



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. 93 OF 2018

REPUBLIC.....APPLICANT/PROSECUTOR

VERSUS

HASSAN DANIEL NDORO....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Nyabuto for the Applicant

Nyongesa for the Respondent

RULING

On 11.12.2018 the Senior Prosecution Counsel **Mr. Nyabuto** filed a notice of motion dated 10.12.2018 expressed to be brought pursuant to Section 348 and 349 of the Criminal Procedure Code seeking leave of the Court to lodge an appeal out of time against the respondent. The stated application is supported and grounded on the annexed affidavit of the Senior Prosecution Counsel where he avers as follows inter alia that:

The Honourable Court in Criminal Case Number 368 of 2017 erred in Law and facts to appreciate the evidence culminating in an acquittal of the respondent while the prosecution had already discharged the burden of proof of a prima facie case.

The whole of the Ruling depones **Mr. Nyabuto** is devoid of any tangible analysis of the evidence and is therefore unjust and totally wrong.

As regards the respondent position, it is clear that conditions for enlargement of time are not satisfied by virtue of Section 348A to extend leave to file an appeal out of time.

In his written submissions Learned Prosecution Counsel **Mr. Nyabuto** contended that time lapsed when it became necessary to obtain the typed proceedings and copy of records from the trial Court. As such **Mr. Nyabuto** submitted that as the time for appealing had passed, an application to extend the time to appeal would have to be made to this Court. **Mr. Nyabuto**, further contended that the applicant has satisfied pre-conditions of demonstrating good cause for grant of an extension of time to file an appeal. Counsel, also argued that the applicant has high chances of success in the intended appeal against the Ruling on a motion of no case to answer.

Mr. Nyongesa for the respondent in his reply contended that the applicant has failed miserably to bring his notice of motion within the ambit of Section 348A as read with Section 349 of the Criminal Procedure Code. He argued and submitted for the Court to look at the evidence in its totality in order to satisfy itself that the applicant has no real chance of success.

Further, counsel argued and contended that there is therefore no need for the Court to exercise discretion for permission to appeal out of time. Counsel **Mr. Nyongesa** in his written submissions opposing the application before this Court placed reliance on certain authorities including **R v William Macharia Murathe {2016} eKLR**. He pointed out that there is no sufficient exceptional circumstances to enlarge the time for the filing of the appeal.

As his final volley **Mr. Nyongesa** argued and submitted that as the time for appealing had long gone, the application to extend time to apply for leave to appeal lacks merit.

Analysis and Determination

In the current provisions under Section 348A as read in conjunction with Section 349 of the Criminal Procedure Code neither provides or speaks to the exact factors to be taken into account by the Court exercising discretion to extend time in allowing or denial of the application. Such a context of interpretation is informed by the decisions of the Courts. The excerpts from the cases of **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} KLR – SCK, Munya Peter Gahran v Dickson Mwenda Kithenji & 2 others Petition No. 2B of 2014, Mathenge Paul Wanjohi v Duncan Gichane Mathenge Civil Application No. 50 of 2010.**

As noted by the Supreme Court in **Salat case (supra)**, its incumbent upon the Court seized of the application to consider the following principles in exercising the discretion to extend time for filing an appeal.

- (1). Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.**
- (2). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
- (3). Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis.**
- (4). Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court.**
- (5). Whether there would be any prejudice suffered by the respondents if the extension was granted.**
- (6). Whether the application had been brought without undue delay and finally whether in certain cases like election petitions public interest ought to be a consideration for extending time.**

In the **Mathenge Paul Wanjohi** case the discretion whether or not grant extension of time ought to factor on

- (1). The length of the delay.**
- (2). The reasons for the delay.**
- (3). Whether there is an arguable case for an appeal.**
- (4). The degree of prejudice to the other parties if time is extended.**

In the instance case pursuant to Section 349 of the Criminal Procedure Code a notice of appeal has to be filed within 14 days from the date of Judgment or Ruling by either the prosecution or the defendant in a Criminal trial.

In a brief background intended applicant became aggrieved of the Ruling of the trial court in dismissing the charge of defilement against the respondent under Section 210 of the Criminal Procedure Code. The consequence of the finding by the Learned trial Magistrate had the effect of an acquittal in favour of the respondent in a decision made on 19.6.2017. The application for extension of time to file an appeal against that decision was lodged before this Court on 11.12.2018. Its stated in the application and annexed affidavit that in filing an appeal the delay involved obtaining the impugned Ruling and the record of the trial Court.

It is on this delay on the part of the trial Court to provide the proceedings and the Ruling subject matter of the intended appeal which rendered the fourteen days under Section 349 of the Criminal Procedure Code untenable. That the application for extension of time was filed on or about six months after the time to file an appeal had since expired. So in the instant matter, we must ask ourselves whether the affidavit bears sufficient evidence to sustain the finding of existence of good cause for the Court to exercise discretion in favour of the applicant.

It follows therefore, when considering the application to extend time the extent of the delay in this matter was inordinate. In the application attempts were made to demonstrate why the applicant failed to comply with the statutory provisions but in my view there is no good explanation for that length of delay of six months. The difference between fourteen days and six months when the Court was finally moved to consider extension of time is of such a nature that one cannot rule out prejudice likely to be suffered by the respondent.

It is therefore my view that the reasons proffered by the applicant are not acceptable more particularly that it took six months to obtain the record and a copy of the impugned Ruling.

Similarly, as was carefully explained by the Supreme Court pursuant to Rule 53 of the Supreme Court Rules, the Court has discretionary powers to extend time within which certain acts can be undertaken. This discretion is a very powerful tool which in my view should be exercised with abundant caution, care and fairness. It should be applied judiciously and not whimsically to ensure that the principles entrenched in our constitution are not infringed.

I must say that I agree with the dictum in **Origo & Another v Mungala {2005} eKLR** where the Court found inter alia that:

“The objective of the Court in exercising its discretion is to do justice between the parties. In weighing the scales of justice, the Court will consider the length of the delay, and the explanation for it, whether the appeal was arguable or not, whether to allow the application would prejudice the respondent and generally the interest of justice.”

It is my view that on the basis of the affidavit evidence the materiality of it fails to meet the threshold provided for under the code to grant extension of time to file an appeal.

In the result, the notice of motion dated 11.12.2018 lacks merit and is therefore denied.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state
2. Mr. Nyongesa advocate for the respondent