REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. APPLICATION NO. 45 OF 2018

REPUBLIC .....APPELLANT

VERSUS

ALI ABDALLA SAID.....RESPONDENT

(Appeal against Judgment of the appellant in Traffic Case No. 15 of 2014 at kilifi Law Courts delivered by Hon. R. K. Ondieki on 31st Otober 2017)

Coram: Hon. Justice R. Nyakundi

Ms Sombo for the appellant

Mr. Matini for the respondent

RULING

The stated application for leave to enlarge time to file an appeal out of time under Section 348 A and 349 of The Criminal Procedure Code.

Background

The respondent Ali Abdalla Said was on 15.1.2014 indicted with a traffic offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 of the Laws of Kenya. The charge sheet specifically stated that on 23.11.2013 at about 10.00 a.m at Matsangoni along Malindi-Kilifi Road, the respondent being a driver of motor vehicle registration number KBS 395 E MAKE Nissan Matatu did drive the said vehicle on the road recklessly or at speed in a manner which is dangerous to the public having regard to all the circumstances of the case, including the nature, condition and use of the road and the crime of traffic which is actually at the time of which might necessarily be expected to be on the road, did fail to keep proper observance hence hit and knocked down causing the death of Emmanuel Mwangunya who was riding motor cycle registration number KMCH 165Y.

The respondent pleaded not guilty to the charges subsequently the prosecution summoned witnesses to proof the offence against him beyond reasonable doubt. The respondent thereafter was placed on his defence. He gave unsworn statement of defence reaching exonerating himself from causation and blame worthiness.

After due consideration of the matter, the court made a finding in its Judgment delivered on 31st October 2017 that the respondent did not cause the accident as alleged by the prosecution's. He was therefore acquitted of only wrong doing.

Being aggrieved with the determination of the trial court, the applicant (state) filed a notice of motion dated 14th May 2018 seeking the following order:

1. **That time be extended for the applicant to file its appeal challenging the dismissal of the charge out of time.**

2. **The affidavit of Henry Nyabuto Achoche filed on 12th May 2018 be permitted to stand as setting out the grounds - in support of the motion.**

The grounds relied on by the applicant were as follows:

1. That the appellant though dissatisfied with the Judgment immediately failed to file its memorandum of appeal within time due to the delay in being supplied with the copy of the Judgment and proceedings.

2. That as a requirement, it took along time and by the time it was complied with, the 14 days' period had lapsed.

3. That the delay therefore was inadvertence and is made pursuant to Section 348A and 349 of the Criminal Penal Code.

The respondent in reply filed a replying affidavit dated 25th October 2018 vehemently objecting to any grant on extension of time in favour of the applicant.

The respondent averred that since the conclusion of his trial and Judgment delivered is over one year for the court to exercise discretion to re-open the proceedings. That no proper reason has been given by the applicant why he failed to meet the deadline to file the appeal within time.

Counsel for the respondent submitted that the appellant has no **locus staids** before this court to bring an application without any evidence to support the appeal.

The Law, analysis and resolution

The legal position on this nature of application is grounded under Section 348A as read with Section 349 of the Criminal Procedure Code the rule there under provides that an appeal to a higher court shall be preferred within 14 days from the date of delivery of Judgment or order of the court or tribunal. Where there has been non-compliance, the applicant has a window to petition the court to enlarge time to file the appeal out of time.

The discretion to extend time is unfettered on the part of the court save that in exercising such jurisdiction it must be on sound basis and judiciously considered.

In the circumstances of Section 348A of the Criminal Procedure Code and the proviso therein, the absence of a good or sufficient reason being shown by the applicant may in itself justify dismissal by an application for extension of time.

In addition borrowing the texture of Section 1A and 1B of the Civil Procedure Act on overriding objective requires the court to exercise discretion in a manner that secures the interest of justice. See the principles in **Finnegan –vs- Parkside Health Authority 1998 ALL ER 595** By virtue of a party's application seeking to extend time which has already lapsed as prescribed in the suit. The supreme court in the case of **Nicholas Salal –vs- IEBC** has raised the question by laying down the following determinacies to be considered

a) The length of the delay.

b) The reasons for the delay.

c) Whether the applicant has an arguable appeal.

d) The degree of prejudice to the other party if by exercise of discretion time is extended.

The threshold requirement under the principles in **Nicholas Silat** case is for the applicant to show that for good reason he was not able to file the appeal within the stipulated time period see in the provisions of the statute. The provision on fair and expeditious delivery of adjudication of dispenses is expressly provided for in the constitution under Article 50 and 159 (1) of the Constitution.

The rules of procedure both in civil and criminal administration of justice, time is an essential element of case management which is to be enforced jealously and consistently.

The Law emphasizes to the court that in exercising court's power in the administering of justice, the express provisions on time should be enforced unless for good reason shown by the default party.

In the persuasive case of **Biguzzi –Vs- Rauce Leisure Plc 1999 Iw. L. R 1926 Woolf** stated that

"If the court want to ignore delays which occur then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."

Though an applicant to a litigation has a right to access justice through independent courts and tribunals under Article 50 (1) of the constitution. The entitlement must be viewed with respect to extension of time raised the question on prejudice likely to be occasioned to the adverse party. Such a prejudice discussed within the process of civil law is also applicable in the context of criminal justice administration. When discussing the effect of delay of the defendants in a civil dispute claim Gikunyo Judge in the case of **Ajit Surghvirdi –vs- J. F. Mchoy 2014 eKLR** observed as follows:

"Prejudice to the plaintiff entails delayed benefits of the Law and unnecessary costs being occasioned on the plaintiff. Prejudice to the administration of justice entails wasting of courts precious time and impediment to the court's ability to deliver on the overriding objective i.e. fair, just, affordable, preferable and expeditious. – resolutions of disputes."

Given the above background of facts and guiding principles, the issue here is whether the applicant ought to be granted an extension of time to file an appeal out of time.

Turning to the record, the applicant is aggrieved with the Judgment of the Learned trial Magistrate but failed to address the substance of the appeal briefly by way of a Memorandum and notice of appeal to the High Court within 14 days period. The application has involved the proviso to extend time. The point I am making is that a criminal case as of a nature that in considerations to re-open the trial such a degree of prejudice caused to already acquitted person must be properly evaluated.

Therefore, lack of merit of the appeal ought to weigh heavily in exercise of discretion to grant an order for extension of time. Applying the reasoning in **Nicholas Salat case** to the instant application I recall from the record that judgment was delivered 31st October 2014 acquitting the respondent of all the charges.

The statutory time line set for preferring an appeal is 14 days and no more unless upon expiry leave to extend time is sought by an intended appellant without undue delay. Further, the intended appellant must demonstrate by affidavit evidence that he has sufficient cause which made him not appeal within time. That period was never compiled with by the appellant.

It is evident from the affidavit that a request for certified copies of the proceedings was vide letter dated 15th November 2017. This was not the end of the matter, a notice of motion seeking extension of time was filed on 22nd December 2017. The appellant counsel in his affidavit though being aware of the 14 days period fails to give sufficient reasons why it took 3 years to seek extension of time to file an appeal.

I find the reasons given on failure to be supplied with the copy of proceedings and Judgment inadequate to accord the appellant discretion of this Court. As much as a copy of proceedings and/or Judgment are necessary in filing the record of appeal, the same might not be expressly true in respect of an application to extend time. I therefore find there are no sufficient reasons given by the appellant to warrant this court to extend time. In a motion of this nature the availability of the original record from which an appeal is preferred would have been sufficient evidence to entertain the application.

It is a cardinal principle of our constitution that justice delayed is justice denied (See Article 159 of the constitution). In Article 50 (2) (e) the trial of the respondent having been concluded he has a right of his appeal to be heard and determined within a reasonable time. The intended appeal to be heard within a reasonable time. That reasonable time cannot be achieved when an application to extend time by the applicant has taken over three years. There is very high likelihood if this Court was to grant this application the respondent would be prejudiced and an injustice occasioned by reopening the same proceedings which have been concluded over three years ago. It is clear that the applicant is guilty of laches.

In the final analysis and for reasons stated herein, the appellant is estopped in re-opening and pursuing an appeal against the respondent. It is just and equitable to decline the notice of motion dated 14th May 2018 for want of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2019

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R. NYAKUNDI

JUDGE