



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(COR.AM: BOSIRE AG. J.A. (IN CHAMBERS))**

**CRIMINAL APPLICATION NO.8 OF 1996**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**PETER KALELI MULWA .....RESPONDENT**

(Being an Application for extension of time to file a  
Notice of Appeal in an intended appeal from a judgment  
and order, of the High Court of Kenya at Nairobi (Justice  
Oguk) dated 24th June 1996)

in

H.C.C.C. No. 920 of 1995)

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**RULING**

This is an application under rule 4 of The Court of Appeal Rules, for extension of time within which to file in court and serve a notice of appeal and the record of the intended appeal.

The judgment and order intended to be appealed from was delivered on 24th June, 1996, by the superior court (Oguk J), in the presence of a state counsel, Mrs Ondieki, among other people.

Under rule 58(1) of the rules of this court any party who was desirous of appealing against that decision was required to file in court and serve a notice of appeal within 14 days of the decision.

The applicant, represented by the Attorney General, did not file and serve a notice of appeal within the prescribed time. In this application the applicant's case is that Mrs Ondieki did not bring the result of the appeal before the superior court to the attention of the Deputy Director of Public Prosecutions, either immediately or at all, with the result that he could not comply with the mandatory provisions of rule 58, above. It is its case further, that upon reading the judgment of the superior court when it was ultimately brought to his attention long after the 14 days period had expired, the Deputy Director of Public

Prosecutions, came to the conclusion that an appeal was necessary. He has, therefore, prayed that this court exercises its discretion under rule 4, above, and grant the extension sought.

There are peculiar circumstances in this matter which militate against exercise of judicial discretion in favour of the extension prayed for. The respondent in this application was tried and convicted before a magistrate's court on criminal charges, details of which are not relevant here. Money which was exhibited in the course of the trial was ordered to be forfeited to the government, and was later surrendered to the Central Bank of Kenya. The respondent appealed to the High Court against both the conviction, and the sentence which was imposed on him.

At the hearing of the respondent's appeal in the High Court, Mrs Ondieki, state counsel, appeared for the state and conceded the appeal. The superior court, thereafter pronounced judgment quashing the respondent's conviction and proceeded to set aside, not only the sentence which had been imposed on him, but, also, the order of forfeiture. It is against the setting aside of the forfeiture order that the applicant intends to lodge an appeal to this court.

There was no material placed before me to show that there was standard practice for state counsels appearing in any court to report to the Deputy Director of Public Prosecutions or any other officer, the outcome of matters they handled in court on behalf of the state. Nor is there material to show that Mrs Ondieki, improperly conceded the respondent's appeal.

It cannot be gainsaid that judicial discretion is exercisable on the basis of facts and sound legal principles. The Deputy Director of Public Prosecutions, Mr Chunga, personally urged this application before me. While I accept that he was unable to file a notice of appeal timeously for reasons which he has stated in his affidavit in support of this application, I am unable to comprehend why this application was not brought urgently. The delay between 9th July 1996, when he became aware of the superior court's Judgment, and 22nd October, 1996, when this application was filed, has not been explained. It was incumbent upon the applicant to do so, but it failed so to do.

Moreover, I have considered all the circumstances of this matter and I am unable to find any special circumstances or proper basis to constrain me to exercise my judicial discretion in favour of extending time.

In the result I decline to grant the extension sought and order the application to be dismissed. It is not the usual practice of this court to make an order as to costs in criminal appeals and applications. So I make no order as to costs.

Dated at Nairobi this 8th of November 1996.

**S.E.O. BOSIRE**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**