



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Miscellaneous Criminal Appeal 13 of 2009

WILLY KIPNGETICH LANGAT1ST APPELLANT
JOEL KIPKEMOI NGETICH 2ND APPELLANT
VERSUS
REPUBLICRESPONDENT
RULING
Leave to appeal out of time
Section 349 of the Criminal Procedure Code Cap 75 Laws of Kenya

1. Criminal Law
2. Criminal Practice and Procedure
Miscellaneous application 9th October, 2009
 - i) Leave for appeal to be admitted out of time.
 - ii) Reasons
 - a) Three original accused in the lower court.
 - b) Advocate instructed to file appeal for all three accused.
 - c) **Only one appeal filed for original accused No. 1.**
 - d) **No appeal filed for original accused No. 2 and 3.**
 - e) **Proposed petition appeal based on the statutory 24 hours period of being held at the police.**
3. State Counsel in reply
 - a) Concedes to the application.
4. Held
 - i) Application not granted and struck out

Obiter dictum ii) The two applicant should file separate applications which upon hearing would have been consolidated.

 - iii) That separate applications for each applicant be filed within fourteen (14) of days to-days date.
5. Case Law
6. Advocates

S.K. Ngetich advocate instructed by the firm of M/S Karen Wanderi & Co. advocates for the Applicants – present

B.L. Kivihya State Counsel instructed by the Attorney General of the Respondent – present

RULING

Leave to appeal out of time
Section 349 of the Criminal Procedure Code Cap 75 Laws of Kenya

I: Background

1. Under **Section 349** of the Criminal Procedure Code, it requires that after a person has been convicted and sentenced with a Criminal offence they are permitted to file an appeal against such conviction and sentence. Namely,

“ an appeal shall be entered within fourteen (14) days of the date of the order or sentence appealed against”
2. In this application filed by the two applicants dated the 9th October, 2009, they seek leave to file their appeal out of time. They had not filed their appeal in good time as required by **Section 349** of the Criminal Procedure Code. The Section has a provision that states

“ Provided that the court to which the appeal is made may for good cause admit an appeal after the periods 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 the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against and a copy of the judgment or order appealed against and a copy of the record within a reasonable time of applying to the court therefrom”.

3. In this application the issue of obtaining the proceedings of the court late did not arise. What prompted this application is that there were three original accused persons. All instructed an advocate to file their appeal. They then instructed the current advocate on 13th July, 2009 to file a notice of change, if need be, and ensure that an appeal had been preferred. Upon making enquiries it transpired that there was no appeal had been filed for the two applicants. An appeal had been preferred for the 1st original accused person. The two applicants now seek that the court grants leave to appeal out of time.

II: Opinion

4. There are two original accused persons. Each was to file a separate file for leave to appeal out of time. Each was to deponed to the reasons as to why they wish to appeal out of time and show the “good” cause why this court should permit them to appeal out of time?
5. I have instead an affidavit deponed by the advocate on the behalf of the two applicants. Unfortunately this affidavit does not disclose the case number of the original criminal court file in order for this court to call up the same to peruse it. The actual offence against them is not disclosed nor the sentence passed.
6. An advocate is mentioned as failing to have filed an appeal. This advocate is not mentioned. The appeal already filed is not mentioned save that the 1st accused is called Geoffrey Kipkoech Rono. This does not assist the court to make appropriate orders in this file.
7. There is a Petition of appeal that discloses a judgment was delivered. On 20th June, 2008 by D.O. Rabala in a PMCR. No. 2487/06. This draft of appeal speaks of the contravention of the 24 hours delay in being brought to court.
8. I hereby struck out the application with leave for the applicants to file fresh application within fourteen (14) days containing the relevant information as sought by court. The affidavit be deponed to by the applicants themselves. The 20th June, 2008 to 9th October, 2009 is over a year in delay and requires substantive explanation.

DATED this 14th day of December, 2009 at KERICHO

M.A. ANG'AWA

JUDGE

Advocates

S.K. Ngetich advocate instructed by the firm of M/S Karen Wanderi & Co. advocates
for the Applicants – present

B.L. Kivihya State Counsel instructed by the Attorney General of the Respondent – present