



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
MISC.CRIMINAL APPLICATION NO E001 OF 2020
MICHAEL MUKHWANA WANYONYI.....APPLICANT
VERSUS
REPUBLICRESPONDENT
RULING

*(Being an application from the judgement and sentence of Hon. L.G.G Okwengu, RM, in the SPM's Court at Kapenguria,
in Criminal Case No. 199 of 2020, Michael Mukwana Wanyonyi)*

The applicant under certificate of urgency through his notice of motion filed in this court on 14/10/2020 seeks the following orders from this court.

- 1) Spent
- 2) An order to grant him leave to file his appeal out of time.

The applicant was convicted and sentenced to a fine of shs 40,000/- in default to serve three years imprisonment in respect of the offence of stealing two tyres of a motor cycle registration No. KMET 459 R, make Honda.

The applicant's application is supported by four grounds that are set out on the face of his notice of motion and a seven paragraphs supporting affidavit.

The major grounds in support of his application include the following.

First, he was confused after the delivery of his judgment. Second, he was not possessed with any knowledge on how and when to appeal against the judgement of the lower court. Third, he was sickly while in remand and prays that the court reviews his sentence in the appeal.

Fourth, the applicant has stated that due to lack of knowledge he was unable to write his appeal in time.

Fourth, he has averred that since his recovery, he was able to file an appeal in the High Court. He has also averred that his appeal raises substantial issues of law and for that reason he prays that his application for leave to appeal out of time be allowed.

Fifth, during the oral hearing of his application the applicant submitted that his application was delayed by the corona pandemic; which delayed his coming to court.

The prosecution opposed the application arguing that the application was an afterthought and an abuse of the court process. The prosecution also submitted that there was inordinate delay of six months in filing the application; since judgement was delivered on 14/4/2020 and he filed his application on 5/10/2020. The prosecution further submitted that the applicant did not produce evidence that the covid-19 pandemic affected the filing of his application.

Issues for determination

I have considered the affidavit of the applicant and his grounds in support of his application together with his oral arguments. I have also considered the submissions of the prosecution in opposition to the application. As a result, I find the following to be the issues for determination.

Issue

1. Whether the applicant has made out a case for the grant of an order to extend leave within which to file his appeal out of time.

Issue 1

A person who has been convicted and sentenced and is desirous of appealing to the High Court has to do so within 14 days; following the delivery of the judgement and sentence sought to be appealed against. However, the High Court may for good cause extend time within which the convicted person may appeal. This is clear from the provisions of section 349 of the Criminal Procedure Code (Cap 75) Laws of Kenya, which read as follows.

“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.”

The basis of the application is not that the applicant did not obtain the judgement and proceedings in time to enable him to appeal. The basis of the application is that he was sickly and the corona- pandemic disabled him from prosecuting his appeal timeously and that he was confused following his conviction and sentence.

Additionally, the other grounds advanced in support of the application are matters of law. The issues of law include the applicant’s assertion that his application raises substantial issues of law.

It is clear that all the applicant’s grounds in support of his application are not recognized by section 349 of the Criminal Procedure Code. This section only recognizes only one ground namely the inability of the applicant to obtain the judgement and proceedings within the 14 days to enable him to appeal. This ground has always been recognized by the court. For instance, in *Abdulla Lule v R (1960) EA 21*, the applicant’s application to appeal out of time was allowed because he did not obtain the judgement and proceedings of the lower within 14 days to enable him to appeal.

In view of the foregoing statutory provisions, resort to other laws is necessary to judicially resolve this application. First, the right of the applicant to appeal has been constitutionalized in article 50 (2) (q), which reads: “Every accused person has a right to a fair trial, which includes the right-

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

Second, article 159 (2) (d) of the 2010 Constitution of Kenya mandates this court to administer substantive justice without undue regard to procedural technicalities.

In view of the above constitutional provisions, although the grounds in support of his application are not recognized by the provisions of section 349 of the Criminal Procedure Code, this court is entitled to consider the grounds advanced by the applicant to decide whether his application is merited. This is more so because the provisions of the Criminal Procedure Code are not comprehensive, since they are defective for not recognizing other grounds that may entitle a convicted person to apply to appeal out of time.

The applicant has averred that he was sickly following his conviction and sentence and that he was not possessed of the knowledge that is required to appeal within the prescribe time. He also submitted that the covid-19 pandemic also caused delay in the filing of his application. The prosecution opposed his application because he did not produce evidence to show that the covid-19 pandemic contributed to his late filing of his application. I take judicial notice that the covid-19 pandemic adversely affected the operations of the court. I therefore find that it was not necessary for the applicant to produce evidence in respect of the adverse impact of the covid-19 pandemic. Furthermore, the averment of the applicant that his was sickly was not controverted by the prosecution.

It therefore follows that the delay of about 6 months in filing the application was not unreasonable.

Furthermore, the application raises substantial issues of law namely whether the plea of guilty is unequivocal. Additionally, the other issue raised is whether the sentence imposed is lawful or not in view of the provisions of section 28 (2) of the Penal Code (Cap 63) Laws of Kenya. These two legal issues in themselves constitute good causes that warrant the application to be allowed.

In the circumstances, I find that the applicant has made out a case for the grant of the orders sought.

The upshot of the foregoing is that the application succeeds and is hereby allowed.

The applicant is to file his appeal within the 14 days.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KAPENGURIA THIS 9TH DAY OF JUNE, 2021 IN THE PRESENCE OF THE APPLICANT AND MR. MAKORI ..FOR THE RESPONDENT.

J M BWONWONG'A

JUDGE