



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. CRIMINAL APPLICATION NO. E095 OF 2021

CORAM: HON. R.E. ABURILI, J

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

ANGELA AKUMU SEWE.....RESPONDENT

RULING

1. By a Notice of Motion dated 15/7/2021, the applicant Office of Director of Public Prosecutions, Siaya seeks the following orders:
 1. That this Honourable court be pleased to grant leave to appeal out of time. The other 'prayers' are in essence grounds and not prayers.
2. The intended appeal is against acquittal of the Respondent Angela Akumu Sewe. The application is grounded upon the affidavit sworn by Edwin Barasa on an undated date and accompanied by a draft Memorandum of Appeal dated 15/7/2021 setting out six grounds of appeal.
3. According to the deponent, the judgment sought to be impugned was delivered on 30/3/2021 by Hon. James Ong'ondo, Senior Principal Magistrate upon which the ODPP was aggrieved by the acquittal of the Respondent under Section 210 of the Criminal Procedure Code.
4. That on 9th April 2021, the ODPP wrote to court asking for typed proceedings and judgment for purposes of an appeal and the said letter was received on 14/4/2021 way after the period for filing of an appeal.
5. That the ODPP then filed an application for leave to extend time to file an appeal but that the unsigned copy was inadvertently send to the High court mail whereas a signed copy was send to the lower court email on 11/6/2021 and that the anomaly was discovered on 28/6/2021 when the application was dismissed for being improperly filed.
6. The delay in filing the appeal within time is therefore attributed partly to the late receipt of typed proceedings from the lower court and that the intended appeal raises serious errors by the trial court in acquitting the Respondent under section 210 of the Criminal Procedure Code hence it has high chances of success.
7. The Application is opposed by the Respondent who filed a Replying affidavit sworn on 18/10/2021 and filed on the same day, giving the background to the case wherein she was acquitted under Section 210 of the Criminal Procedure Code and contending that the ODPP have not given reasons for seeking leave to appeal out of time since the Ruling on no case to answer was delivered in their presence and therefore they would have appealed within the stipulated time.
8. That there is no proof that the ODPP applied for the lower court proceedings in time nor a follow up made hence the applications is brought in bad faith.
9. According to the Respondent, it is in the interest of justice that litigation is brought to an end and that an innocent person should not be tried twice without any justifiable cause. That the anxiety caused by malicious changes almost cost her job as she had to miss work and attend to all court sessions hence, a repeat of the same scenario will strain her relationship with her employer further.
10. The Respondent urges this court to dismiss the application by the ODPP as no prejudice will be suffered by the latter.
11. The application was argued orally on 19/10/2021 with Mr. Kakoi Senior Principal Prosecution Counsel submitting on behalf of the

ODPP whereas Ms. Peres Odoyo advocate argued on behalf of the Respondent in opposition.

12. The submissions restated the application, reasons for the delay and the replying affidavit. The respondent maintained that the application is an abuse of court process and that the alleged Memorandum of appeal does not raise any triable issue.

DETERMINATION

13. I have considered the application for leave to appeal out of time from the Ruling on no case to answer in Siaya SPM in Cr. 321/2020 delivered on 30/6/2021 by Hon. James Ong'ondo, Senior Principal Magistrate. I have also considered the opposition by the Respondent and submissions by both parties' advocates reiterating the filed documents.

14. Section 349 of the Criminal Procedure provides that an appeal from judgment of the subordinate court to the High court shall be filed within 14 days of the order, sentence or judgment.

15. The proviso to the said section, however, allows this court to consider an application for filing of an appeal out of time, if the applicant demonstrates that the inability to file the appeal was caused by late supply of copy of judgment or order appealed against.

16. In this case, the applicant claims that it applied for copies of proceedings and judgment but the same were not supplied until after the time for filing of the appeal had elapsed. I have perused the application as presented and I find no copy of letter requesting for copies of proceedings or judgement of the lower court for appeal purposes. What they have annexed is a copy of draft Memorandum of Appeal. However, it is true that the applicant did file High Court Criminal Miscellaneous Case No. E082 of 2021 which application for leave to appeal out of time was struck out on 30/6/2021 for reasons that it was not signed and neither was the affidavit in support thereof signed by the person purporting to depose facts therein. It is the striking out of that application that led to the filing of this application.

17. In the earlier application No. E082 of 2021 which was struck out on 30th June 2021, and which is still part of this court's record, I did see a letter Ref: ODPP/ LTR/001/144 dated 9th April 2021 addressed to the Senior Principal Magistrate's Court at Siaya asking for typed and certified copies of proceedings and ruling in Siaya PM Cr Case No 321 of 2020 where the Respondent herein was an accused person. For that reason, I am persuaded that the Applicant did request for copies of proceedings and ruling before the elapse of 14 days of the date of the Ruling.

18. The Respondent contends that no good reasons are advanced for the delay in filing the appeal since the Ruling of 30/3/2021 was delivered in the applicant's presence. Further, that the intended appeal has no triable issues and that the applicant is out to vex her and have her undergo a second trial over malicious charges for which a court of competent jurisdiction has found her innocent hence she should not be dragged back to court.

19. It must be appreciated that an acquittal is appealable against just like a conviction. Justice is both ways, for the accused whose rights are guaranteed under Article 50(2) of the Constitution, and for the victims of offences under Article 50(9) of the Constitution and where there is no specific victim or complainant, then the State Prosecutor who acts or prosecutes on behalf of the public.

20. I have perused the Respondent's draft Memorandum of Appeal and the Replying affidavit by the Respondent and observe that the Respondent was acquitted of several counts of fraud.

21. In my view, the draft Memorandum of appeal is not frivolous on the face of it. It raises arguable issues which cannot be delved into indepth at this moment. An arguable appeal or case is not necessarily one that must succeed but that it should not be frivolous or vexatious on the face of it and that there must be triable issues for the court's determination. Albeit the Respondent claims that the charges were malicious, that is not for this court to determine at this stage.

22. The Prosecution admits that they were late in filing of the appeal but that the application for leave which was struck out giving way to this application was not brought with inordinate delay.

23. In my humble view, where in the opinion of the ODPP, there was prima facie sufficient evidence to place the accused/Respondent on her defence, the only option that it has is to appeal against the acquittal as it cannot charge her freshly of the same charges owing to the rule against double jeopardy.

24. A proviso to section 349 of the Criminal Procedure Code affords this court unfettered discretion to grant leave to appeal out of time. Whether the intended appeal shall be successful or not is not for this court to determine at this stage.

25. I do not find any prejudice that the Respondent shall suffer where due process is followed to ensure justice is done and is seen to be done for both sides in the criminal case and whoever is aggrieved is given an opportunity to ventilate its grievances fully on appeal. Courts exist to dispense justice and courts of law should be hesitant at closing the door to the corridors of justice prior to litigants being heard on their complaints fully through the available legal channels, an appeal being one of them, especially where it is not shown that there is indolence or demonstrable bad faith on the part of the applicant or that the Respondent will be prejudiced in any way. See **Kamlesh Pattni vs Director of Public prosecutions and 3 others [2015] e KLR.**

26. For the above reasons, I find the application dated 15/7/2021 meritorious. I allow it and grant leave to the applicant to file an appeal arising from Siaya SPM Cr. Case No. 321 of 2020 out of time.

27. The appeal shall be filed and served on the Respondent within 14 days of today.

28. This file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF OCTOBER 2021

R.E. ABURILI

JUDGE

In the absence of parties and their counsel

CA: Modestar and Mboya