



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

MISC. CRIMINAL APPLICATION NO E001 OF 2021

REPUBLIC.....APPELLANT/APPLICANT

VERSUS

MATHEW KIPROP AMDANY.....RESPONDENT

(Being an application for extension of time within which to file an appeal out of time from the acquittal judgement of Hon. N.M. Idagwa, SRM, dated 10th December 2020 in the Senior Principal Magistrate's Court at Kabarnet in Criminal Case No. 394 of 2020 Republic v Mathew Kiprop Amdany)

RULING

The Republic/applicant vide its notice of motion dated 21st January 2021 has filed an application in this court seeking the following orders.

1 An order to grant leave to the applicant to file an appeal out of time against the acquittal judgement of Senior Resident Magistrate's court in Criminal Case No. 394 of 2020, in which the respondent was acquitted on a charge of malicious damage to property contrary to section 339 (1) of the Penal Code (Cap 63) Laws of Kenya.

2. To make any other order that the court may deem fit to grant in the interests of justice.

The application is supported by five grounds that are set out on the face of the notice of motion, with the major grounds being the following. First, the failure to file the appeal within the required period was due to the inability of the applicant to obtain the judgement and record of the proceedings within a reasonable time.

Second, the application has been brought in a timely manner without undue delay.

Third, the applicant has stated that: "THAT from the copy of proceedings and judgement herewith annexed it is apparent that here are trial issues which ought to be conversed at the hearing of the appeal."

Fourth, in the event the application is allowed no amount of prejudice shall be occasioned to the respondent.

In addition to the above grounds the application is supported by an eleven (11) paragraphs supporting affidavit of the applicant's counsel (Mr. George Abuga Mong'are), who is an acting Senior Assistant Director of Public Prosecutions; whose major averments are as follows.

The affidavit has replicated the same matters that are set out in the notice of motion which I find unnecessary to set out. The only new matters that are deposed in the affidavit are as follows. The application has been brought timeously without undue delay and ought to be allowed in the interests of justice.

The submissions of the applicant

The applicant has submitted that it was unable to file an appeal within the stipulated 14 days due to the inability to get a copy of the judgement and proceedings within the 14 days as required by law. Counsel has submitted that the delay in filing of the application is not inordinate.

Counsel for the applicant cited Paul Kanai & Another v Republic, Machakos High Court, Misc. Criminal Application No. 7 of 2017, in which the court in turn cited the proviso to section 349 of the Criminal Procedure Code (Cap 75) Laws of Kenya; whose provision do clothe the court with discretion to extend the time within which to file an appeal out of time after the expiry of the permitted statutory 14 days.

The case for the Respondent

The respondent filed a 19 paragraphs replying affidavit in opposition to the application; whose major averments are as follows.

Based on the advice of his advocate the respondent has deposed that the application is frivolous and an abuse of the court process. He has also deposed that the applicant has not demonstrated that it received the proceedings late and that there is no evidence that there was delay in receiving the proceedings from the court.

The respondent has further deposed that the proceedings were supplied to the applicant on 23rd December 2020. He has also deposed that the applicant has not demonstrated as to why it took over 14 days from the date of receiving the copy of the judgement and proceedings to lodge the appeal.

The respondent has deposed that there is nothing on record to show that the applicant ever applied for the proceedings orally or in writing and the current application is actuated with the complainant's malicious intentions and that the ODPP is not acting independently.

Again based on the advice of his advocate the applicant believes that appeals from an acquittal shall lie on points of law only and that the applicant has not demonstrated that there are points of law in its appeal. Furthermore, the applicant has not annexed any memorandum of appeal to its application. He has further deposed that if the application is allowed it will prejudice him "*as the delay by the applicant to file the appeal led me to believe that I was innocent as result of which I already moved on from litigation and in the process of stabilizing my life again.*"

The respondent has deposed that he will be prejudiced as he now has to undergo the expense, inconvenience and stigma of additional criminal proceedings after enjoying months of freedom and liberty.

Finally, based on advice of his advocate the respondent has deposed that the applicant has not met the threshold for the grant of the orders sought.

The submissions of the Respondent

Messrs Kogo Kimutai & Co, advocates for the respondent have cited section 349 of the Criminal Procedure Code (Cap 75) Laws of Kenya, which requires an applicant to file the appeal within 14 days; provided that the court to which the appeal is made may for good cause admit an appeal after the period of 14 days has elapsed. The court may so admit the appeal if satisfied that the failure to file the appeal within 14 days has been caused by the inability of the applicant to obtain a copy of the judgement appealed against and a copy of the proceedings within a reasonable time of applying for them to that court.

Furthermore, counsel for the respondent cited *Ratman v Cumarasy* (1964) 3 All ER 993, which was cited in approval in *Republic v Wycliffe Simiyu Wasike & Another* (2013) e-KLR, in which the court observed in part that there ought to be material upon which the court can exercise its discretion. Counsel also cited *Republic v William Macharia Murathe* (2016) e-KLR, in which this court (Mativo, J) in part observed that the requirements to the proviso to section 349 of the Criminal Procedure Code had not been proved and that made it impossible for the court to determine whether the appellant therein was prevented from filing the appeal due to the inability to obtain the proceedings within the time required for filing the appeal.

Based on the foregoing, counsel for the respondent has submitted that the applicant is insincere to aver that the delay was due to the inability to obtain a copy of the record in good time since the proceedings were supplied to the applicant on 23rd December 2020. According to counsel the applicant has not advanced any reason for the lapse of time between the time of being supplied with proceedings and Judgment and the time the application was filed. He has therefore urged the court to dismiss the application.

Issues for determination

I have considered the affidavits of the parties and their submissions including the authorities they cited. I find that the issue for determination is whether the applicant has placed enough material before the court to enable it exercise its discretion as required by the proviso to section 349 of the Criminal Procedure Code, *supra*.

I find that the applicant in its affidavit has only deposed that the judgement appealed against was delivered on 10th December 2020. The applicant has not deposed in respect of the date when it applied for the copy of the judgement and proceedings. The applicant has also not deposed as to when it received the copy of the judgement and proceedings. The applicant has only shown the date of filing the application as being 21st January 2021, which is clear from the court stamp on the application.

I find as persuasive the decision of this court in *Republic v William Macharia Murathe*, *supra*, as regards the date of applying for a copy of the judgement and proceedings for appeal purposes.

I find that it is difficult to ascertain the date when the applicant applied for the judgement and proceedings and when it received them.

I therefore find that the authorities cited by counsel for the Respondent are inapplicable and unhelpful.

In the circumstances I find it difficult to exercise the discretion envisaged in the proviso to section 349 of the Criminal Procedure Code, *supra*. In this regard, I also find as persuasive the decision of the court in *Ratman v Cumarasy* (1964) 3 All ER 993, which was cited in approval in *Republic v Wycliffe Simiyu Wasike & Another*, *supra*.

The reason why this court cannot exercise its discretion is that a court of law must base its decision on the evidence placed before it. A court

of law is not allowed to speculate.

In the circumstances of this application, counsel for the applicant has invited the court to exercise its discretion in a vacuum or to speculate, which is legally impermissible.

In the premises, I find that the applicant has failed in its application with the result that it is hereby dismissed.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI 18TH DAY OF OCTOBER 2021

J M BWONWONG'A

JUDGE

IN THE PRESENCE OF:-

- 1. MR. MONG'ARE FOR THE APPLICANT**
- 2. MESSRS KOGO KIMUTAI & CO. FOR THE RESPONDENT.**
- 3. MR. KINYUA COURT ASSISTANT**