



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 32 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. Z.Abdul (R.M) in Narok CMCR No. 76 of 2013 on 19<sup>th</sup> July 2013)

PS.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No 3 of 200. It is alleged that on the 19<sup>th</sup> day of January 2013 at [Particulars Withheld] area in Narok North district within Rift Valley Province being a male person caused his penis to penetrate the vagina of LS a female juvenile aged 15 years who was to his knowledge her daughter.
2. In the alternative charge, he was charged with the offence of indecent act contrary to section 11(1) of the sexual offences act no. 3 of 2006. The particulars of the offence were that on 19<sup>th</sup> day of January 2013 at [Particulars Withheld] area of Narok north district within the Rift Valley Province committed an indecent act with LS by rubbing his genital organ(penis) against the said LS's female genital organ(vagina).
3. He was tried for the offence and convicted on the main charge. He was sentenced to life imprisonment. Having been dissatisfied with the conviction and sentence he filed this appeal.

#### **background**

4. The appellant delayed in filing his appeal for a period of three years and five months. He therefore filed a **Criminal Miscellaneous Application No. 1 Of 2017** dated 16<sup>th</sup> January 2017 at Narok high court. In the said application he sought leave to appeal out of time under Section 349 of the criminal procedure code. **Bwonwong'a J.** dismissed the application vide the ruling delivered on 8<sup>th</sup> February 2017.
5. The appellant herein then filed a myriad of applications before the high court as follows;

**i. Miscellaneous Criminal Petition No. 6 Of 2018-** received in court on 29<sup>th</sup> may 2018. The application sought resentencing under **Muruatetu** case.

**ii. Miscellaneous Criminal Application No. 35 of 2018** seeking to be released on bond pending appeal. The applicant vide letter dated 30<sup>th</sup> January 2020 notified the court that he was withdrawing the miscellaneous application no. 35 of 2018 and appeal no. 32 of 2019.

**iii. Petition of Appeal No. 32 of 2019** filed on 17<sup>th</sup> July 2019.

**iv. Miscellaneous Criminal Application No. 6 of 2020** filed on 30<sup>th</sup> January 2020. The applicant was seeking a close hearing date for his appeal.

**v. Criminal Revision No. 51 Of 2020** filed in court on 26<sup>th</sup> March 2020. In this application the applicant sought the court to invoke its criminal revisionary jurisdiction.

**vi. Miscellaneous Criminal Application No. 7 Of 2020** dated 17<sup>th</sup> February 2020 seeking leave to file his appeal out of time. The advocates on record, Wambua Kigamwa & Company Advocates vide letter dated 19<sup>th</sup> March 2020 notified the court that the appellant had withdrawn his application seeking leave to extend time to lodge an appeal against the conviction and sentence dated 19<sup>th</sup> July 2013 in Narok chief magistrate criminal case no. 76 of 2013 entirely.

6. On 7<sup>th</sup> October 2020 when miscellaneous application no. 7 of 2020 came for mention the court directed that the matter be mentioned on 14<sup>th</sup> October 2020 to enable the prosecution prepare for a hearing date.

7. The advocate for the appellant on 17<sup>th</sup> November 2020 prayed that all applications filed in the suit be marked as closed which prayer was granted.

8. When the matter came up for mention on 8<sup>th</sup> February 2021, prosecution counsel Ms. Torosi addressed the court on the fact that the appeal as filed is incompetent and an abuse of the court process. The prosecution opposed the appeal as being incompetent and null and *Void ab initio* and ought to be struck out.

9. The prosecution has submitted that having not been granted leave the appellant appeal was sneaked in the confusion caused by the myriad applications filed by the appellant. That the high court in its ruling dated 8<sup>th</sup> February 2017 dismissed the appellant's application to appeal out of time. This was after the court heard both parties. Therefore, the current appeal by the appellant is not founded on any legal footing as he was not granted leave to file his appeal. The appellant has not approached this court with clean hands from the onset as he failed to disclose to this court that the high court dismissed his application to file his appeal out of time. That under Section 361(8) (b) of the Criminal Procedure Code the ruling is final and cannot be appealed against in the court of appeal. The prosecution has cited the case of **Atieno V Republic [1985] eKLR.**

10. The prosecution has submitted that this court having a concurrent jurisdiction cannot admit this appeal as that would amount to sitting on appeal or review of the decision dated 8<sup>th</sup> February 2017 made by a fellow judge. The prosecution has relied in the cases of **Republic Vs Baktash Akasha Abdalla Alias Baktash Akasha & 3 Others [2015] eKLR and Bellevue Development Company Ltd V Francis Gikonyo & 7 Others [2018] eKLR**

11. Therefore, the prosecution prayed that this court finds that the appeal filed by the appellant is null and *void ab initio* and ought to be struck out.

12. Despite this court's orders of 13/7/2021 that the appellant to file and serve supplementary submission on the issue of leave in 21 days after service by the DPP, the same has not been complied with.

13. The appellant filed the submission in respect of the appeal on 23<sup>rd</sup> September 2020.

#### **Analysis of the law and determination**

14. I have perused all the applications filed before this court by the appellant, the appeal and the lower court record as well as the submissions by the respondent. I find that the orders issued on 2<sup>nd</sup> February 2017 by Bwonwong'a J. have not been set aside or reviewed. The question then becomes: is this appeal competent?

15. No review of the orders issued by this court (Bwonwong'a J) has been sought or granted by this court or appellate court. No leave has been obtained to file the appeal out of time. An appeal filed out of time without leave of the court is incompetent and the court cannot lawfully exercise jurisdiction on such appeal. Limitation of actions is a substantive matter of law. It serves a noble objective to ensure finality of litigation. Thus, failure to obtain leave to file proceedings out of time is not a mere technical omission but a substantial lapse that goes to the root of the proceeding itself.

16. In the upshot, this appeal is an abuse of court process for it was filed without leave of the court. For that reason, the appeal is declared incompetent and is struck down. In any case, there is no appeal before this court as the same was withdrawn.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

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**F. GIKONYO M.**

**JUDGE**

#### **In the presence of:**

1. Appellant
2. Karanja for Respondent

