



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 64 OF 2019

REPUBLIC.....RESPONDENT/APPLICANT

VERSUS

MICHAEL ABALA WANGA.....1ST APPELLANT

VALENTINE MAGERO2ND APPELLANT

RULING

1. By the application dated 7th October 2019, the Director of Public Prosecutions (DPP) seeks leave to file a cross-appeal out of time and that the petition of appeal upon admission be consolidated with the appeal filed by **Michael Abala Wanga** and **Valentine Magero** (hereafter the Appellants) in respect of the judgment of the lower court delivered on 20/07/2018 by **Kituku SPM** in **Kiambu CM's Criminal Case No. 201 of 2016**. The motion is premised on sections 348A and 349 of the Criminal Procedure Code and is based on grounds inter alia that the delay in filing appeal was caused by inability to obtain a copy of the judgment and proceedings and that the DPP has an arguable appeal which has high chances of success. The motion is supported by two affidavits of **Stephen S. Kasyoka**, a prosecution counsel. The affidavits reiterated the grounds on the face of the motion.

2. The two Appellants opposed the motion through the replying affidavits which are similar. To the effect that the application is an afterthought and activated by malice and that the appeal was instigated by the complainant in the lower court, **Kenya Medical Laboratory Technicians & Technologists Board's** CEO, one **Abdulatif Ali** and another in furtherance of a personal vendetta against the Appellants previously members of the said board, arising from past interactions at the Board; that there is no proof that the DPP applied for proceedings as alleged and in any event such proceedings are not a requirement for filing an appeal; that the delay is inexcusable; and that the appeal has no chance of success and is a waste of judicial time while exposing the Appellants to prejudice through delay and increased costs.

3. In a further affidavit, the DPP disputed the Appellants' depositions in their replying affidavit and reiterated that the DPP exercises his mandate in respect of criminal cases independently.

4. The motion was canvassed by way of written submissions. The DPP and the complainant in the lower court submitted on the discretion of the court under Section 349 of the Criminal Procedure Code to admit an appeal out of time and emphasized that the provision envisions delay caused by inability to obtain a copy of proceedings and judgment to be appealed from, as a ground and that the delay herein is not inordinate. Pointing out that the Appellants have already filed their appeal, the DPP asserts that the intended cross-appeal will not cause delay or prejudice the Appellants; and that the intended cross-appeal has high chances of success.

5. On their part, the Appellants submitted as follows. That sufficient reason for delay must be demonstrated, which is not the case herein as the DPP did not require copies of the lower court judgment or proceedings to file the cross-appeal. Citing the principles enunciated in **Leo Sila Mutiso v. Helen Wangari Mwangi [1999] EA 231** the Appellants asserted that not only does the intended cross-appeal have no chances of success, but potentially will cause delay and occasion prejudice upon the Appellants and is a waste of judicial time. In the appellants' view the applications is devoid of merit and ought to be dismissed.

6. The court has considered the material canvassed in respect of motion dated 7th October, 2019. The court's jurisdiction to enlarge the time for filing appeal is found in Section 349 of the Criminal Procedure Code which states:

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 therefor. (Emphasis added)

7. The successful applicant is required to demonstrate good cause to justify the extension of time, and the section includes among such causes the inability by an applicant to obtain the copy of judgment and record within reasonable time of applying. The Appellants themselves have deposed in their replying affidavits that copies of the proceedings and judgment of the lower court only became ready and available on 25th October, 2019. They however had filed their petition of appeal by that date. Although it is a requirement under Section 350(1) of the Criminal Procedure Code, that the petition of appeal be accompanied by a copy of the judgment or order appealed from, in practice, this section is not rigidly applied by the High Court due to the notorious fact that in most cases proceedings and judgment from the court below take time to obtain. Section 349 civil Procedure Code echoes and recognizes this reality.

8. The DPP has stated that delay of about two months was due to the inability to obtain a copy of the proceedings and judgment in time. The delay is not inordinate as the application was filed after two months. There is no requirement in Section 349 of the Civil Procedure Code for the applicant to demonstrate the merit of his intended appeal. In this case, the Appellants' appeal is yet to be heard, and if the court grants the prayer for consolidation, the two appeals can be heard together. In the circumstances, the Appellants will not be prejudiced in any material way.

9. The complainant through DPP and the Appellants are all entitled to access to justice under Article 48 of the Constitution and to a fair hearing as guaranteed in Article 50 (1) of the Constitution. There is no evidence that these rights will be infringed upon in any way if the application is allowed.

10. Reviewing all the matters placed before it, the court is satisfied that the delay on part of the DPP is not inordinate, that a good explanation has been offered and that the Appellants are not likely to suffer any undue prejudice if the DPP's motion is allowed. The justice of the matter lies in exercising the court's discretion in the DPP's favour. In the result, the court will grant the motion dated 7th October, 2019 in terms of prayer 1. Accordingly, the DPP is directed to file the cross-appeal within 14 days of today's date. Upon the said cross-appeal being filed it will be consolidated with the present appeal and the matter placed before the Judge for her directions.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021

C. MEOLI

JUDGE

In the presence of:

Ms Kathambi for the DPP

Mr. Mong'eri for the Appellants

Kevin: Court Assistant