



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CRIMINAL APPEAL NO 177 OF 2019**

**BETWEEN**

**NUMBER 61603**

**POLICE CONSTABLE JAMES LOIBORKERA....APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

**RULING**

The accused PC James Loiborkerra filed this application dated 6/11/2019 under the provisions of **Article 50 of the Kenya 2010 Constitution and Section 349 of the Criminal Procedure Code**, seeking an order for leave to file an appeal, against the judgment delivered on the 21/9/2018 out of time. He bases the application on grounds stated at the face of the application in particular that he was convicted on the offence of desertion from the **Kenya National Police Service Contrary to Section 94(1) as read with Section 94(3) of the Act**, and sentenced to a fine of Kshs.30,000/- that he duly paid.

The applicant by his affidavit in support depones that he was aware of the 14 days period upon which he ought to have filed the appeal, but that his intention was constrained due to family involvement to have an advocate engaged to represent him on the intended appeal, and that the family failed to raise the necessary funds to engage an advocate within the Statutory period.

He states by his affidavit that it is only recently that he has been able to raise funds to engage a lawyer thus this application.

**Section 349 of the Criminal Procedure code** empowers the court to admit and or allow a party to file an appeal out of time if satisfied that the delay has been caused by the inability of the applicant or his advocate to obtain a copy of the judgment or order appealed against or for any good cause.

The applicant has not stated that for the period of 14 months after the judgment was delivered he was unable to obtain a copy of the judgment. Indeed he avers that he was not ignorant of the time limitation.

The applicant did not require funds beyond his reach to file, the petition of appeal in person. I am not persuaded that the reason he states as his family's failure to raise funds to engage an advocate is a plausible and sufficient reason.

I agree with the Respondent's averments in its replying affidavit sworn by Odera Vena Prosecution Counsel, on the 24/2/2019, that the applicant was not confined, and could have easily filed a notice of appeal, while awaiting to engage an advocate to argue the appeal.

It is further noted that the applicant is an adult, and a police officer, thus did not need advice by his family members as to whether or not to file the appeal. The decision lay with him all through, and the period of delay of 14 months is clearly inordinate, and devoid of reasonable explanation. He has failed to demonstrate his inability to file the appeal within the requisite period. I am persuaded that this application is, but an afterthought.

I find no merit in the application, and proceed to dismiss it.

**Delivered, signed and dated at Nakuru this 6<sup>th</sup> Day of May 2020.**

**J.N. MULWA**

**JUDGE.**