



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CRIMINAL APPLICATION NO. E016 OF 2020

MIRRIAM NKATHA..... 1ST APPLICANT

REPUBLIC.....2ND APPLICANT

VERSUS

CHRISTINE NKUENE MUCHUNGI..... 1ST RESPONDENT

MWENDA THURANIRA MUCHUNGI.....2ND RESPONDENT

PAUL MUCHUI MUCHUNGI.....3RD RESPONDENT

RULING

1. The court is called upon to determine an amended notice of motion dated 9/2/2021, pursuant to Section 349 of the Criminal Procedure Code, Article 159 of the Constitution, Section 4, 9 &13 of the Victims Protection Act and all enabling provisions of the law. In it, the 1st applicant seeks leave to appeal against the judgement in Tigania Criminal case No.1846/2018 out of time. The grounds advanced to support the application are that, the appeal has high chances of success. The delay in filing the appeal in time is attributed to the ODPP's failure to act on the 1st applicant's request to lodge the appeal. The 1st applicant contends that she learnt that she could file the appeal on her own, way late after the stipulated time to appeal had lapsed. She contends that it took her long to obtain the requisite proceedings from Tigania law court. She has exhibited the impugned judgement, the memorandum of appeal and a letter to the ODPP.

2. The directorate of Prosecution, named as the 2nd applicant, filed grounds of opposition against the application. It termed the application as incompetent, unmerited, an abuse of the court process, misleading and full of half-truths, as the applicant lacked the requisite locus standi to file the appeal. It would appear that the respondents named did not file any Grounds of opposition or Replying Affidavit but did file written submissions

3. The court on 9/2/2021 directed that the parties herein file their respective written submissions to the application, which were filed on 27/5/2021 and 24/6/021 by the applicants and the respondents respectively.

4. From the onset, it needs to be pointed out that the application as presented is by a complainant who was never the accused nor the prosecutor at trial. In it even though the word leave is used, the grounds thereof and the affidavit in support demonstrate that the remedy sought is one of extension of time to lodge an appeal rather than leave to appeal. It must be remembered that the control of criminal prosecution which extends to criminal appeals is the exclusive duty of the Office of the Director of Public Prosecutions. It is therefore imperative that before I consider extending time within which to lodge an appeal I determine if the applicant has a right to appeal against an order of acquittal. In answering that question the court must be alive to the mandate and protection accorded that office of Director of Public Prosecution under article 157(10) of the Constitution. That however cannot be done in isolation but with regard to the other provisions of the constitution including the provisions of article 50(9) of the same Constitution enshrining the rights of the victim of a crime. I have given due consideration to those provisions as well as the provisions of Part XI of the Criminal Procedure Code on appeals.

5. Having done so, I do find that there no right upon the applicant to prefer and sustain an appeal from the trial in which she was a complainant or victim of crime without the participation of the Director of Public Prosecution. In coming to this determination I am not oblivious to the entrenched right of the victim of crime under the constitution and the Victim Protection Act. In deed I am guided by the decision of the court of Appeal in **Joseph Lendrix Waswa v Republic [2019] eKLR** where the court delivered itself in the following words: -

“From the foregoing, it is clear that the Constitution and the VPA gives a victim of an offence a right to access justice and a right to fair trial which rights, as Article 20(2) provides, should be enjoyed to the greatest extent consistent with the nature of the right. The right to a fair trial as Article 25 provides is an absolute right. The fact that the rights of an accused person to fair trial are enumerated and the rights of victims of offences are recognized by Article 50(9) but to be stipulated in a

legislation indicates that the Constitution intends, as a principle, that the constitutional rights of an accused person to a fair trial should be balanced with the statutory rights of the victim of the offence as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial.”

6. What I learn from the decision is that the rights of a victim of crime to access justice even by way of an appeal is an absolute one that is incapable of limitation. That however does not mean that that right overrides other constitutional value systems and structures of exercise of power. It does not sidestep the mandate of the office of the Director of Public Prosecutions and the independence accorded to it under the constitution. In appropriate cases, however, if shown to the satisfaction of the court that the office is failing on the due performance of its duty, say, by failure to have regard to public interests, the interests of administration of justice and the need to prevent and avoid abuse of the legal process, the court may step in to allow the pursuit of an appeal by a victim of crime or indeed a public spirited individual.

7. In this matter, no leave and authority to file the appeal has been sought and no material has been laid before the court to demonstrate that the Director of public Prosecution, has failed or unwilling to perform its mandate, hence there is no basis to grant the leave and authority. Without such leave and authority, I do find that it would be an act in superfluity to extend time within which to file an appeal because, so far there is no right upon the applicant to lodge an appeal from the decision said to have aggrieved him. It thus follows that there is no useful purpose to be served by any attempt to find out if extension should be ordered.

8. The end result is that the application dated 9th February 2021 lack any merits and is thus dismissed.

DATED SIGNED AND DELIVERED AT MERU, VIRTUALLY BY M TEAMS THIS 24TH DAY OF SEPTEMBER 2021

PATRICK J O OTIENO

JUDGE

In presence of

Miss Mutegi for the respondent

Mr. Maina for the 2nd applicant

PATRICK J O OTIENO

JUDGE