

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

APPEAL NO: AAU 62 OF 2006
(High Court HAC 47 of 2005)

BETWEEN : **APAKUKI SOWANE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Ms N Nawasaitoga for the Appellant**
Mr L Fotofili for the Respondent

Date of Hearing : **24 October 2013**

Date of Ruling : **20 December 2013**

RULING

[1] This is an application for leave to re-instate an appeal which was first filed on 5 February 2007. The application was made by summons filed on 27 September 2013 by the Legal Aid Commission on behalf of the Appellant. The application was supported by an affidavit sworn by Apakuki Sowane on 27 September 2013. The Respondent filed an answering affidavit sworn by Apenisa Lewatoro on 18 October 2013.

[2] The application is made under Rule 44 (14) of the Court of Appeal Rules which provides that:

“Except with the special leave of the Court of Appeal, no appeal or application for leave to appeal may be filed after the time specified in sub-rule (13).”

[3] Rule 44 (13) provides that in the event of non-compliance with the requirements of either Rule 43 or Rule 44 (except provisions relating to preparation of the record by the Registrar) the notice of appeal or application for leave to appeal is deemed to be abandoned but may be refiled before the expiration of three months from the date of the deemed abandonment.

[4] The Appellant had been convicted on 28 October 2006 in the High Court on one charge of murder and sentenced to life imprisonment. The Appellant was granted leave to appeal against conviction on 9 July 2008 by a single judge of this Court pursuant to section 35 (1) of the Court of Appeal Act. He was represented by the Legal Aid Commission at his leave to appeal hearing.

[5] Following the granting of leave to appeal the preparation of the appeal record became the responsibility of the Legal Aid Commission who remained on record as the legal practitioner acting for the Appellant.

[6] Due to the delay in finalising the appeal record, the Appellant applied for bail pending appeal. There is a handwritten note attached as an exhibit to the Appellant’s affidavit which indicates that on 28 January 2010 the Appellant received advice from a solicitor with the Legal Aid Commission and stated that he wanted to withdraw his application for bail. There is also another handwritten note dated 24 February 2010 to the effect that the Appellant *“has taken his summing up and Ruling and withdrawal of lawyer.”* It is not clear from the material what was intended by this note. There is nothing in the file to indicate that the Legal Aid Commission had informed the Registry that it was no longer acting for the Appellant.

- [7] By letter dated 6 April 2010 the Court of Appeal Registry informed the Legal Aid Commission that the draft appeal record had been checked. The Registry requested that the draft be amended by renumbering the pages clearly. The Commission was required to resubmit the record for signing. A cc copy of that letter was addressed to the Appellant. In my opinion it can fairly be inferred that the draft appeal record had been lodged with the Registry by the Legal Aid Commission on behalf of the Appellant.
- [8] It would appear, for reasons which are not revealed, the Legal Aid Commission did not proceed to resubmit the appeal record as requested. As a result by letter dated 11 April 2011 the Court of Appeal Registry informed the Legal Aid Commission that the Appellant's appeal had been abandoned under Rule 44(13) due to non-compliance with Rule 44(5) of the Court of Appeal Rules. The Commission was requested to advise the Appellant accordingly. Rule 44(5) provides that the Appellant (or in this case the Legal Aid Commission) is required to remedy any deficiency within 21 days. This had not been done.
- [9] Unfortunately the Legal Aid Commission appears not to have informed the Appellant as requested that his appeal had been abandoned. By letter dated 10 August 2011 the Appellant sought an explanation from the Registry for what was then almost a five year delay. The Appellant was subsequently informed by letter dated 22 September 2011 from the Registry that his appeal had been marked abandoned due to non-compliance with the Rules. Then the Appellant filed the present application on 27 September 2013.
- [10] In my view the present application should be considered as an application under Rule 44 (14) for leave to file a fresh application for leave to appeal after the time specified in Rule 44(13) has expired. It is an application under Rule 44 (14) to extend the time within which an application for leave to appeal may be given under Rule 44 (13). It falls under section 35(1) (b) of the Court of Appeal Act as an application for which jurisdiction may be exercised by a single judge of the Court.
- [11] The application is not opposed by the Respondent and having read the affidavit material I am satisfied that the inordinate delay in this matter has in no way been the

fault of the Appellant. I am satisfied that a grave injustice would be inflicted on the Appellant if the application were to be refused.

[12] In accordance with Section 35 (1) (a) and so as to avoid further unnecessary delay I grant leave to the Appellant to appeal against conviction on the grounds specified in his letter dated 30 October 2006. The Appellant is to file any further or amended grounds of appeal within 14 days from the date of this Ruling. The appeal is to be placed in the next call-over for hearing in the May session of the Court of Appeal. The Legal Aid Commission is ordered to finalise the appeal record and lodge for certification by the Registrar no later than 28 February 2014.

[13] I therefore make the following orders:

1. *Application is granted.*
2. *Leave to appeal against conviction is granted in respect of the grounds in the Appellant's letter dated 30 October 2006.*
3. *Appellant is to file and serve any further or amended grounds of appeal within 14 days from the date of this Ruling.*
4. *The appeal record is to be lodged for certification by 28 February 2014.*
5. *The appeal is to be listed for call-over on a date to be fixed for hearing in the May session of the Court of Appeal.*

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HON. MR JUSTICE W.D. CALANCHINI
PRESIDENT

