



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, J.A. (IN CHAMBERS))

CRIMINAL APPLICATION NO.3 OF 2014

BETWEEN

JOSEPH SAGUGE MARWA.....APPLICANT

AND

REPUBLIC.....RESPONDENTS

(An application for leave to file Notice of Appeal and leave to enlarge the time filing of appeal out of time against judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 5th July, 2012

in

H.C.CR. A. NO. 116 OF 2010)

RULING

The applicant seeks two orders under Rule 4 Court of Appeal Rules namely leave to file Notice of Appeal out of time and extension of time for filing appeal against the judgment of the High Court (Sitati, J.) dated 5th July, 2012.

The applicant was convicted of three counts of Arson contrary to **Section 332 (a)** of the Penal Code and sentenced to 18 months probation by Senior Resident Magistrate at Kisii.

The state being dissatisfied with the sentence appealed to the High Court against sentence. The High Court found the appeal incompetent but in exercise of its revisionary jurisdiction under 364 (1) of the Criminal Procedure Code enhanced the sentences to 7 years imprisonment in each count to run concurrently.

The present application was filed on 8th May, 2014. It is supported by the affidavit of **Cephas Agure Odero** the applicant's advocate.

He deposes in essence that upon delivery of judgment, he prepared a Notice of Appeal together with Memorandum of Appeal to be filed in the Court of Appeal Kisumu but his clerk who was a drunkard squandered the filing fees which fact he came to know later.

Mr. Abele, the Assistant Director of Public Prosecutions does not oppose the application in the interest of justice.

I was informed from the bar that the applicant has not served the custodial sentence because the High Court granted him bond pending appeal to this Court.

I have considered the application and the draft Memorandum of Appeal. It is clear that the applicant did not file an appeal in the High Court against the conviction for the three counts of Arson. He can only appeal to this Court against the enhancement of sentence by the High Court. I have studied the judgment of the High Court. It is clear that legal issues were raised regarding the jurisdiction of the High Court to alter the nature of and enhance the sentence.

Although delay is inordinate and has been sufficiently explained, I am satisfied that the intended appeal is not frivolous.

Consequently, I allow the application. The time to file both the Notice of Appeal and the Memorandum of Appeal are extended. The Notice of Appeal to be filed within 7 days from the date hereof and the Memorandum of Appeal together with the Record of Appeal within 14 days thereafter.

Dated and Delivered at Kisumu this 4th day of July, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR