



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Crim Appli 4 of 2006

INNOCENT MADARAKA ONSONGO1ST APPLICANT

EDWARD MOTUKA2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Application for leave to file and serve Notice of Appeal out of time and same be deemed to have been filed and served as to validate the Memorandum of Appeal filed on 19th December, 2005 from a Judgment of the High Court of Kenya at Kisii (Wambilyangah J.)

dated 7th April, 2003

in

H.C.C.R.A. NO. 102 & 103 OF 2005)

R U L I N G

This is an application under **Rule 4** of the Court of Appeal Rules (*Rules*) for orders that:

- (a) ***The applicants be granted leave to file and serve a Notice of Appeal out of time and the same be deemed to have been filed and served so as to validate the memorandum of appeal dated and filed on 19th December, 2005.***
- (b) ***Such orders as the Court shall deem fit be made to meet the ends of justice.***

The application is supported by an affidavit of **Richard Onsongo**, an advocate for the applicant in this application to which he has annexed only four documents namely a *Ruling of Deverell, J.A.* dated 16th day of December, 2005 in *Criminal Application No. Nai. 12 of 2005 (KSM7/05) Innocent Madaraka Onsongo & Another vs. Republic*, a letter dated 27th April, 2006 from Deputy Registrar of this Court to Deputy Registrar, Court of Appeal Kisumu Registry which was copied to the applicant’s advocates, a

copy of the orders of the superior court (Wambilyangah, J.) dated 7th day of April, 2003 in High Court of Kenya Kisii Criminal Appeal Nos. 102 and 103 of 2003 and a Copy of Memorandum of Appeal dated 19th December, 2005.

Although the applicants did not avail a copy of the judgment in Chief Magistrates Court at Kisii Criminal Case No. 447 of 2005, it is apparent from the documents filed that the two applicants were convicted of the offence of rape in the Criminal case and sentenced to prison terms. The first applicant **Innocent Madaraka Onsongo** and the second applicant (**Edward Motuka**) filed High Court Kisii Criminal Appeals Nos. 103 of 2003 and 102 of 2003 respectively. The two appeals were however summarily rejected under **section 352 (2)** Criminal Procedure Code by the superior court on 7th day of April, 2003. The applicants being dissatisfied filed Criminal Appeal No. 76 of 2003 in this Court against the summary rejection of the appeals through Mr. J.O. Soire, Advocate. The appeals were however withdrawn under **Rule 67** of the Rules on 29th, November 2004.

By criminal application No. Nai. 12 of 2005, dated 21st September, 2005, the applicants through M/s Onsongo & Co. Advocates filed an application for leave to file and serve a memorandum of appeal out of time from the orders of Wambiliangah, J. dated 7th April, 2003 summarily rejecting the appeals.

On 16th December, 2005 Deverell, J.A. allowed the application in the following terms:-

“I hereby order that time within which to file and serve a memorandum of appeal out of time be and is hereby extended to expire fourteen days after the delivery of this ruling.”

That ruling notwithstanding, the Deputy Registrar of this Court wrote to the Deputy Registrar, Court of Appeal Kisumu Registry on 27th April, 2006 as follows:-

“Pursuant to Rule 58(1) of Courts Rules, Criminal Appeals are instituted by way of a Notice of Appeal and not memorandum of appeal. In view of the foregoing, it appears there is no appeal pending as a notice of appeal for the above appellant has not been filed to enable me to assign a number for the fresh appeal. The earlier notice of appeal filed was in respect of a withdrawn appeal No. 76 of 2003. The leave application, Criminal Application No. Nai. 12 of 2005 for extension time sought only leave to file and serve a memorandum of appeal out of time and after grant of the same on 16th December, 2006 by the Hon. Mr. Justice Deverell no fresh notice of appeal has ever been filed.”

That letter was, as I have observed above, copied to the present advocates for the applicants prompting the filing of the present application on 9th May, 2006. Mr. Onsongo deposes that he failed to file a Notice of Appeal as he was under an honest but mistaken impression that the original Notices of Appeal filed in respect of the appeals which were withdrawn were still valid.

Mr. Ogutu advocate, who prosecuted the application on behalf of Mr. Onsongo stated from the bar that the applicants have instituted an appeal Criminal Appeal No. 253 of 2006 which is scheduled for hearing in this Court on 27th November, 2006.

I have perused the record of Criminal Appeal No. 253 of 2006. It is true that the applicants lodged respective Notices of Appeal dated 3rd November, 2006 on 7th November, 2006 out of time and without the leave of the Court. The Criminal Appeal No. 253 of 2006 was registered as a result of the filing of the Notices of Appeal. The present application seeks to validate the Notices of Appeal and therefore Criminal Appeal No. 253 of 2006.

The proceedings of the Chief Magistrate’s Court at Kisii Criminal Case No. 447 of 2003 which the applicant failed to attach to this application are contained in the record of Criminal Appeal No. 253 of 2006. They show that the applicants were charged with the offence of rape contrary to **section 140** of the Penal Code and with an alternative charge of indecent assault of a female contrary to **section 144(1)** of the Penal Code. They pleaded not guilty and the case was fixed for hearing for 31st March, 2003.

On the hearing date, however, each applicant pleaded guilty to the charge, was convicted and sentenced to serve **9 years imprisonment**. The prosecutor who appeared on the date of the trial was **Inspector Muiruri**. The applicants then filed *criminal appeals Nos. 103 of 2003 and 102 of 2003* respectively against **SENTENCE ONLY**. Those were the respective appeals which Wambiliangah, J. rejected summarily on *7th April, 2006*.

There is a legal impediment to the extension of time for filing Notices of Appeal or validating the Notices of Appeal filed in *Criminal Appeal No. 253 of 2006*.

It is correct as the Deputy Registrar advised in the letter dated *27th April, 2006* that by **Rule 58(1)** of the Rules, a criminal appeal to this Court is instituted by a Notice of appeal. It follows therefore that by extending the time for filing the Notices of Appeal dated *3rd November, 2006* and lodged on *7th November, 2006*, Criminal Appeal No. 253 of 2006 would ipso facto be validated.

By Notices of Appeal, the applicants are appealing against the Order of Wambilyangah, J. dated *7th day of April, 2003* rejecting the appeals summarily. It is on record that a previous appeal – Criminal Appeal No. 76 of 2003 was lodged in this Court against the same orders but the appeal was withdrawn on *29th November, 2003*. Can the appellants competently lodge a second appeal to this Court having withdrawn the first appeal?

Rule 67 of the Rules states:-

“(1) An appeal may be withdrawn at any time before hearing by notice in writing to the Registrar signed by the appellant and upon such notice being given the appeal shall be deemed to have been dismissed.

(2)

(3) An appeal which has been withdrawn may be restored by leave of the Court on the application of the appellant if the Court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interest of justice requires that the appeal be heard.

(4) An appeal may be withdrawn by an informal application in court at any time before the hearing is concluded.”

In this case, the application for withdrawal of the Criminal Appeal was made informally under **Rule 67 (4)** of the Rules and was allowed.

In my view it is not permissible to file a second appeal to this Court after the first appeal has been withdrawn.

The only remedy available is the one provided by **Rule 67 (3)** of the Rules – that is, making an application to this Court for the restoration of the withdrawn appeal on the grounds specified in that Rule.

Thus if I were to allow this application I would in effect be exercising jurisdiction which I do not have – that is, allowing the filing of second appeal and thereby perpetuating an illegality.

For those reasons, I have come to the conclusion that I have no jurisdiction to extend time in the circumstances of this case and that the application is incompetent.

In the result I dismiss the application. I make no orders as to the costs of the application.

Dated and delivered at Kisumu this 22nd day of November, 2006.

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR