

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.646 OF 2018

REPUBLIC.....APPLICANT

VERSUS

KEYUR SAVLA NAVICHADRA.....1ST RESPONDENT

JYOTI KEYUR.....2NDRESPONDENT

RULING

The Director of Public Prosecutions was aggrieved by the Ruling delivered by the trial court in Nairobi Chief Magistrate's Court Criminal Case No.1458 of 2015 Republic –versus Keyur Savla Navichandra and Jyoti Keyur. In the ruling, the trial court held that the prosecution had failed to establish a prima facie case which would have necessitated the Respondents to put to their defence. The Respondents were therefore acquitted of the charge of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. Immediately after the ruling was delivered, the Applicant sought for typed copies of proceedings and the ruling from the court. The Applicant did not get the said proceedings within the 14 days period that they were required to lodge an appeal against the said decision to the trial court.

Upon securing the proceedings, the Applicant filed the present application on 13th November 2018, seeking *inter alia*, orders of leave to file appeal out of time. The Applicant explained that it was unable to lodge the appeal in time due to the fact that it had failed to obtain copies of the proceedings and ruling from the court. This was despite the fact that they had made the application for the same in time. The Applicant pleaded with the court to grant them leave to file appeal out of time on account that the subject matter of the criminal case was a child whose interest ought to be of paramount consideration to this court. The Applicant urged that it would be in the interest of justice for the application to be granted.

The application was opposed. The Respondents filed grounds in opposition to the application. They contended that there was no basis upon which this court could grant the application sought by the Applicant. In particular, the Respondents argued that the reasons put forward by the Applicant for its delay in filing the appeal within time were not tenable and should be disregarded by the court. It was in light of these reasons that the Respondents prayed that the application by the Applicant's application be dismissed.

During the hearing of the application, this court heard oral rival submission made by Ms. Aluda for the Applicant and by Mr. Mumia for the Respondents. The issue for determination by this court is whether the Applicant made a case for this court to exercise its discretion in its favour and grant the leave to appeal out of time. **Section 349** of the **Criminal Procedure Code** provides thus:

“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.”

In the present application, it was the Applicant's contention that immediately after said the ruling was delivered, it applied for typed copies of the proceedings and the ruling. Unfortunately, it was unable to obtain the said proceedings and rulings within the stipulated period required to lodge an appeal. The Applicant urged the court to favourably consider its application for extension of time to file appeal out of time. On the other hand, the Respondents were not convinced by the reasons advanced by the Applicant for its failure to lodge the appeal in time. In essence, the Respondents were saying that the Applicant placed no reason before this court so that this court may exercise its discretion in its favour. The Respondents further argued that there was no law which granted the Applicant an opportunity to appeal against an order of acquittal by the trial court.

This court has benefitted from the submission made by the parties to the application. It was clear to this court that indeed the Applicant had applied to the court within the stipulated time for typed copies of the proceedings and ruling. The said proceedings were not availed to the Applicant until two months later. The Applicant filed the present application soon thereafter. The Applicant cannot therefore be blamed for the delay in the typing of the proceedings. The typing of proceedings is a function of the court. There is nothing the Applicant could have done other than wait for communication from the court to be informed when the proceedings were ready.

Further, this court noted that the subject matter of the criminal case is a child. Under **Section 4(3)** of the **Children Act**, this court is required, in its deliberation, in cases involving children, to always put the best interest of the child as of paramount consideration. The criminal case

dealt with an issue of custody of a child. It was alleged that the child was physically abused. This court formed the view that it would be in the interest of justice for all the issues pertaining to the matters in dispute to be resolved by giving the Applicant an opportunity to ventilate its grievance before an appellate court.

In the premises therefore, the Applicant's application is allowed. The Applicant is granted leave to file and serve the appeal out of time within fourteen days from today's date. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE