



REPUBLIC OF KENYA

High Court at Machakos

Criminal Miscellaneous Application 163 of 2012

SOLOMON MUTUKU MUKAVI .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. By Notice of Motion dated 23<sup>rd</sup> October, 2012 the applicant, **Solomon Mutuku Mwakavi** has moved this court seeking leave to appeal out of time. The intended appeal is against the decision of **Hon. A.W. Mwangi**, Ag. Senior Principal Magistrate delivered on the 1/9/2009.
2. The application is premised on grounds that having been convicted and sentenced, the Applicant failed to appeal within the stipulated time due to lack of knowledge, finances and stress. Secondly, that the appellant stood to suffer irreparable damage as the complainant was in the process of demanding payment of his items that were the subject matter of the case. The application is supported by an affidavit deposed by the Applicant.
3. At the hearing the Applicant stated that following conviction, he served sentence of one (1) year imprisonment. Consequently he was relieved of his job. He therefore did not have money to file an appeal. He was depressed hence failed to remember the duration within which he was to appeal.
4. In her response, **Mrs Gakobo** the Senior Principal State Counsel objected to the application arguing that the applicant served his sentence by 1<sup>st</sup> September, 2010. He then waited for more than three (3) years to file the application. He urged the court to dismiss the application on the ground that the delay in the circumstances was inordinate.
5. I have considered the application herein. A decision whether or not to grant the order sought is discretionary. (see section 349 of the Criminal Procedure Code). This was also stated in the case of **Juma –versus- Diesel & Auto Electric Services Ltd & Others, EALR (2008) IEA, 148**, where it has held as follows:-  
  
***“It is common knowledge that the court has discretion to extend the time within which to file an application for leave to appeal. That such discretion is to be exercised judicially is also elementary. However, in the exercise of such power, the requisite condition is that sufficient reason has to be given for such discretion”***
6. In the premises in exercising the discretion bestowed upon me, I must take into account;-
  - a. The length of delay taken to apply for leave.

- b. The reason for the delay
  - c. The chance of the appeal succeeding
  - d. The degree of prejudice if any that the applicant will suffer if the order sought is not granted
7. The Applicant has deponed in paragraph 2 of his affidavit as follows:-

***“That I was charged before that Ag. Senior Principal Magistrate, Kithimani with the offence of stealing contrary to section 275 of the Penal Code and an alternative charge of handling stolen goods contrary to section 322 (2) of the same code and the case proceeded to full hearing and determined on 1/9/2009.”***

8. Judgment in the case was delivered on 1/9/2009. The Applicant was fined Kshs. 40,000/=. In default he was ordered to serve one (1) year imprisonment. He did not raise the fine therefore served the imprisonment term. He was released from prison in the year 2010. However, he did not appeal. He alleges that he was confused and stressed. Two (2) years later he applied for certified copies of proceedings and judgment. He collected copies of proceedings and judgment on the 14/8/2012. He then stayed for two (2) months prior to filing this application. A delay of three (3) years is indeed inordinate.

9. The Applicant has stated that this delay in making the instant application was caused because he was confused and lacked finances. He may have been confused while in prison. But, he has failed to explain why he did not act soon after he was released. He has not given a plausible reason why he waited for two (2) years to move this court. The reason given for delay is not satisfactory in the circumstances.

10. I must then consider whether the appeal has the chance of succeeding. I have perused the draft Petition of Appeal which basically faults the trial magistrate for having erred in law and fact by relying on incredible evidence to reach the decision. The Applicant alluded to a judgment that was not availed for perusal. Consequently I am not able to tell if the appeal has any chance of succeeding.

11. The reason given as to why the applicant may suffer prejudice is because the complainant in the lower court is in the process of demanding payment of his items that were the subject matter of the case. Indeed the applicant was rightly convicted then he will not suffer any prejudice.

12. In the premises, I find no good cause disclosed warranting issuance of the orders sought. The application herein is dismissed. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 9<sup>TH</sup> day of MAY, 2013.**

**L.N. MUTENDE  
JUDGE**