



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC. CRIMINAL APPLICATION NO. EO27 OF 2021

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

JULIUS MUGAMBI.....1ST RESPONDENT

ISAAC MUGENDI.....2ND RESPONDENT

R U L I N G

1. Before this court is the Notice of Motion application dated 19th May 2021. The said application is expressed to be brought pursuant to the provisions of **Sections 348A and 349** of the **Criminal Procedure Code (Cap 75 of the Laws of Kenya)**. It seeks leave to file an appeal out of time from the decision rendered in **Marimanti Senior Principal Magistrate's Court Criminal Case No. 546 of 2019**.
2. The application is based on the grounds on the face of it and is supported by the affidavit of Prosecution Counsel Jane K. Maari sworn on 19th May 2021.
3. The background facts of this case are that the Respondents were charged with the offence of assault in **Marimanti Senior Principal Magistrate's Court Criminal Case No. 546 of 2019**.
4. On 2nd March, 2021, the Respondents were acquitted under **Section 215** of the **Criminal Procedure Code**. The Applicant has now expressed dissatisfaction with the finding of the trial magistrate and seeks the leave of this court to file its appeal against the same out of time.
5. In opposition to the Application, the 2nd Respondent swore an affidavit on 14th September 2021 contending that the application is devoid of any merit.
6. The Application was canvassed by way of written submissions. The Applicant filed its written submissions on 18th October 2021 while the Respondents filed their written submissions on 29th November 2021.

Applicant's Submissions

7. It was the Applicant's submission that the failure to file the appeal on time was occasioned by the delay in obtaining copies of proceedings and judgment from the subordinate court. The Applicant thus urged this court to find that the present Application is merited and allow the same.

Respondents' Submissions

8. The Respondents on the other hand contend that the leave sought by the Applicant was sought belatedly. They further contend that the delay is so inordinate yet at the same time no sufficient reason was given for the inordinate delay. It was thus their submission that the present application is unmerited and should be dismissed as no sufficient cause has been offered to this court to exercise its discretion in favour of the Applicant.

Issue for Determination

9. Having carefully considered the grounds in support of and against the Application together with the submissions by both parties and the

relevant law and authorities cited, it is my view that the main issue for determination is leave to appeal out of time.

Analysis

10. The legal position on this nature of application is grounded under **Sections 348A** as read with **Section 349** of the **Criminal Procedure Code** which provide as follows:

“348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law.”

“349. An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefore.”

11. It is evident from a reading of the above provisions that an appeal to a higher court shall be preferred within fourteen (14) days from the date of the delivery of judgment or order of the court. Where there has been non-compliance, the Applicant has a window to petition the court to file the appeal out of time.

12. The discretion to extend time is unfettered on the part of the court save that in exercising such jurisdiction, it must be on sound basis and judiciously considered.

13. As a rule in the administration of justice, time is an essential element of case management which is to be enforced jealously and consistently. **Section 349** of the **Criminal Procedure Code** provides for a time limit of fourteen days within which to file an appeal. Clearly, the Applicant is out of time for filing its intended appeal. The same provision allows this court to admit an appeal out of time if the appellant demonstrates that its failure to comply with the provision was because of his inability or of his counsel to obtain a copy of the judgment or order appealed from, and a copy of the record, within reasonable time.

14. The present application was filed on 20th May 2021. The Respondents were acquitted on 2nd March 2021. As per the provisions of **Section 349** of the **Criminal Procedure Code**, the Applicant herein was to file the appeal on or before 16th March, 2021.

15. The thrust of the Applicant’s intended appeal as captured in its draft Petition of Appeal is that the learned trial magistrate erred in law and fact by acquitting the Respondents despite the overwhelming evidence adduced by the prosecution.

16. By operation of **Section 348A** of the **Criminal Procedure Code**, the Applicant is permitted to appeal to this court against the acquittal of the Respondents herein. The said section further provides that the absence of a good or sufficient reason being shown by the Applicant may justify dismissal of an application for extension of time.

17. The Applicant attributes the delaying filing the appeal to the closure of Chuka Law Courts for 10 days beginning 22nd March, 2021 following the outbreak of the COVID-19 pandemic. The courts reopened in the month of April 2021. As such, the Applicant submitted that the present Application was not filed after inordinate delay but rather, this court was moved at the earliest opportunity available.

18. This court ought to take judicial notice that the COVID-19 pandemic created several disruptions worldwide which led to the closure of some courts in the country. For this reason, I opine that the Applicant cannot be faulted for the delay to file its intended appeal.

19. The Applicant further contends that it took a considerable amount of time before the Applicant could obtain the proceedings and judgment in the matter. While no proof has been availed to substantiate this assertion, it is my view, that the length of delay was not inordinate.

20. I note that the Applicant was prompted to action by the complainant vide the letter dated 11th March, 2021. The Applicant has however not attached any evidence to show its attempt to get the copies of the proceedings and judgment or order it intends to appeal against. It is however trite that Court will always exercise their discretion in a manner that does not unnecessarily impede the right of parties to access justice.

21. As to the possibility of the intended appeal succeeding, I have perused the draft Petition of Appeal annexed to the present application. Whereas the court should peruse the proceedings, this will only happen once the appeal is filed, the courts determines whether to admit the appeal or not as provided under **Section 349 of the Criminal Procedure Code.**

22. With regard to prejudice, I am of the considered view that the only prejudice that would be occasioned on the Respondents by allowing the Application is that they would have to wait a little longer for the matter to be concluded. The delay between 14 (fourteen) days and the two months when this Court was finally moved to consider extension of time is of such a nature that one can rule out prejudice likely to be suffered by the Respondents.

Conclusion

23. Taking into totality the circumstances of this case, it is my view that the reasons provided by the Applicant for the delay in filing the intended appeal are sufficient to warrant allowing the present application. It would be unjust to disallow the Application on the ground of delay alone. As such, I opine that the present application is merited. I allow it and order that the Applicant is granted 14 days from the date of this ruling to file its intended appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JANUARY 2022.

L.W. GITARI

JUDGE

27/1/2022

Ruling read over in open court.

L.W. GITARI

JUDGE

27/1/2022