



**REPUBLIC OF KENYA**

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

**MISC CRIMINAL NO. 42 OF 2018**

***(CORAM: F.M. GIKONYO J.)***

**DANIEL NJUGUNA KIMANI.....APPLICANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

**RULING**

**Leave to appeal**

[1] The Applicant filed Narok High Court Criminal Appeal No. 61 of 2016. When it came up for hearing on 24/07/2019, *Bwonwong'a J.* declared the appeal to be incompetent for it was filed without leave of the court and therefore struck it out.

[2] The Applicant has now approached this court via a miscellaneous application. On 8/2/2021 the applicant verbally sought for leave of court to file appeal out of time. He further stated that he was jailed in 2012.

[3] The prosecution counsel for the Respondent opposed the application for leave to file appeal out of time. The Respondents' objection to the application was, principally, that the matter was concluded in 2012 and that there is inordinate delay which has not been explained on the part of the applicant. The learned prosecution counsel therefore urged this court to reject the applicant's request as it is an abuse of the court process.

**ANAYSIS AND DETERMINATION**

[4] In essence, I should determine: -

**a) Whether good cause has been established to warrant extension of time to file appeal.**

[5] Article 50 (2) (q) of the Constitution sets out the of appeal in the following terms;

*“50 (2) Every accused person has the right to a fair trial, which includes the right—*

*.....*

*(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”*

[6] The procedure and timelines governing filing of appeal is ***as prescribed by law***. According to section 349 of the Criminal Procedure Code (hereafter the CPC): -

***349. 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] According to the proviso to section 349 of the CPC: -

***...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.***

[8] The delay should be explained to the satisfaction of the court. The applicant was convicted and sentenced on 14<sup>th</sup> December, 2012 but did not file appeal in time. I expected the applicant to explain the delay after his appeal was struck out. But, he offered none. He simply stated that he was jailed in 2012 and he needed leave to file appeal. The prosecution counsel considered the delay herein to be contumelious, unexplained and inordinate.

[9] I am aware that, under Article 50 (5) (b) of the Constitution: -

***“The accused has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in turn for a reasonable fee as prescribed by law.”***

[10] The question is, however; Has the Applicant shown that the inability to file appeal in time was due to late supply of judgement or order appealed against? I have perused the appendix of date in HCCRA 61/2016; it indicates that the applicant herein requested for proceedings and judgment on 4/4/2014. He then lodged the appeal on 29/11/16 without leave. It is clear that he requested for judgment and proceedings after two years of conviction and sentence. It bears repeating; he offered no explanation for the delay. These facts excite a reasonable conclusion; that, considerable time has passed by and absence of reasonable explanation makes the delay inordinate, and therefore inexcusable. In light thereof, I reject his application for leave to appeal out of time. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH T DAY OF MARCH 2021**

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**F. GIKONYO**

**JUDGE**

In the Presence of:

1. Ms. Torosi for the DPP
2. The applicant in person
3. Mr. Kasaso - CA

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**F. GIKONYO**

**JUDGE**