

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL MISC. APPLICATION NO. 96 OF 2017

MICHEAL MAPESA MAKOKHA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein has filed an application seeking to be granted leave to lodge appeal out of time and that the draft memorandum of appeal as well as the Notice of appeal be considered.
2. The Applicant's case is that his family had promised to hire an advocate to appeal on his behalf but that none has turned up as the family failed to raise the fees. The Applicant further maintains that his intended appeal has high chances of success. The Applicant further went on to add that the High court delayed in providing him with a copy of the judgement which thus occasioned the delay in filing the second appeal.
3. The Application was strongly opposed by the Respondent whose learned counsel Mr. Cliff Machogu filed a replying affidavit raising several grounds of objections *inter alia*: that the first appellate court delivered its decision on the 25/11/2015 and Applicant granted 14 days to lodge appeal if aggrieved as provided for under Section 349 of the Criminal Procedure Code; that the Applicant failed to file any notice of intention to appeal nor any appeal within the stipulated time; that the present attempt to lodge appeal after a period of more than two years is an abuse of the court process; that the applicant has not demonstrated that the delay to lodge his appeal out of time was not of his own making but was caused by the inability to obtain the court proceedings and judgment within reasonable time as required under Section 349 of the Criminal Procedure Code; that if the Application is allowed it will grant leeway for the abuse of Section 349 of the Criminal Procedure Code; that the Applicant has not demonstrated that his appeal has high chances of success if application is allowed.
4. I have considered the Applicant's Application and the rival affidavits. It is not in dispute that the judgment of the first appellate court was delivered on the 25/11/2015 and that the Applicant was under obligation to lodge his appeal, if any, within 14 days as required under Section 349 of the Criminal Procedure. The Applicant appears not to have done so and has now made a move after a period of over two years. The only issue for determination herein is whether the Applicant has given sufficient reasons for the delay in lodging the appeal.
5. The Applicant has filed two supporting affidavits the gist which is that the delay had been caused by the High court in providing him with the copy of the judgment. The Applicant has also annexed a draft Memorandum of Appeal alongside a Notice of appeal. The draft Memorandum of Appeal raises about five grounds of appeal against the judgement of Hon. Lady Justice Thurairajah dated 25/11/2015. The Appellant was thus required to lodge his second appeal to the court of Appeal within 14 days from the date of the dismissal of his appeal.
6. Learned Counsel for the Respondent has stated in his replying affidavit that granting the Application will give leeway for the abuse of Section 349 of the Criminal procedure code thus leading to abuse of the court process. It is common knowledge that the 14 days appeal period granted under Section 349 of the Criminal Procedure Code though legal is by any means quite short and that is why the same provision allows the court to consider a request for lodging appeal out of time if an Applicant shows that the inability had been caused by late supply of judgement or order appealed against.
7. The Applicant, it appears, had been acting in person in the matter and being incarcerated in prison might not have been able to follow up on the requisite documents and thereby lodge the appeal in time. It is not in doubt that prisoners serving sentence hardly have the luxury to visit the court's registries and pursue for proceedings and judgement and they have to rely on the prison officers to run those errands on their behalf and there is a high chance that some of the pleadings or documents do not end up at the court registry for processing. Again some of the prisoners are transferred to other prison facilities and thus it becomes quite difficult for those prisoners to follow up on their cases. This therefore leads to delay in lodging the requisite appeals. The Applicant herein has stated that the delay was due to the fact that the judgment was not delivered to him in time. More often than not Applicants who act in person are whisked away by the prison officers as soon as the judgments are delivered by the courts and this contributes to the delay by the prisoners from lodging their appeals in time. In the case of the Applicant, he had been sentenced to imprisonment for twenty (20) years by the trial court and that his first appeal was dismissed by this court on 25/11/2015. I find that to deny the Applicant a chance to ventilate his appeal would be against the principles of natural justice. The respondent will not suffer any prejudice if the Applicant's request is allowed since the Applicant is still serving the sentence meted out on him by the trial court and upheld by the first appellate court.
8. Taking into account all the circumstances, this court will overlook the two years delay and grant the Applicant a chance to lodge his second appeal to the Court of Appeal. There is good cause for this court to intervene to ensure that the Applicant is able to ventilate his intended appeal.
9. In the result, it is the finding of this court that the Applicant's Application to lodge appeal out of time is merited. The same is allowed with an order that the Applicant is hereby directed to lodge his appeal to the Court of Appeal within the next fourteen (14) days from the date hereof.

Orders accordingly.

Dated and delivered at **MACHAKOS** this **15TH** day of **OCTOBER, 2018**.

D. K. KEMEI

JUDGE