

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.221 OF 2012

JOEL NDIRANGU KAGEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Joel Ndirangu Kagema was tried and convicted of committing three (3) offences under **the Anti-Corruption and Economic Crimes Act (Act No.3 of 2003)**. He was sentenced to pay a total sum of Kshs.80,000/- as fine or in default he was to serve four (4) months imprisonment. He paid the fine. Being aggrieved by his conviction and sentence, the Appellant filed an appeal to this court. The appeal was admitted to hearing on 15th May 2013. The appeal was fixed for hearing on 4th December 2014. On that day, neither the Appellant nor his counsel attended court. His counsel sent one Mr. Amutala to hold his brief. The said counsel applied for an adjournment on account of the absence of both the Appellant and his counsel. This court acceded to the request for adjournment. The appeal was fixed for hearing on 28th January 2015. On that day, once again, neither the Appellant nor the counsel appeared before court. Mr. Arusei who was holding brief for counsel for the Appellant told the court that learned counsel had lost contact with his client. The advocate requested to be granted three months to make attempt to contact the client. Ms. Aluda for the State opposed the application. This court formed the view that the Appellant was no longer interested in prosecuting this appeal. It dismissed the appeal for want of prosecution. It ordered the file closed.

That would have been the end of the matter. However, it was not to be. On 15th August 2016, about twenty months after the dismissal of the appeal, the Appellant made an application seeking to have the order of dismissal that was issued by this court set aside. He further sought for an order to have the appeal reinstated to hearing. The Appellant explained that he did not attend court on both occasions that the appeal had been listed for hearing because his advocate had failed to inform him. On his part, the advocate explained that he had failed to inform his client to attend court because he had misplaced his contacts. Ms. Aluda for the State was not impressed by the reasons given by the Appellant for failure to attend court, and for failure to prosecute his appeal. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. That the Appellant has the constitutional right to appeal against his conviction and sentence is without doubt. **Article 50(2)(q)** of the **Constitution** grants him this right. However, his appeal must be prosecuted in a manner prescribed by the law. The Appellant and his advocate failed to attend court on two occasions that the appeal had been fixed for hearing. On both occasions, counsel for the Appellant instructed another counsel to hold his brief with a view to adjourning the hearing of the appeal. In both instances, it was apparent that counsel was unable to trace the Appellant because he had lost his contact. The present application to reinstate the appeal to hearing was filed twenty months after the court had dismissed the appeal on account of the Appellant's failure to prosecute his appeal.

The Appellant has pleaded with the court to reinstate his appeal to hearing so as to give him a chance to ventilate his appeal. It is trite law that any case filed in court, and for that matter any appeal, belongs to the party filing such case. The case does not belong to the advocate. A party lodging the appeal has the duty to pursue his appeal. He has the obligation to follow up with his advocate on the progress of his

appeal. It will not do for such party to give the excuse that he relied on his advocate to inform him of the progress of his appeal. Much as the advocate has the professional duty to update his client on the progress of the appeal, the primary duty lies with the client. In the present application, it was clear to this court that the Appellant was indolent. He went to sleep once his appeal was lodged. He forgot about his appeal. He did not contact his advocate to check the progress of his appeal. The fact that it took twenty months for the Appellant to realize that his appeal had been dismissed is clear indication of his lack of diligence. This court cannot in the circumstances reward indolence.

In the premises therefore, this court holds that the Appellant's application lacks merit and is hereby dismissed. This court properly dismissed the appeal when the Appellant failed to appear before the court on the dates that were appointed for the hearing of the appeal. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE