



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**IN THE ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**CORAM: MUMBI NGUGI J**  
**MISCELLANEOUS CRIMINAL APPLICATION NO. 6 OF 2020**  
**REPUBLIC.....APPLICANT**  
**-VERSUS-**  
**LIVINGSTONE NYAGA MUTHURI.....RESPONDENT**  
**RULING**

1. The applicant, the office of the Director of Public Prosecutions (DPP), filed the present application in Nakuru as Misc. Crim. Application No. 193 of 2019 on 3<sup>rd</sup> December 2019. It was subsequently transferred to this Division on 28<sup>th</sup> January 2020.
2. The applicant seeks leave to file an appeal out of time in Nakuru Chief Magistrate's Court Anti-corruption Case No. 6 of 2011. The grounds on which the application is brought are that the applicant had, immediately upon the acquittal of the respondent on 21<sup>st</sup> June 2019, applied for certified copies of the proceedings and judgment as it was dissatisfied with the acquittal and intended to appeal. It had also written to the Executive Officer of the Nakuru Law Courts requesting for the certified copies of the proceedings and judgment. The proceedings and judgment were received in its office on 2<sup>nd</sup> December 2019, five months after the acquittal. After considering the proceedings and judgment, it had decided to appeal.
3. The DPP states that the delay in lodging the appeal is due to the inability to obtain copies of the proceedings and judgment within a reasonable period, and it is in the interests of justice that it should be granted leave to file an appeal out of time.
4. The application is supported by an affidavit sworn by Daniel Karuri, a Senior Assistant Director of Public Prosecution. He avers that the respondent was the accused in Nakuru Chief Magistrate's Court Anti-Corruption Case No. 6 of 2011. He was acquitted by Hon. L. Gicheha, (SPM) on 21<sup>st</sup> June 2019 under section 215 of the Criminal Procedure Code (CPC). The deponent had applied for certified copies of the proceedings and judgment by letter dated 23<sup>rd</sup> July 2019 but received the proceedings on 2<sup>nd</sup> December 2019 by which time the 14 day period for lodging an appeal had elapsed. It is his deposition that the intended appeal raises arguable grounds, and he annexes to his affidavit a draft petition of appeal. He avers that the delay in lodging the appeal in time was due to the inability to obtain certified copies of the proceedings and judgment in time. He reiterates the contention that it will be in the interests of justice that the court grants the DPP leave to file the appeal out of time.
5. In submissions in support of the application, the DPP notes that section 349 of the CPC allows the court to enlarge time within which an appeal can be filed. Section 348 allows the DPP to file an appeal against, *inter alia*, an acquittal in a criminal trial. It submits that its delay in filing the appeal was due to inability to obtain the proceedings within reasonable time, and that it has demonstrated the steps it took to obtain the proceedings. The applicant reiterates that it has an arguable appeal and that the interests of justice demand that the application be allowed.
6. The respondent opposes the application. He has filed an affidavit that he swore on 24<sup>th</sup> February 2020 in opposition to the application, a further affidavit sworn on 15<sup>th</sup> March 2020, and submissions dated 10<sup>th</sup> June 2020. In these two affidavits which are essentially the same in content, the respondent avers that his trial proceeded, with the applicant calling 14 witnesses, and he was placed on his defence. In its judgment dated 21<sup>st</sup> June 2019, the trial court acquitted him of all charges brought against him under section 215 of the CPC and gave the applicant 14 days right of appeal.
7. He states that he had personally paid for the judgment and proceedings which were available for collection and were certified on 3<sup>rd</sup> of July 2019. He attaches to his affidavit as annexure "NLM 1" what he refers to as the said certified copy of the proceedings, but is in fact a

copy of a letter to the Executive Officer dated 12<sup>th</sup> September 2019 in which he requests for certified copies of the typed proceedings in the matter. It is his averment that the judgment and proceedings were available in good time for the applicant to exercise its right of appeal within the statutory time lines.

8. The respondent asserts that the applicant has not demonstrated that the delay to lodge its appeal in time was not of its own making but was caused by the inability to obtain the court judgment within reasonable time. He further avers that the applicant has not demonstrated any reasonable steps that it took to obtain the proceedings and judgment as required under section 349 of the CPC, or why it took over 6 months from the date of judgment to request for the typed proceedings and lodge the appeal.

9. With regard to the intended appeal, the respondent avers that the petition of appeal does not disclose any arguable point of fact or law. In his view, it is a fishing expedition whose sole purpose is to deny him the fruits of his judgment and cause him undue suffering, and he asserts that the court was right in dismissing the suit against him. He submits that the applicant has not stated that its appeal has a high chances of success or that it will suffer prejudice should the application not be allowed.

10. In his submissions, the respondent reiterates the contents of his affidavits. He notes that the applicant only filed an application to file an appeal out of time six months after the judgment of the trial court. It is his submission that the applicant has not demonstrated that reasonable steps were taken to obtain certified copies of the proceedings and judgment of the trial court as required under section 349 of the CPC. The applicant has not given any cogent reason why it took over 6 months from the date of judgment to request for typed proceedings to lodge the appeal. The applicant had also not provided full particulars of the dates on which his office applied for the proceedings of the trial court. He notes that the applicant has only attached a single letter to the Executive Officer dated 23<sup>rd</sup> July 2019, and no follow-up letter was done for a period of 5 months. He reiterates that the applicant has failed to explain the delay of 5 months and takes the view that the DPP never intended to appeal and did not therefore act diligently or with speed in trying to get the certified copies.

11. It is the respondent's submission further that he had personally applied for a certified copy of the judgment and proceedings, and that they were certified on 3<sup>rd</sup> July 2019. He therefore submits that the applicant could not have waited for the certified proceedings for a period of 5 months to lodge its application, and has not attached the pages showing when the proceedings were certified to enable the court verify the same. He maintains that the proceedings were available at the registry on the 3<sup>rd</sup> of July, 2019 within the required 14 days of appeal.

12. The respondent relies on the decisions in **Samson Owiti Atambo vs. Republic (2018) eKLR** and **Director of Public Prosecution vs. Peter Kombo & Anor (2018) eKLR** and urges the court to dismiss the application. He notes that the petition of appeal annexed to the application does not disclose any arguable points of facts or law. He submits that re-opening the prosecution case will be extremely prejudicial to him as his salary has been suspended from the time his prosecution started.

#### **Analysis and Determination**

13. I have considered the pleadings and submissions of the parties in this matter. Section 348A of the CPC grants the office of the DPP a right of appeal in the following terms:

##### **Right of appeal against acquittal, order of refusal or order of dismissal**

**(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.**

**(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.**

14. Section 349 of the CPC provides as follows with respect to appeals:

##### **Limitation of time of appeal**

**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)**

15. The decision sought to be appealed from arises from a prosecution of the respondent that commenced in 2011. The judgment sought to be appealed against was rendered on 21<sup>st</sup> June 2019, and the applicant was granted 14 days right of appeal. The applicant did not file the appeal within this period, and now applies for leave to file the appeal out of time. The applicant blames its failure to file an appeal within the prescribed period on an inability to obtain certified copies of the proceedings and judgment within reasonable time. In his affidavit sworn on behalf of the applicant, Mr. Karuri annexes a letter dated 23<sup>rd</sup> July 2019 in which he requested the lower court to supply him with certified copies of the proceedings and judgment in the matter.

16. In his affidavit in response, the respondent argues that the proceedings were ready by 3<sup>rd</sup> July 2019, and that he obtained a certified copy thereof. While he states that he has annexed a copy of the certified proceedings, what is annexed is his own letter dated 12<sup>th</sup> September 2019

requesting for the certified proceedings.

17. I note, however, that the applicant did not respond to the averment by the respondent that the certified proceedings were available on 3<sup>rd</sup> July 2019, long before the DPP filed his application for leave to file the appeal out of time. Indeed, I note that at page 11 of the proceedings attached to the affidavit sworn by Mr. Karuri in support of the application, there is a stamp of the court certifying the proceedings as at 3<sup>rd</sup> July 2019. Accordingly, therefore, contrary to the averment by the applicant, the proceedings were available five months prior to the filing of the application for leave to file an appeal out of time.

18. The respondent has relied on the decision of the High Court in **Samson Owiti Otambo v Republic [2018] eKLR** in which the High Court struck out an appeal that had been filed, without leave, more than two years after the judgment and sentence appealed against. He has also cited the case of **Director of Public Prosecution v Peter Mcharo Kombo & another [2018] eKLR** in which the court found that the DPP had furnished sufficient reason for the grant of leave to file an appeal out of time, but that the DPP had no right of appeal under section 348A given that the decision at issue was a conviction, the option open to the DPP being an application for revision.

19. In this case, the applicant does have a right of appeal. However, I am not satisfied that sufficient reason has been advanced for failing to file the appeal within the time prescribed under section 349 of the CPC. From the material before me, the proceedings and judgment were ready and were certified by 3<sup>rd</sup> July 2019. This was almost three weeks before the applicant applied for the proceedings, and five months before the present application was lodged.

20. I have also considered the draft Petition of Appeal annexed to the application for leave. The four grounds of appeal set out therein challenge the trial court's findings on the sufficiency of the evidence and allege a failure on the part of the trial court to properly analyse the evidence before it. Given my finding, however, that the applicant had more than five months to lodge its application for leave and having not found sufficient cause for the delay, I am not satisfied that this court should exercise discretion in favour of the applicant.

21. Accordingly, I find the present application to be without merit, and it is hereby dismissed.

**Dated Delivered and Signed at Nairobi this 30<sup>th</sup> day of June 2020**

**MUMBI NGUGI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent.

**MUMBI NGUGI**

**JUDGE**