



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 134 OF 2018

REPUBLICAPPELLANT

VERSUS

JOSEPH MUTUKU MUIA.....RESPONDENT

RULING

1. The Ruling relates to the application dated 4.6.2019 by the Respondent seeking leave to cross appeal and lodge an appeal out of time. The application is supported by the affidavit of the Respondent who averred that he received the copy of the proceedings and the judgement on 28th May, 2019 and since time had lapsed, he sought the requisite leave. The deponent averred that the delay was not inordinate and that the issues raised in the cross-appeal are triable and no prejudice will be suffered by the appellant who has appealed and will equally have a chance to be heard during the hearing.

2. The Appellant opposed the application and raised the following grounds of objection:-

(a) That the application is dead on arrival by dint of Section 348 of the Criminal Procedure Code- No appeals shall be allowed in a case where an accused has been convicted on his own plea of guilty except as to the extent of the legality of the sentence.

(b) That the Criminal Procedure Code does not recognize cross-appeals.

(c) That the application for leave to file a cross-appeal is an afterthought aimed at derailing the hearing of this appeal. The same is a non-starter.

3. The appellant opted to rely on the grounds raised in the P.O dated 24th June 2019 while the respondent filed submissions dated 5th July 2019. The thrust of the respondent's submission is that the preliminary objection by the appellant is not backed by any legal basis. Reliance was based on the Court of Appeal decision in the case of **Alexander Lukoye Malika v Republic (2015)eKLR** where the court held as follows:

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misrepresentation of facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to him. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged”

4. Learned counsel for the respondent further submitted that the respondent has raised sufficient grounds in the cross appeal warranting consideration by this court as it was not necessary to file a separate appeal in the same file.

5. I have considered the Respondent's Application and the grounds of opposition as well as the submissions by the respondent/applicant. The first point taken by the appellant is that appeals in respect of an own plea of guilt are not allowed. However the same plea is being challenged in the intended appeal. The record of the lower court indicates that the Respondent was convicted and sentenced on 6.12.2018. By the clear provisions of Section 349 of the Criminal Procedure Code an Appeal ought to have been lodged within 14 days from the date of delivery of the sentence or order. However, the said provisions allows the Appellate Court to consider a request for lodging an appeal out of time if an Applicant shows that the inability had been caused by late supply of judgement or order appealed against. The unmarked exhibit annexed to the application by the Respondent indicates that the proceedings were received on the 28.5.2019 and this has not been disputed by the appellant and by failing to respond to the respondent's affidavit, the Respondent's claim that he received the proceedings late must be taken as a reasonable explanation. Even though the Respondent was late in lodging the Appeal by about five months, I find the reasons for delay advanced to be excusable.

6. A draft copy of the Cross Petition of Appeal has been annexed to the Application and which raises issues to do with the conviction and

sentence and more particularly legality of the conviction and the sentence. According to the record, the court convicted the respondent on “own plea of guilty” hence no Appeal shall be allowed under Section 348 of the Criminal Procedure Code except to the extent of the legality of the sentence. However the petition of appeal and the cross petition of appeal has issues that appear to be arguable and appear to be a substantial question of law or fact or both such that when resolved one way or the other, will affect the result of the appeal. In the instant case, both the appellant and respondent should be given the opportunity to ventilate in the appeal since they each have a right of access to justice under the constitution and to enable them to freely exercise that right without hindrance. Once the cross appeal has been filed by the respondent it is imperative that the same be put forth for determination during the appeal. Indeed the respondent has clearly indicated that he intends to challenge the manner in which the plea was taken. As far as the respondent is concerned the plea was not unequivocal as claimed by the appellant. This then calls for the cross appeal to be allowed and the parties do proceed to canvass the appeal on merits.

7. The second point taken up by the appellant is that the Criminal Procedure Code does not recognize cross-appeals hence the issue to be determined is whether the respondent can invoke the appellate jurisdiction of the court. A cross-appeal amounts to an appeal that is lodged by a respondent; the online law dictionary defines the same as “the term given to an appeal where both parties will appeal the judgement rendered.” Though the Criminal Procedure Code Act is silent on cross-appeals, Article 50(2) (q) of the Constitution provides that every accused person has a right “if convicted, to appeal to, or apply for review by, a higher court as prescribed by law”. From the application before the court, it is clear that the appellant is aware that the respondent has opted to escalate his issue to the appellate court. Hence the respondent ought to be given a right to be heard as recognised in Article 50 of the constitution. This would mean that technical issues such as those raised by the Appellant in its notice of preliminary objection should not be allowed to defeat the determination of this Appeal on its merit. Therefore the preliminary objection dated 24.6.2019 has the effect of creating a roadblock to the respondent’s quest to approach the appellate court on appeal. There will be no prejudice suffered by the appellant if the respondent is granted leave to lodge his cross appeal out of time as the appellant will have its day in court to challenge the same. Hence the preliminary objection raised by the appellant lacks merit.

8. In the result the Applicant’s Application dated 4.6.2018 is found to have merit. The same is allowed in the following terms:

(a) The Respondent is granted 14 days within which to file and serve his cross petition of appeal.

(b) As directions had been taken regarding the hearing of the appeal, the Respondent is to file and serve his submissions alongside the cross petition of appeal.

(c) The appellant is granted leave to file and serve supplementary submissions if need be within fourteen (14) days upon being served.

It is so ordered.

Dated and delivered at Machakos this 23rd day of July, 2019.

D.K. KEMEI

JUDGE