



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. CR. CASE NO. 13 OF 2019

REPUBLIC.....APPLICANT

-V-

EVELYNE GATHONI NYOKABI.....RESPONDENT

RULING

1. The applicant filed an application for leave to appeal out of time against the ruling of Hon. E. O. Wambo, Kerugoya Senior Resident Magistrate's Court Cr. Case No. 29/2019 delivered on 8/5/2019. The application is brought under the provisions of **Section 349 of the Criminal Procedure Code Cap 75 Laws of Kenya** and all other enabling provisions of the law. It seeks orders that the court be pleased to extend time and grant the applicant leave to file an appeal out of time against the ruling of Hon. E. O. Wambo, Kerugoya Principal Magistrate's Court in criminal case No. 29 of 2019 delivered on 8/5/19.

2. The application is based on the following grounds:-

- a. That the respondent was charged with the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code whereby she took plea on 14/01/2019 in Kerugoya Law Courts, Court No. 3.
- b. That after the plea was taken the matter was allocated to Court No. 2 for hearing and determination a fact which was not within the knowledge of the complainant.
- c. That the matter was given hearing dates in Court No. 2 but the complainant and her witnesses were erroneously seating in Court No. 3 where the plea was taken.
- d. That the matter was later dismissed under the provisions of Section 202 of the Criminal Procedure Code notwithstanding the fact that the complainant who was desirous to prosecute the case was unknowingly seating in Court No. 3 instead of Court No. 2.
- e. That the applicant was not able to lodge its appeal in time since typed and certified court proceedings were not ready and availed in time until 3/7/2019.
- f. That the applicant has a good appeal with overwhelming chances of success.
- g. That it is in the best interest of justice that the application herein is allowed.

3. The application is supported by the affidavit of Miriam Wanjiru Mwaura sworn on 8/7/2019. She has deponed that she is a prosecution counsel practising as such in the office of the Director of Public Prosecutions. She depones that the respondent was charged with the offence of assault causing actual bodily harm contrary to **Section 257 of the Penal Code** in Kerugoya Criminal Case No. 29/2019 and she took plea on 14/1/19 at Kerugoya Law Courts No. 3. After the plea was taken the matter was allocated to Court No. -2- for hearing and determination a fact which was not well in the knowledge of the complainant.

4. The matter was given two hearing dates, 17/4/2019 and 8/5/2019. On both occasions the complainant and her witnesses were erroneously seating in Court No. 3 where plea was taken.

5. The honest mistake complainant by the complainant was misconstrued for none attendance and the court proceeded to dismiss the case against the accused person under **Section 202 of the Criminal Procedure Code** notwithstanding the fact that the complainant was sitting in Court -3- instead of Court No. -2-.

6. The State Counsel made an oral application requesting for the copies of proceedings and ruling. They were supplied on 3/7/19. The delay in lodging the appeal was not deliberate. The applicant has a very good appeal with overwhelming chances of success. That no prejudice will be occasioned to the respondent if the application is allowed.

7. The respondent opposed the application and filed a replying affidavit sworn on 13/11/2019. She deposes that the application is an abuse of court process, filed as an afterthought and waste of courts time. There is no evidence that the complainant was sitting in court M-3-. That the appeal has no chances of success. She further deposes that the delay in filing the appeal was inordinate and has not been adequately explained. That due process was followed and the applicant ought to raise the issue in another forum.

8. I have considered the application. The issue for determination is whether the applicant has shown good cause for the delay in filing the appeal. **Section 349 Criminal Procedure Code. (Cap 75 Laws of Kenya)** provides that:-

“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 14 days has elapsed and shall so admit an appeal if it is satisfied that failure to enter the appeal within that period has been caused by the inability of the appellant 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 thereof.” The section gives the court powers to exercise discretion.

9. In this case the applicant has stated that they applied for the proceedings and the ruling but it was not supplied in time and the time lapsed. The applicant could only file the appeal after receiving the proceedings and the ruling of the lower court. The right of appeal is a constitutional right and a party should not be denied the right on a procedural technicality. There is no dispute that the applicant was supplied with the proceedings and ruling after the period provided for filing the appeal had lapsed. The applicant has explained the delay in filing the appeal in time. The applicant has shown good cause for the delay. I will therefore exercise discretion and grant the applicant leave to file the appeal.

10. I order as follows:-

1. The applicant is granted leave to appeal out of time.
2. The appeal be filed within 14 days from the date hereof.

Dated at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE