



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CRIMINAL APPLICATION NO 91 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS... APPLICANT

VERSUS

ENOS JUMA ROBERT.....RESPONDENT

R U L I N G

1. **Director of Public Prosecution** (DPP) has moved this court by application dated 12<sup>th</sup> July 2019. That application is brought under the provisions of S. 349 of the Criminal Procedure Code (CPC) and Article 159 (2) (d) of the Constitution. DPP seeks an order to appeal out of time in respect to **Chief Magistrate Thika Criminal Case No 4186 of 2016**. Judgment in that case was delivered by the trial court on 15<sup>th</sup> April 2019. The accused in that case **Enos Juma Robert** (Enos) was acquitted of the offence under Section 215 of Criminal Procedure Code of the charge under Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. It is that acquittal that DPP prays, by its application, to file an appeal out of time as provided under Section 349 Criminal Procedure Code. That is the Section which requires that an appeal is filed 14 days from the date of judgment.

2. The application is supported by an affidavit of **Penninah Ngondi, (Ngondi)** the prosecution counsel who handled the trial before the lower court. The view of the deponent is that the lower court erred in acquitting Enos on issues of law and facts which errors can only be remedied by an appeal. The deponent stated that the lower court's judgment was delivered while she was on annual leave and when her brief was held by **Ms Wamuyu Ngugi**. That Miss Wamuyu inadvertently failed to inform the deponent of the outcome of the judgment. That had Ms Wamuyu informed her of the outcome of that judgment the deponent would have noticed the error thereof. The deponent stated that on her resumption on duty and on perusing the judgment of the lower court she noticed that the judgment was not supported by the evidence adduced at trial. The deponent therefore stated that it is in the interest of justice the application to file an appeal out of time be allowed so that the appeal can be heard and determined on merit.

3. Enos opposed the application through his replying affidavit dated 2<sup>nd</sup> October 2020. He deponed that since the DPP had failed to file an appeal, against the lower court's judgment, he had moved on from the "unfortunate nightmare" that hung over his head for three years. Enos further deponed that the delay in filing the appeal was inexcusable and had not been satisfactorily explained because Ngondi had not supported, with evidence, when her leave commenced and ended; and because Wamuyu had failed to file an affidavit to support the contention of Ngondi. Further that DPP had failed to demonstrate it had difficulty in obtaining typed proceedings and judgment of the lower court. Enos further deponed that the appeal lacks merit and if DDP is allowed to appeal out of time such an appeal would occasion him unnecessary costs and would adversely impact his young family.

**ANALYSIS AND DETERMINATION**

4. One of the guiding Laws for the application before me is Section 349 Criminal Procedure Code. This Section provides:

"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." (Emphasis added)

5. A close interrogation of that section reveals that the court is afforded discretion to grant leave for an appeal to be filed out of 14 days period, set in that Section. The court in exercising that discretion is required to consider if good cause has been shown by the applicant and the court should admit an appeal out of time if it is satisfied failure to file the appeal out of time is caused by the trial court's judgment and record not being supplied within reasonable time on being applied for. It is clear from the provision of the above Section that the court in considering an application to file an appeal out of time is not required to consider the merits or otherwise of the appeal. This was what the

court in the case **Republic –v- Ranchandra Shankaria Bhatt (2017) eKLR** stated:

“12. *In Misc. Criminal Application No.10/14 - R vs Jane Njeri Mwangi*, Ngaah J, in granting the applicant leave to file an appeal out of time, observed as follows:

“The respondent’s counsel’s submission that the appeal does not raise any triable issue either in law or fact does not appear to have any legal basis; this is because under section 349 of the Criminal Procedure Code, the only consideration this court must give regard to in exercising its discretion to grant leave to file the appeal out of time is “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 therefor.” Whether the appeal will succeed or not does not seem to count at this stage.”

6. The authorities relied upon by Enos, in opposition to the application are distinguishable to the facts before me. In the case **Republic –v- Charles Kipkorir & Another (2012) eKLR** the delay in filing an appeal was one year. although DPP, in that case, alleged it had taken long to get the lower court’s proceedings the High Court found that the lower court’s proceedings were available for at least one year. The other case Enos relied upon is **Republic –v- William Macharrra Murathe (2016) eKLR**. In that case the proceedings of the lower court were applied for by the complainant who then gave them to DPP. The High Court was therefore not satisfied that DPP, had in that case, proved it had difficulty in receiving the proceedings and the court went further to find that by the complainant supplying the lower court’s proceedings it compromised the independence of DPP to decide to commence criminal proceedings, under Article 157 (10) of the Constitution. The High Court therefore concluded that DPP had failed to show that it had taken any steps to institute the appeal.

7. In this case the facts are very different. Ngondi stated that her brief was held by another counsel who failed to relay to her the judgment of the lower court. The delay in filing the appeal, here, is three months. DPP annexed to the application before me the draft petition of appeal. More importantly Ngondi applied by letter dated 1<sup>st</sup> July 2019 for the proceedings and judgment of the lower court. I have sighted those typed proceedings and judgment and indeed they have been compiled into the record of appeal.

8. My findings are that Enos will not suffer any prejudice if leave is granted to DPP to file an appeal out of time. In considering such an application, as this one, I would be required, in my view to bear in mind Article 50 (9) of the Constitution, which Article recognized the rights of victims of offence. In so doing I have looked at **The Victim Protection Act, 2014** whose object is to recognize and give effect the rights of victim. Before the trial court the victim of sexual offence was 9½ year old boy. He has a right to have his complaint ventilated fully and to have his grievances by the application of law which will be decided in a fair and public hearing. In stating this I am simply echoing what was stated in the case **Silas Okumu Diang’a/ODPP -v- George Onyona Arek (2020) eKLR** where the court was considering DPP’s application to file an appeal out of time. The court in that case stated:

“17. Furthermore, this court finds no prejudice being occasioned to the Respondent if the application is granted. Access to justice under Article 48 of the Constitution is a guaranteed right and it means according every person an opportunity to ventilate their grievances fully. The applicant too has a right to a fair hearing under Article 50(1) of the Constitution which right is to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or other independent body. As such, the applicant should not be curtailed by mere technicality and purported delay that was substantially not occasioned by him.”

9. The application before me for the reasons set out above is meritorious. DPP has given explanation why it failed to file the appeal out of time. That explanation simply reveals human frailty of forgetfulness. On Ngondi realizing the appeal needed to be filed she applied for typed proceedings and judgment. There is no record, even though the lower court’s file is before me, of when those proceedings were supplied by the lower court. DPP in my view has adequately met the requirements of Section 349 Criminal Procedure Code.

10. In the end in respect to the Notice of Motion dated 12<sup>th</sup> July 2019 I grant the following orders:

a. Leave is hereby granted to Director of Public Prosecution to file an appeal out of time in respect to the case Chief Magistrate’s Court Thika Criminal Case No.4186 of 2016.

b. That appeal shall be filed within fourteen (14) days from the date of this Ruling.

**SIGNED AND DELIVERED VIRTUALLY THIS 18<sup>th</sup> DAY OF MARCH 2021.**

**MARY KASANGO**

**JUDGE**

18<sup>th</sup> March 2020

Before Justice Mary Kasango

C/A - Kevin

For DPP the Applicants – Christine Kathambi

For the Respondent – Mr. Kasavuli

**COURT**

Ruling virtually delivered in their presence.

**MARY KASANGO**

**JUDGE**