

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CRIMINAL APPLICATION NO 36 OF 2018 & 13 OF 2020

KENNEDY KIPKOECH CHERUIYOT alias KIPKEMOI.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Leave to appeal out of time

1. The applicant filed two applications to wit: Narok HC Misc. Cr. Appl. No. 36 of 2018 and No. 13 of 2020. The two applications relate to NAROK SOA CASE NO. 1154 OF 2011. In the former case, he filed a petition of appeal supported by an affidavit sworn by him. In that affidavit, he stated at paragraph 4 thereof that, he filed an appeal at Nakuru but his file was transferred to Narok High Court, and on 13/2/2019 he was summoned to court only to find that his petition of appeal has not been filed in court. At paragraph 5 thereof, he sought leave of court to allow his appeal out of time.

2. In Narok HC Misc. Cr. Application No. 13 of 2020 he is seeking leave of court to file appeal out of time. In the Notice of Motion and the affidavit in support, he stated that he was convicted and sentenced on 3/11/2012 to serve a 20 years' jail term for defilement. The motion is anchored on article 50 (6) (a) (b) of the constitution. He explained why he did not file appeal in time: Lack of legal fee.

3. The state counsel, Ms. Sharon Koina, submitted that the state filed a replying affidavit in opposition to the application. It was deposed that judgment to be appealed from was pronounced 8 years ago. Thus, there has been inordinate delay which has not been explained to the satisfaction of the court. She took the view that the applicant filed these applications himself – something he would have done with the appeal. Accordingly, she took the view that lack of fees is not an issue, but, merely an excuse. She accused him of not being diligent and so she prayed that these applications be dismissed.

4. According to section 349 of the Criminal Procedure Code (Cap 75) Laws of Kenya

“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.”

5. Therefore, the applicant must show good cause why he did not file appeal in time. Of central consideration is inability to obtain the judgment and proceedings in time. The applicant has established that inability to obtain judgement and or proceedings prevented him from filing appeal in time. He merely stated that his family did not have the legal fee to file appeal. I agree with Ms. Torosi's averment that fee is not an issue here as he would still have filed a petition of appeal at no cost just as he did with Misc Cri. App. No 36 of 2018 and 20 of 2020. I note also that the applicant did not substantiate the claim that he filed an appeal at Nakuru. In any event, if he filed an appeal in Nakuru, then subsequent applications such as the ones before me would be an abuse of the process of court.

6. Be that as it may, 8 years has passed since his conviction and sentences- this is a considerable period of time for a person to wait before coming to court for leave to appeal out of time. And in law, the period becomes inordinate delay and inexcusable if no reasonable explanation is given for the delay. The explanation given by the applicant that his family did not have legal fee to file appeal is a mere excuse. Accordingly, I find that the applicant has not shown any good cause for which I can exercise my discretion in his favour. In the upshot, I dismiss application No. 36 of 2018 as well as No. 13 of 2020. In accordance with the proceedings for 18/11/2020, this ruling be placed in each of the two files to which it relates.

Dated, signed and delivered at Narok through Teams Application this 9th day of December 2020

F. GIKONYO

JUDGE

In the Presence of:

1. Ms. Koina for the State

2. The appellant in person

3. Court Assistant – Mr. Kasaso