



**SWK v Republic (Criminal Appeal E059 of 2023)
[2025] KEHC 395 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E059 OF 2023
AK NDUNG’U, J
JANUARY 22, 2025**

BETWEEN

SWK APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in Nanyuki CM
Sexual Offences Case No E052 of 2022– V. Masivo SRM)*

JUDGMENT

1. The Appellant, SWK, was convicted after trial of incest contrary to Section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on diverse dates between the year 2021 and 12/07/2022 at [Particulars Withheld] within Nyeri County, being a male person caused his penis to penetrate the vagina of A.W.W a female person who to his knowledge is his daughter aged 9 years old. On 12/04/2023, he was sentenced to ten (10) years imprisonment.
2. He appealed against conviction and sentence vide a petition of appeal filed on 15/08/2023 challenging the conviction and the sentence on the following grounds;
 - i. The learned magistrate erred by failing to note that the prosecution evidence and witnesses was full of inconsistency and contradictions.
 - ii. The learned magistrate erred convicting him on a case that was not proved beyond reasonable doubt.
 - iii. The learned magistrate erred by failing to note that the medical evidence did not prove penetration.
 - iv. The learned magistrate erred by failing to note that the hymen was old broken.



- v. The learned magistrate erred by failing to note that the sentence meted was harsh and excessive.
 - vi. The learned magistrate erred by failing to note that he was not subjected to medical examination.
3. The appeal was canvassed by written submissions which I have duly considered.
 4. The Respondent’s counsel in her submissions raised a preliminary point of law to wit, the appeal was filed out of time and without the leave of the court hence the appeal is bad in law for being time barred and ought to be struck out. She placed reliance on the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR and emphasized that the appeal is a nullity and ought to be struck out.
 5. The judgment of the lower court was delivered on 05/04/2023 and the Appellant was sentenced on 12/04/2023. The petition of appeal as seen earlier was filed on 12/08/2023. Therefore, the petition of appeal was filed four months after the ruling on the sentence was delivered.
 6. The period within which a criminal appeal should be filed is statutorily provided under Section 349 of the Criminal Procedure Code which provides:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period 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 record, within a reasonable time of applying to the court therefor.”
 7. The Appellant was therefore supposed to lodge the appeal before the expiry of 14 days. The appeal was however lodged after four months which was outside the stipulated timelines and as submitted by counsel for the Respondent leave was not sought. Section 349 above states that court can admit an appeal filed out of time but that discretion can only be exercised on the court being formally moved by an application.
 8. The Supreme Court of Kenya in SC Appl No 38 of 2014 between TSC vs Simon Kamau and 19 Others, adopted its earlier decision in Nicholas Kiptoo Arap Korir Salat vs the IEBC & 7 Others SC Appl No 16 of 2014 and stated:

“No appeal can be filed out of time without leave of Court. Such filing renders the “document” so filed a nullity and of no legal consequences. Consequently, this court will not accept a document filed out of time without leave of the court.”
 9. The SC further held that a document filed out of time without leave of court is irregular and unknown in-law and the same should be struck out.
 10. Although the above decision related to civil litigation, the principles applicable are same in criminal cases. A party who is convicted and sentenced to serve prison sentence and who proceeds to serve that prison sentence must if he/she so wishes to challenge the decision of the court, file, at the earliest opportunity, an appeal or if for good reason they delayed in filing of the appeal, then they must first seek for leave extending the 14days period. This is not the case here.



11. In Moses Mwicigi and 14 Others -vs- Independent Electoral and Boundaries Commission and 5 Others Supreme Court Petition No. 1 of 2015 the Court held:

“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

12. What have the courts said in so far as an infraction in respect of Section 349 of the Criminal Procedure Code is concerned? In the case of Samson Owiti Otambo v Republic (2018) e KLR the judge stated:

“7. The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court.”

13. In Michael Onyango Owala -v- Republic (2018)eKLR the court stated;

“15. Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the Criminal Procedure Code to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an ‘appeal’ is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.”

14. The Court of Appeal court of appeal where called upon to determine the competence of an appeal before it where the Appellant had failed to file a Notice of Appeal in Faisal Mohamed Ali alias Feisal Shahbal -v- Republic (2015) eKLR stated:

“Accordingly the Court cannot exercise its adjudicatory powers conferred by law or *the Constitution* where the appeal is incompetent and that an incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

15. From the foregoing, there is no competent appeal before the court as the appeal herein was filed out of time and no leave was ever sought even late in the hearing for the admission of the appeal out of time. The court lacks the jurisdiction to entertain the same. The Appeal filed herein is hereby struck out.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JANUARY 2025.

A.K. NDUNG’U

JUDGE

