



IN THE COURT OF APPEAL

AT KISUMU

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

MISC. CRIMINAL APPLICATION NO. 2 OF 2020

BETWEEN

JUSTUS MUGANDA MACHIRA.....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 Justices R. Sitati and A. Makhandia, dated 24th February, 2011 in Kisii High Court Criminal Appeal No. 186 of 2007)

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, Justus Muganda Machira, seeks extension of time to appeal from the judgment of Justices R. Sitati and A. Makhandia given on 24th February 2011 in Kisii High Court Criminal Appeal No. 186 of 2007, which was an appeal from the judgment of the Chief Magistrate's Court at Migori Criminal Case No. 891 of 2006. Neither the Notice of Motion nor the supporting affidavit, which is 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 28th February 2011 in compliance with **Rule 59** of the Court of Appeal Rules.

According to the notice, he seeks to appeal against both conviction and sentence, but does not disclose the point of law (if any) raised or to be raised in the intended appeal having been convicted for the offense of robbery with violence contrary to **Section 296(2) of the Penal Code**. The Applicant made no written submissions.

In his written submissions, Mr. Ligami Shtsama for the Director of Public Prosecutions contends that –

- a. the extension of time is not available as of right;*
- b. the Applicant has the burden of laying the basis for the grant of the orders sought;*
- c. the delay in issue should be explained to the satisfaction of the Court; and*
- d. the applicant should demonstrate that the application has been brought without undue delay.*

Determination

I agree with counsel for the prosecution. 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, and the Notice of Appeal filed on 28th February 2011, 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. 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 over ten 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.

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. 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. 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



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