



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT SIAYA
HC. CR. A. CASE NO. 151 OF 2016
(DEFILEMENT)
(CORAM: R.E. ABURILI – J)

SAMSON OWITI OTAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence

dated 22.10.2014 in Criminal Case No. 443 of 2013 in Siaya

Principal Magistrate's Court before Hon. H. Wandere – PM)

JUDGMENT:

1. On 26th June 2013 the Appellant herein **SAMSON OWITI OTAMBO** was arraigned before the **P.M's Court vide Cr. Case No. 443/2013** charged with the offence of **Attempted Defilement contrary to Section 9 (1) of the Sexual Offences Act No. 3 of 2006** and an alternative count of **Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act, No. 3 of 2006**.
2. He denied the charges and was taken through the trial, found guilty of attempted defilement of the Complainant victim and acquitted on the charge of committing an Indecent Act on the victim child which was the alternative charge. This was on 22.10.2014.
3. Being dissatisfied with the conviction and sentence of 10 years imposed on him by Hon. Wandere (P.M.) the Appellant herein filed an appeal on 25.10.2016 which was exactly two years and 3 days after the conviction and sentence on 22.10.2014.
4. The record does not indicate whether the Appellant sought leave of Court to file his appeal out of time.
5. The Petition of appeal duly endorsed by the Appellant being prisoner **No. SYA/716/2016/LS** – Samson Owiti Atambo and as forwarded by David W. Mutura (IP) for officer-in-charge, Siaya G.K. Prison, dated 17th October, 2016 was received in Court on 25.10.2016.
6. On 16.4.2018 the Appellant appeared in Court and handed in his Supplementary Grounds of Appeal.

There is nothing on record to show that the appeal against conviction and sentence was filed within the 14 days stipulated-in-law. The Appendix of date and order of the Judge under **Section 352 of the Criminal Procedure Code** on admission of the appeal shows that the learned Judge. J.A. Makau – J., did on 30.6.2017 admit the Appellant’s appeal for hearing. However, the Learned Judge did not consider whether the appeal was filed within the stipulated timeframe.

7. The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court.

8. The Supreme Court of Kenya in **S.C. Appl. No. 38 of 2014 between TSC Vs. Simon Kamau and 19 Others**, adopted its earlier decision in **Nicholas Kiptoo Arap Korir Salat V. the IEBC & 7 Others SC Appl. No. 16 of 2014** and stated:

“To file an appeal out of time and seek the Court extending time is presumptive and inappropriate. No appeal can be filed out of time without leave of Court. Such filing renders the “document” so filed a nullity and of no legal consequences. Consequently, this Court will not accept a document filed out of time without leave of the Court. The S.C. further held that a document (Petition filed out of time without leave of Court is irregular and unknown in-law and the same should be struck out. Where one intends to file an appeal out of time, what he can do is to annex the draft intended Petition of Appeal for the Court’s perusal when making his application for extension of time, and not to file an appeal and seek to legalise it.”

[66] *Article 159 (2) (b) of the Constitution cautions Courts against permitting injustice through delays, in the following terms:*

(a)

(b) *Justice shall not be delayed*

[67] *Thus, the stand point of the Constitution is that, delayed Justice amounts to injustice and the Courts which are the dedicated mechanism for the delivery of Justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time frame. This is the context in which Article 259(8) of the Constitution is to be seen, it thus prescribes:*

“If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises.”

[68] *From the record, it appears to us that the Applicant had no intention of appealing, the Appellant did take definite steps towards implementing the judgment of the Court. The desire on the Appellant’s part to lodge an appeal is not even evident, and hardly any initiative was taken to secure the right of appeal. The three-year period that elapsed is, in the circumstances, to be regarded as unreasonable delay, which is inconsistent with a quest for justice before this Court. [Emphasis added].*

9. Although the above decision related to civil litigation, the principles applicable in criminal cases as far as Criminal Appeals from the Subordinate Court to the High Court are concerned, a party who is convicted and sentenced to serve prison sentence and who proceeds to serve that Prison sentence must if he/she so wishes to challenge the decision of the Court, file, at the earliest opportunity, an appeal.

10. In this case, the convicting Magistrate in sentencing the Appellant to serve 10 years imprisonment at page 42 of the proceedings also informed him of his right of appeal within 14 days, on 22.10.014. The Appellant having served sentence from 22.10.2014 only filed an appeal into this Court on 25.10.2016 which was over two years from the date of conviction and sentence. And as indicated earlier, there is no order of this Court extending the period for filing of the appeal. Leave of Court is what would give the Applicant the greenlight for filing of the Criminal Appeal. In **Ocheja Emmanuel Dangara Vs. Hon Attai Aidoko A/O Usman and Others, Supreme Court 480/2011 and SC 11/2012 (Consolidated)**

Boda Rhodes – Vivour JSC stated:

“A Court is competent, that is to say, it has jurisdiction when – (material)

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2 –

3 - The case comes before the Court initiated by the due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction [See Feisal Mohamed Ali Alias Feisal Shahbal V R. [2015} eKLR (Criminal Application No. 2/2015.

11. Therefore, having found that the appeal herein was filed out of time without leave of Court, this Court will not delve into the merits of the appeal at this stage. The appeal is hereby struck out for being incompetent.

Dated, Signed and Delivered in open court at Siaya this 12th Day of June 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for the State

Samson Owiti Otambo: Appellant in person

Court Assistant: Brenda