.

Secondly, even though it is very true that the economic conditions prevailing in Kenya (and indeed, in the rest of the World) is currently very tough, the applicant ought to have explained how the said conditions hampered his efforts to appeal within the prescribed period, and also hampered his efforts to seek leave of the court earlier, with a view to appealing out of time.

In conclusion, I hold that the applicant has not satisfied me that he deserves to be given leave to appeal out of time. The application is therefore dismissed.

***Dated, Signed and Delivered at Kakamega, this 28<sup>th</sup> day of April, 2009.***

**FRED A. OCHIENG**

**J U D G E**