



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Crim Appli 470 of 2006**

*(Intended appeal from conviction and sentence of the court martial Lang'ata Barracks*

*Nairobi –court martial case No. 05 of 2005*

**GILBERT OTIENO OWITI.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

The Application before court was for leave to file appeal out of time. The Applicant stated that the reason for delay in filing the appeal was the delay in obtaining the proceedings of the Court Martial and in going through the voluminous record in order to prepare grounds of appeal. Counsel for the Applicant submitted that the Court Martial had ended in January 2005 and that the proceedings were only ready in July 2005.

The application was opposed. **Mr. Kirihia** for the State submitted that the Affidavit supporting the Application was defective in that the source of information or basis of belief in paragraph 5, 6, 8 and 9 are not given. Counsel submitted that there was inordinate delay, which was unexplained since the paragraphs of the affidavit explaining the delay were defective.

In brief response **Mr. Sumba** for the Applicant submitted that paragraph 5 of the affidavit has an annexure which supported the averment. That paragraph 6 merely makes a statement that the proceedings were 367 pages, which is a fact. That paragraph 8 of the Application merely states that he was not the cause of the delay but that his advocate in Court Martial was, which is a fact evidenced in the proceedings.

I have considered the Application. I do not find that the affidavit in support of this Application is defective. In any event, the paragraphs challenged, even if they were to be struck off, would not adversely affect the Application.

My greatest concern was whether the record was complete with the summing up by the Judge - Advocate. Counsel for the Applicant was not helpful. However, I have confirmed from the bundle of proceedings that the summing up is part of it.

I have also satisfied myself that the proceedings of the Court Martial were completed on 19<sup>th</sup> January 2006. The proceedings were thereafter prepared for the appeal. I do not find delay in filing the appeal

inordinate. The Applicant's advocate was not clear of the date the matter was ended and erroneously stated it was in January 2005. So as Counsel for State alleged there is not a one year lapse between completion of the trial and filing of the appeal. The lapse of time is far less.

Even if there was such a delay, I find that the Applicant's right to an appeal should not be muzzled on such a flimsy ground. I will allow the prayer sought in this application. Applicant granted leave to lodge their appeal within 28 days from the date herein and to serve the Respondent within 7 days from the date of filing.

Dated at Nairobi this 3<sup>rd</sup> day of November 2006.

**LESIT, J.**

**JUDGE**

Ruling read in the presence of:

Applicant

Mr. Kiriha for State

Mr. Sumba for the Applicant

CC: Tabitha

**LESIT, J.**

**JUDGE**