



**REPUBLIC OF KENYA**

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

**Misc Crimi Appli 57 of 2005**

**AUGUSTINE LIKAMI .....APPLICANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

Augustine Likami, the Applicant, applied to this court on 5.8.05 seeking an order that he be allowed to lodge appeal out of time from the judgment of the Resident Magistrate at Butali delivered on 5.7.2005 in Butali Resident Magistrate Criminal Case No.334 of 2005. He also sought a second order that the sentence on cancellation of his driving licence be suspended pending hearing and/or final determination of the intended appeal.

The application shows that the applicant was on 5.7.05 convicted on his own plea of guilty for reckless driving contrary to section 47 (1) of the Traffic Act, Cap 403, of the Laws of Kenya. After mitigation, the applicant was fined Shs.5,000/= and in default of payment of the fine, a term of six months imprisonment was imposed. The Applicant's driving licence was also cancelled.

The facts were that the applicant was driving an Isuzu Bus registration No. KAJ 281 G which was carrying students from Musingu Boys High School along Kakamega Webuye road. At Malava town, the applicant lost control of the bus which landed in a ditch. It was alleged that he had driven it recklessly in a manner dangerous to the public having regard to all the circumstances of the case.

The Applicant applied for the proceedings on 6.7.2005. They were supplied on 2.8.05. The application for leave to lodge appeal out of time was made on 3.8.2005. Under s. 349 of the Criminal Procedure Code, Cap 75, if the court is satisfied that the failure to enter appeal within 14 days was 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 record, within a reasonable time of applying to the court therefor, it must admit the appeal. The court also has discretion to admit an appeal out of time if good cause is shown. In the present application, the application is premised on the first limb. On the facts which are straight forward, I am satisfied that the applicant's inability to file appeal within the prescribed time was caused by his inability to obtain a copy of the proceedings (which I take included the judgment and sentence) in time. Being so satisfied, I am obliged to admit the appeal out of time. Accordingly, I grant prayer one of the application.

As regards prayer 2 of the application, the lower court record shows that the applicant was convicted on his own plea of guilty. Section 348 of the Criminal Procedure Code does not permit a person who is convicted on his own plea of guilty to appeal against conviction save that he may appeal against the severity or legality of the sentence. The draft Petition of Appeal shows that the applicant is challenging the conviction as well as the legality of the sentence. The appeal is yet to be filed. There is not therefore an appeal in being on the basis of which the court can make an order in terms of prayer 2 of the application. It would not be procedurally right for the court to make the order sought in absence of or before an appeal is lodged. Once the appeal is lodged, the question of the appropriateness of the order may be revisited. This is not a case for summary allowance of the appeal. At any rate under section 352 A of the Criminal Procedure Code relating to summary allowance of an appeal, the court must be satisfied that the conviction cannot be supported and the Attorney General must have informed the court in writing that he does not support the conviction.

In the result, the application partially succeeds. The applicant shall file appeal within 14 days and serve the record of appeal within 7 days of filing. Prayer two in the application is refused.

**Dated at Kakamega this 11th day of November, 2005.**

**G. B. M. KARIUKI**

**J U D G E**