



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CRIMINAL APPLICATION NO. 19 OF 2019

REPUBLIC.....APPLICANT

VERSUS

DAVID WANGARA KIMENJU.....RESPONDENT

RULING

1. The Applicant, is the State and has brought the application under no specified provision of the Criminal Procedure Code; the Applicant prayed for the following order;

a. That this Honourable Court be pleased to grant leave to the applicant to file an appeal out of time suit against the Respondent after the limitation period.

2. The Applicant relied on the grounds on the face of the application and on a Supporting affidavit made by the Prosecuting Counsel Mr. Magoma dated the 22nd May, 2019; the application was opposed by Learned counsel Mr.Theuri acting on behalf of the respondent;

3. At the hearing hereof the parties made oral presentations; hereunder are the rival submissions;

APPLICANTS SUBMISSIONS

4. Counsel submitted that respondent had been charged in Othaya CMCR. No 7 of 2018 with the offence of Offensive Conduct Conducive to Breaching of the Peace contrary to Section 94(1) of the Penal Code; on the 30/08/2018 judgment was delivered and the respondent was acquitted under the provisions of Section 215 of the Criminal Procedure Code; the State being aggrieved by the judgment of the Othaya Court wished to appeal the decision;

5. The prescribed time in which to file the appeal had lapsed before the State was able to obtain the proceedings as well the instructions to proceed with the appeal;

6. Counsel submitted that the appeal had overwhelming chances of success and prayed that this court do exercise its discretion by allowing the application to ensure that justice was done.

RESPONDENT'S SUBMISSIONS

7. The application was opposed and in response counsel for the respondent submitted that the appeal was an afterthought; there was nothing to demonstrate when the applicant had applied for a copy of the proceedings or a copy of the judgment; the application does not also provide details as to when or whether the proceedings have been received; the applicant only states that it "*received proceedings later*".

8. The applicant also blamed the respondent for the delay in filing the appeal whereas the respondent had nothing to do with the applicant's failure to appeal on time;

9. No proceedings or the ruling acquitting the respondent have been annexed by the applicant nor have the chances of success of the intended appeal been demonstrated to this honorable court; nothing has been placed before the court for it to exercise its discretion under the provisions of section 349 of the Criminal Procedure Code;

10. The respondent reiterated that the intended appeal is an afterthought and that the applicant was not serious in adhering to the timelines; counsel prayed that the application be disallowed.

ISSUES FOR DETERMINATION

11. Taking into consideration the above submissions this court has framed only one issue for determination; which is;

- i. Whether the explanation given for the delay is satisfactory;

ANALYSIS

12. The judgment in CMCR No.7 of 2018 was delivered on the 30th August, 2018 and the applicant being aggrieved by the decision is seeking leave from this court to enlarge the time for the filing of an intended appeal;

13. The provisions of section 348A give the Director of Public Prosecution the right to appeal to this court against a decision of the subordinate court on an acquittal or order on a matter of law; and the time set for the filing of the appeal is limited to fourteen (14) days from the date the order or sentence is passed;

14. An application for leave to appeal out of time is normally made under the proviso to Section 349 of the Criminal Procedure Code; which provides as follows;

15. The instant application is premised on no particular provision of law but this court in order to do justice will overlook the omission and shall instead invoke the provisions of Article 159(2)(d) of the Constitution 2010 and proceed to determine the merits of the application without due regard to procedural technicalities;

16. The fourteen (14) day period for filing of the appeal lapsed on the eve of the 15/09/2018; the failure by the State to lodge the appeal in time is attributed to the absence of instructions and also to the inability to obtain a copy of the record or the decision appealed against within reasonable time of applying to the court therefor;

17. No letter applying to court for a copy of the record or the decision was annexed to the Supporting Affidavit by the applicant in support of its contention of its inability to obtain a copy of the record or the order from the court within a reasonable time; no letter was annexed to demonstrate when instructions were sought and when it received giving it the go-ahead to lodge the appeal;

18. Had the applicant annexed such letters these would have demonstrated to this court that it had first sought appropriate instructions and had therefore stayed taking necessary or reasonable steps pending the receipt of the instructions;

19. The applicant also failed to annex any letter written to the court requesting for typed certified proceedings; nor is there any averment in the supporting affidavit as to when or whether the proceedings have been received; the letter of application for the proceedings would have also demonstrated its attempts and inability to obtain the proceedings or order within reasonable time; the application is also devoid of a draft Petition of the intended appeal;

20. This court can only exercise its judicial discretion from the material placed before it; in the absence of any of the aforementioned letters to support the application it then follows that the applicant has failed to place any material before the court to enable it exercise this discretion in its favour;

FINDINGS AND DETERMINATION

21. This court finds the explanation given by the applicant as to why it failed to file its intended appeal within the stipulated time to be unsatisfactory; and finds that this is not a suitable case for this court exercise its judicial discretion in its favour;

22. For the forgoing reasons the application for enlargement of time to file its intended appeal is found to be lacking in merit and is hereby disallowed.

Orders accordingly.

Dated and Signed at Nyeri this 28th day of November, 2019.

HON.A.MSHILA

JUDGE