



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 10 OF 2005

BELIWARD AZERE APPLICANT

AND

REPUBLIC RESPONDENT

(Application for restoration of Criminal Appeal No. 155 of 1990 being an appeal from a judgment of the High Court of Kenya at Kakamega (Osiero, J) dated 1st October, 1990

in

H.C.Cr. Appeal No. 37 of 1990)

RULING OF THE COURT:

A long time ago Beliard Azere, the applicant herein, was the assistant chief of Madzu Sub-location of the then South Maragoli Location, Kakamega District. On 2nd October, 1987, the applicant appeared before the District Magistrate’s Court at Hamisi and he was charged with the offence of stealing by a person employed in the public service contrary to **section 280** of the Penal Code, the particulars of the charge being that on diverse dates between the months of January and November, 1984 at Madzu Sub-location, South Maragoli Location, Kakamega District of Western Province, the applicant, being a person employed in the public service stole **K. Shs 18,200/=** which came into his possession by virtue of his employment. He was tried on that charge, found guilty thereon, convicted and sentenced to eighteen months imprisonment. This was on or about 24th July, 1989. He appealed to the High Court in Criminal Appeal No. 370 of 1989, but by an order dated and made at Kakamega on 1st October, 1989, the High Court (Osiero, J.) summarily rejected his appeal under **section 352 (2)** of the Criminal Procedure Code. The applicant then appealed to this Court vide Criminal Appeal No. 155 of 1990. That appeal came up for hearing before this Court on various occasions when it was adjourned for one reason or the other. Finally, on 22nd March, 1993, this Court made the following order:-

“The appellant having served his sentence and discharged and having failed to turn up to prosecute his appeal, this appeal is dismissed under rule 70 (4) of the Rules of this Court.”

Matters then rested there until 10th June, 2003, some ten years after the Court’s order of 22nd March, 1993 when the applicant wrote a letter to the Deputy Registrar of the Court asking the Deputy Registrar to –

“arrange and supply me with a copy of proceedings and judgment certified. I shall meet the

charges. My employer needs the same to enable them pay me my dues.”

He was duly supplied with the order of the Court dated 22nd March, 1993; the Deputy Registrar’s copy of the letter sending the order, which copy we have in the file, is undated but the applicant told us in Court that he came to know about the dismissal of his appeal by this Court in 1993.

On 10th March, 2005, some twelve years since the dismissal of the appeal by the Court, the applicant filed the present motion before us. The motion is brought under **Rule 70 (4)** and it has only one prayer:-

“The Criminal Appeal No. 155 of 1990 dismissed on 22/3/1993 for want of prosecution be restored back to hearing.”

The motion is supported by the affidavit of the applicant and the burden of that affidavit is largely that the applicant had left the matter of the appeal in the hands of his advocates, that he waited for the advocates to tell him what was happening but when the waiting became endless, he wrote his letter to the Deputy Registrar and that was how he came to know of the dismissal of his appeal. He has a strong desire to have his appeal heard on its merits and had done all within his power to have the same heard but his advocates played tricks and were dishonest to him and thus lead to his appeal being dismissed.

Rule 70 (4) under which the Court dismissed the appeal provides:-

“Subject to the provisions of sub-rule (3), if on the day fixed for the hearing of an appeal the appellant does not appear in person or by an advocate and has not lodged a statement under rule 65, the appeal may be dismissed or may be heard in his absence:

Provided that where an appeal has been dismissed under this sub-rule, the Court may restore it for hearing if it is satisfied that the appellant was prevented by any sufficient cause from appearing when the appeal was called for hearing.”

The applicant is clearly invoking the proviso to **sub-rule (4)** and in that proviso, no time-limit is set within which a party whose appeal has been dismissed under **sub-rule (4)** is to make an application for its restoration to hearing. In the absence for a time-limit, the application for restoration must be made within a reasonable time – see for example **section 57 of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya** which provides that:-

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.”

The applicant himself told us that he came to know of the dismissal of his appeal in 1993. He did not do anything about the matter until 10th June, 2003 when he wrote to the Deputy Registrar and even then he took another two years before filing the motion now under consideration. His only explanation for that inordinate delay is the alleged tricks and dishonesty of his advocates. We obviously do not accept that explanation and we are satisfied the applicant only came to the Court because he wants to revive the appeal so that he can use it to bargain with his former employer.

Nor has he satisfied us that on the day when his appeal was dismissed, he was prevented by sufficient cause from attending the trial. We have looked at the record in Criminal Appeal No. 155 of 1990 and it is clear from that record that the applicant was not represented by an advocate. He appeared in person on all occasions and all hearing notices were directed at him personally. So the excuse of some advocate playing dirty tricks on him is no more than an excuse – there was no advocate involved in the matter. The upshot of all this is that there is no reason for reopening the matter some thirteen years after it was dismissed. We refuse to grant the order sought and we order that the notice of motion dated 10th August, 2003 and lodged in the Court on the same day be and is hereby dismissed.

Dated and delivered at Kisumu this 31st day of March, 2006.

R.S.C OMOLO

.....

JUDGE OF APPEAL

S.E.O BOSIRE

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR