



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: DR. K. I. LAIBUTA, J.A. (IN CHAMBERS))

MISC. CRIMINAL APPLICATION NO. 8 OF 2020

BETWEEN

DOMINIC OKODOL.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application for extension of time to file an appeal out of time, and to appeal as a pauper, from the Judgment of Justice Githinji, dated 10th November 2016

in

Kapenguria High Court Criminal Appeal No. 12 of 2016)

RULING

Background

The Applicant's Notice of Motion before me seeks extension of time to appeal out of time pursuant to **Section 349 of the CPC**. He also seeks to do so as a pauper, but the application bears no date. In addition to the foregoing Section, Part III of the Court of Appeal Rules (Section 58-73) governs the procedure for criminal appeals from superior courts. **Rule 4** guides the Court on the basis on which the applicant's Motion may be determined.

The Applicant, Dominic Okodoi, seeks extension of time to appeal from the judgment of Justice Githinji given on 10th November 2016 in Kapenguria High Court Criminal Appeal No. 12 of 2016, which was an appeal from the judgment of the Senior Principal Magistrate's Court at Kapenguria Law Courts, Criminal Case No. 753 of 2013. Neither the Notice of Motion nor the supporting affidavit, which are not dated or commissioned, disclose the grounds on which the intended appeal is founded. The applicant's affidavit merely explains the reasons for the delay in lodging the intended appeal, and for seeking to appeal as a pauper.

The Applicant filed a Notice of Appeal on 22nd June 2020 pursuant to **Rule 59** of the Court of Appeal Rules, four years and seven months after delivery of the judgment. According to the notice, which was lodged in court on 18th August 2020, he seeks to appeal against both conviction and sentence, having been convicted for the offense of Defilement contrary to **Section 8(1) and (2) of the Sexual Offences Act**.

The Applicant has not made any written submissions, but has lodged an unsigned and undated Memorandum of Appeal containing 5 grounds on which the intended appeal is founded. These are to the effect that the Judge erred in law:

- a. by failing to analyse and evaluate the whole evidence and come to his own independent conclusion as required by law;
- b. in reaching a decision on a matter that was so contradictory and was dangerous to convict on such evidence;
- c. in reaching a decision while vital witnesses were not called to prove basic facts as required by law; and
- d. in reaching a decision while essential elements in a case of defilement were not proved.

Mr. Ligami Shitsama for the Director of Public Prosecutions made written submissions dated 12th July 2021. He drew my attention to the Applicant's inordinate delay in applying for the record of appeal and submitted that, indeed, there is no evidence that such an application has been made. He invoked the provisions of **Rule 4** of the Court of Appeal Rules and requested me to dismiss the Applicant's Motion.

Determination

Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to –

“... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...,” on such terms as it thinks just.

The Court of Appeal in *Leo SilaMutiso v Helen Wangari Mwangi [1999] 2 EA p231* set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that

“the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

The case of *Fakir Mohammed v Joseph Mugambi and two others [2005] eKLR* lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

Having carefully read the Applicant's undated Notice of Motion, the undated and uncommissioned affidavit filed in support thereof, the Notice of Appeal and Memorandum of Appeal filed on 18th August 2020, I find that the Applicant has not disclosed what point of law (if any) is raised, or is intended to be raised, in the intended appeal, if time is extended.

A careful examination of the Applicant's reference to the trial Judge having “erred in law” reveals that, in actual fact, the errors complained of relate to evidential matters and not to issues of law. Indeed, none is raised. In my considered view, it is not enough to express an intention to appeal “against conviction and sentence” as is the case here. Accordingly, his application fails to satisfy the pivotal condition for grant of the order sought to extend time to lodge the record of appeal. Even though the Court's discretion is unfettered, it has to be exercised judicially, not on whim, sympathy or caprice.

I hasten to add that there must be an end to litigation. It is almost five years since judgment in this matter was delivered. While the reason of poverty given for the delay in preparation of the record of appeal are appreciable, the time taken is inordinate. The application to appeal as a pauper could have come earlier. **Rule 113(1) (b)** makes provision for exemption, by reason of poverty, from payment of the requisite fee ordinarily payable, including the fees for the preparation of the record of appeal. Moreover, there is nothing to show that a formal application under **Rule 113(1) (a) and (b)** of the Court of Appeal Rules has been made in the prescribed form.

It is noteworthy that this discretion is exercisable on the express condition that the applicant satisfies the requirements of paragraph (a) – that “the appeal raises one or more questions of law proper for determination by the Court.” No such ground is pleaded and, consequently, the Applicant's Motion fails on both counts. Accordingly, I order and direct that the Applicant's Notice of Motion for extension of time to file a record of appeal and to appeal as a pauper be and is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR