



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CRIMINAL MISC. APPLICATION NO. 33 OF 2018**

**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 261 OF 2017 OF THE SENIOR PRINCIPAL  
MAGISTRATE'S COURT AT MARIMANTI)**

**REPUBLIC.....APPELLANT**

**VERSUS**

**JOHN MWANGANGI ICHARIA .....RESPONDENT**

**R U L I N G**

1. Before me is an application by the State through Office of the Director of Public Prosecution dated 7<sup>th</sup> November, 2018 asking for leave to appeal out of time. The grounds upon which the application is made are that the typed copy of the proceedings were not availed on time and that it was only availed on 25<sup>th</sup> September 2018 when time to appeal had long expired as the judgment against the Respondent was delivered on 29<sup>th</sup> March 2018.

2. The application is supported by the affidavit of David Kithaka Gachihu sworn on 9<sup>th</sup> November, 2018. The deponent has averred that he was dissatisfied with the decision of the lower court to acquit the Respondent herein as he believes that the evidence tendered during trial was overwhelming. He has further deposed that when he wrote a complaint letter to the Office of Director of Public Prosecution, he was asked to apply for typed proceedings which he did but that there was delay in getting the proceedings. The applicant believes he has a strong appeal and has annexed a copy of the grounds which he personally drafted.

3. The Respondent has opposed this application terming it ill intended and aimed at prolonging trial and unfairly punish him when in his view there are zero chances in the intended appeal.

4. The Respondent has faulted the delay in bringing this application stating that the intended appeal is an afterthought with ulterior motive. He further argued that the complainant was present in court when judgment was delivered and heard the trial court giving 14 days to anyone aggrieved to appeal.

6. This court has considered this application and grounds upon which it has been made. I have considered the grounds of opposition. The provisions of **Section 384 A** of the Criminal Procedure Code gives the Director of Public Prosecution a window to appeal from an acquittal and **Section 349** gives it 14 days to do so. This court is however given discretion under **Section 349** to admit the appeal after the period of 14 days has lapsed if it is satisfied that failure to enter the appeal has been caused by inability to obtain a copy of the judgment or order or copy of the record within a reasonable time of applying for the same.

7. It is quite clear from this application that the Office of the Director of Public Prosecution was prompted to action by the complainant who had reservations about the acquittal of the Respondent in the trial court. I have noted that he tried to get proceedings vide a letter dated 20<sup>th</sup> August, 2018 five months after the judgment was delivered and though he has not enclosed an earlier letter dated 9<sup>th</sup> April 2018, I am inclined to give him the benefit of doubt for purposes of upholding his right to access justice under **Article 48** of the Constitution of Kenya 2010. Courts will always exercise their discretion in a manner that does not unnecessarily impede right of parties to access justice and it is only in that spirit that I am inclined to allow this application. The state (Office of the Director of the Public Prosecution) is granted 14 days leave to file its appeal. The Respondent's bond is extended until the appeal is filed and determined.

**Dated, signed and delivered at Chuka this 20<sup>th</sup> day of February, 2019.**

**R.K. LIMO**

**JUDGE**

**20/2/2019**

Ruling signed, dated and delivered in the open court in presence of Momanyi for Applicant and Respondent in person.

**R.K. LIMO**

**JUDGE**

**20/2/2019**