



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. CRIMINAL APPLICATION NO. 29 OF 2019

(CORAM: HON. R.E. ABURILI - J)

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTIONS, SIAYA.....APPLICANT

VERSUS

FRANCIS OCHIENG ONYANGO.....RESPONDENT

(Being an Application for leave to appeal out of time from the Judgment and orders made in Siaya PM's Court vide Siaya Criminal Case 713 of 2019 before Hon. Olando, SRM on 29th July 2019 and 31st July 2019)

RULING ON LEAVE TO APPEAL OUT OF TIME

1. By a Notice of Motion dated 16/10/2019 the Applicant, Office of the Director of Public Prosecutions, Siaya, filed the application under certificate of urgency seeking for orders:

(1) Spent

(2) That this court be pleased to grant leave for the enlargement of time to file the appeal herein attached, and allow the Petition of Appeal No. 73 of 2019, as duly filed and to be served upon the respondent's advocates;

(3) That orders issued by Hon. Tom Mark Olando in Cr. Case No 713/2019 be set aside.

(4) That this Hon. Court do exercise its supervisory jurisdiction and correct an error that is on the face of the record on Siaya Lower Court's decision on (sic) Criminal Case No. 713/2019.

2. The Notice of Motion is supported by an affidavit sworn by David Mugunde Okachi, Senior Principal Prosecution Counsel in charge, Siaya and Prosecutor, Siaya High Court,

3. In the said affidavit, counsel deposes that on 31/7/2019 proceedings and judgment in the Siaya PM Cr. Case No. 713/2019 were applied for after a plea of guilty was entered against the Respondent and orders for release of motor vehicle KCQ 723 H it to the owner thereof made but that the lower court file went missing and that the said proceedings were therefore never supplied to the applicant to enable the ODPP file an appeal within the stipulated period which is 14 days.

4. Counsel deposed that on 4/10/2019 he was served with an order and proceedings in the said case.

5. That they intended to appeal against the sentences imposed on the Respondent because they were too lenient and that as the motor vehicle KCQ 723H was used for illegal trade, forfeiture thereof was mandatory unless a proper explanation was given by the owner.

6. Annexed to the affidavit are copies of charge sheet in Cr. Case No. 713 of 2019, against the Respondent herein Francis Ochieng Onyango who was charged with six counts of:

Count I: - Distributing alcoholic drinks in plastic bottles contrary to Section 31(1)(2)(a) as read with Section 31(3) of the Alcoholic Drinks Act No. 4 of 2010;

Count II: - Being in possession of uncustomed goods contrary to Section 200(a)(i)(iii) as read with Section 210 and Section 213 of the EAC Customs Management Act, 2004.

Count III: - Being in possession Alcoholic Drinks (chang'aa) contrary to Section 27(1)(b) as read with Section 27(4) of the Alcoholic Drinks Control Act, No. 4 of 2010.

Count IV: - Selling Alcoholic drinks in plastic bottles contrary to Section 1(2) as read with Section 31(3) of the Alcoholic Drinks Control Act.

Count VI: - Being in possession of Alcoholic Drinks (changaa) contrary to Section 27(1)(b) as read with Section 27(4) of the Alcoholic Drinks Control Act No. 4 of 2010.

Count VI: - Being in possession of uncustomed goods contrary to Section 200(a)(i)(ii)d(i)(iii) as read with Section 210 and Section 213 of the East African Community Customers Management Act 2004.

7. In Counts 1 and 2, the Respondent was alleged to have been using motor vehicle registration No. KCQ 723H to transport the alcoholic drinks in plastic bottles and possessing the uncustomed goods.
8. The Respondent pleaded guilty to all the six counts and he was accordingly convicted on his own plea of guilty by Hon. T.M. Olando, on 29/7/2019.
9. The sentence imposed were fines in default, to serve consecutive prison terms of between one year and 6 months' imprisonments.
10. On 31/7/2019 Mr. Namasake informed the court that he had no objection to the release of motor vehicle to the owner and the court ordered that motor vehicle KCQ 723H to be released to the owner.
11. Those are the proceedings that have generated this application and the intention to appeal out of time.
12. In vehemently opposing the Application by the Applicant ODPP, the Respondent filed a Replying affidavit sworn by Francis Ochieng Onyango contending that as the applicant has filed an appeal out of time without leave of court, the appeal is a manifest abuse of the court process. Further, that the appeal has low chances of success due to the glaring irregularities stated above.
13. That the application was filed with inordinate delay on 16th October 2019 without any explanation and that the applicant did not have to wait for the proceedings to file an appeal.
14. That the application is an afterthought as the applicant was awoken from slumber by contempt of court proceedings in Cr Application No. 47 of 2019 which is due for hearing before Hon. Muthoni Mwangi Resident Magistrate and Deputy Registrar of this court. Further that the prosecution did not make any application for forfeiture of the motor vehicle during the trial hence this application is an afterthought
15. The respondent urged this court to dismiss the application for being unfounded in law.
16. The parties canvassed the application orally with Mr. Okachi Senior Principal Prosecution Counsel representing the applicant whereas the respondent was represented by Mr. Ochanyo Advocate.
17. In his oral submissions, Mr. Okachi relied on his affidavit sworn on 16.10.2019. And the annexures thereto including a letter requesting for Court proceedings on 31.7.2019. He conceded that the intended appeal ought to have been filed 14 days after 31.7.2019 but that he applied for proceedings the same day. He submitted that the said proceedings were only received on 4th October 2019 after the file had gone missing. He maintained that the delay was not on their part as they could not appeal without the necessary proceedings.
18. According to Mr. Okachi, it is in the interest of justice that this Court grants the prayers sought as there is an anomaly in the Lower proceedings. He submitted that they filed Appeal No. 73/2019 on 9.10.2019 but out of time and served it on the Respondent on 16.10.2019 so they only seek for enlargement of time.
19. In opposing the application, Mr. Ochanyo counsel for the respondent submitted relying on the Replying affidavit sworn by Francis Ochieng Onyango on 22.10.2019, and reiterated the depositions by the respondent while maintaining that the Petition of Appeal was filed out of time without leave of Court. That Judgment was delivered on 31.7.2019 and the Respondent served it upon the Office of Director of Public Prosecution and the Officer-in-Charge Siaya Police Station. That it is upon such service that the Respondent was advised that there is an appeal in the matter hence the vehicle could not be released until the appeal was heard and determined. That the Respondent had to file the Misc. Criminal Case No. 47 of 2019 which is due for hearing on 6.11.2019 which woke up the Applicant from slumber to file this application and purported appeal.
20. Further, that at Page 5 of the Lower Court proceedings, the Court Prosecutor indicated that they had no objection to the release of the motor vehicle to the owner. That even if the court were to find that the application is merited, and that the appeal be filed out of time, the appeal has no chances of success. That this Court might issue orders contradictory of the Orders in the Lower Court as there is no stay of the orders of the Lower Court hence it will cause embarrassment. That this application should have been filed first before the appeal was filed. Counsel maintained that the application is an afterthought and urged the court to dismiss the application to file the appeal out of time.
21. In a rejoinder, Mr. Okachi submitted denying that they went to slumber after judgment was delivered. That immediately he was informed of the orders for release of the motor vehicle, he requested for the proceedings. He also added that only an order for release of the motor vehicle was served on them.

22. On the irregularity of filing an appeal upfront, counsel submitted that this Court will direct on whether they should file a fresh appeal or they proceed with the already filed appeal hence their application for leave of court.

23. On the chances of success of the intended appeal, counsel submitted that the intended appeal has high chances of success and that there was an error made by the trial Magistrate and the [prosecution counsel who was then on record.

24. Counsel submitted that the trial Court has to decide whether a tool of illegal trade has to be forfeited and that the trial Court did not demand for an explanation from the owner of the motor vehicle of how the vehicle was used to carry illicit goods.

25. In his view, the trial court should only have ordered for release of the motor vehicle after the owner thereof was called to give an explanation and that it was premature for the trial Court to demand the Prosecution Counsel to state whether the motor vehicle should have been released to the owner.

26. Further, that consequences are immense to the society and that ends of justice will be met if the appeal is admitted as no prejudice will be suffered by the Respondent if the application is allowed.

DETERMINATION

27. I have considered the application and the rival affidavits and submissions for and against this application for leave to file an appeal out of time by the prosecution.

28. The main issue for determination is whether the application for leave to appeal out of time has merit.

29. It is clear from the trial court record that after the trial court made orders after convicting the Respondent on his own plea of guilty and sentencing him as appropriate on 29th July, 2019, the applicant immediately filed a letter requesting for copies of proceedings and judgment in the said case file on 31st July 2019. Accordingly, there was no delay in showing the intention to challenge the impugned orders. It is also deposed by Mr. Okachi, SPPC that the said court file went missing and that it was only traced and the proceedings supplied to him on 4/10/2019. Again there is no dispute about this deposition, noting that the trial magistrate was poised to conclude all his matters and proceed on transfer to another station by 31st July 2019.

30. Under **Section 349 of the Criminal Procedure Code**, *the court to which an appeal is made may for good cause admit an appeal after the period of fourteen days has lapsed 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 applicant 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 the applying to the court therefore.*

31. There is no contrary view that the judgment and orders sought to be challenged were made on 29th and 31st July 2019 respectively, and that the request for proceedings and judgment was lodged timeously on 31st July 2019 by the applicant but the applicant was never supplied with the same and counsel deposed that the court file went missing until 4/10/2019.

32. The law under **Section 350(1) of the Criminal Procedure Code** commands that *every petition to the High Court unless the court so desires be accompanied by a copy of the judgment or order appealed against.*

33. It follows that the applicant could not have filed an appeal without a copy of judgment which has now been supplied to them.

34. The clear provisions of **Section 349 of the Criminal Procedure Code** are that an appeal ought to have been lodged within 14 days from date of judgment or order being 29/7/2019 and 31st July 2019. The Applicant concedes that it is late in lodging the appeal but are requesting for leave to file an appeal out of time or to have the appeal filed be admitted out of time.

35. I am satisfied that the inability to lodge the appeal within time was occasioned by delay in supplying the copies of proceedings and judgment which were applied for expeditiously.

36. On whether the intended appeal has chances of success of success, I refrain from commenting on the same as it might prejudice the outcome of the intended appeal. More so, Section 349 of the Criminal Procedure Code does not require that one must satisfy the court that the intended appeal has high chances of success, unlike in cases of stay of execution of decree pending appeal under the Civil procedure Rules. These being criminal proceedings, any determination on the success or otherwise of the intended appeal by the prosecution might prejudice the rights of an accused person.

37. I however must state that a right of appeal is a constitutional right to accord each aggrieved party an opportunity to fully ventilate their grievances and as it has not been shown that the intended appeal is hopelessly frivolous, I see no prejudice to be occasioned to the Respondent if leave to appeal is granted to the prosecution who represent the public interest.

38. On whether or not the Applicant has sought for a stay of orders of 31/7/2019 issued by the lower court is not for this court to determine as the proceedings are still live in court.

39. There is no evidence of laxity laches or negligence on the part of the Prosecution and no prejudice has been shown to be occasioned to the respondent if the application herein is allowed.

40. For the above reason, and as the power to grant leave to appeal out of time is discretionary, I hereby grant leave to the applicant to file an appeal from the proceedings, judgment and orders made in Siaya PM Cr. Case No. 713 of 2019. The intended appeal shall be filed and served within the next 14 days from the date hereof.

41. On prayers 3 and 4, I find that the same can be canvassed in the intended appeal to avoid the appeal as intended being determined piecemeal.

42. As the application herein was not filed in the HCRA NO. 73 of 2019, which was obviously filed out of time without leave of court, I order that the intended appeal shall be filed afresh. HCRA 73/2019 to be brought before this court forthwith for closure.

Orders accordingly.

Dated, signed and Delivered at Siaya, this 30th Day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Ngetich Prosecution Counsel for the applicant

Mr. Ochanyo Advocate for the Respondent

CA: Brenda and Modestar