



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 291 OF 2017

REPUBLIC.....APPLICANT

VERSUS

JOHN KAMAU KIBE.....RESPONDENT

(An application for extension of time to appeal the decision in Milimani Traffic Case No. 2808 of 2016 delivered on 24th April 2017).

RULING

The application

The Applicant filed a Notice of Motion dated 26th September, 2017 in which the main prayer was that; the Applicant be granted leave to file an appeal out of time against the judgment in **Milimani Traffic case No. 2808 of 2016**. Annexed to the application was a draft petition of appeal. The main ground on which the application was premised were that there was a delay of the Applicant being furnished with both the trial proceedings and the judgment as a result of which the appeal could not be filed on time. To that end, the DPP wrote a letter to the Executive Officer, Milimani Law Courts requesting a certified copy of the proceedings and judgment. The proceedings and judgment in question were received at their offices on 25th September, 2017, five months after the acquittal, and after perusing them it was resolved that an appeal would be lodged. Thus, the delay in lodging the appeal was caused by the inability to obtain certified copies of the proceedings and judgment within reasonable time. The Applicant contents that it was in the interest of justice that the application be allowed as the appeal was arguable.

The Application was supported by an affidavit sworn by Senior Assistant Director of Public Prosecutions, Daniel Karuri on 26th September, 2017 who reiterated the grounds on which the application is premised.

I would wish to note that the application was initially placed before me ex-parte when I granted the orders accordingly. The Respondent was however dissatisfied with the extension of time to file the appeal. He filed a Notice of Motion dated 11th October, 2017 seeking the setting aside of the ex-parte orders. The Applicant opposed the latter application by Grounds Objection dated 1st November, 2017. When this application came up for hearing on 22nd November, 2017, the court on its own motion granted the application paving the way for hearing of the main application. The Respondent was consequently granted ten days to file and serve a reply.

It was not until 15th January, 2018, a day before the hearing of the application that the Respondent filed his reply, a decision the Applicant took exception with and urged the court to expunge it from the record. The Respondent did not advance any satisfactory reasons for filing the Replying Affidavit late as a result of which the court struck it out.

Submissions

In submission, learned State Counsel, Mr. Karuri for the Respondent mirrored his submissions on the grounds on which the application is premised. He emphasized that the delay in filing the appeal on time was not intentional but was occasioned by the failure to obtain certified copies of proceedings and judgment on time. He added that the Applicant had a right to appeal against the trial court decision and urged the court to consider that the application was brought as soon as the proceedings and the judgment were obtained.

Learned counsel for the Respondent, Mr. Njenga submitted that it was conceded that a certified copy of the judgment in Traffic Case 2808 of 2016 was available on 26th June, 2017 which pointed to a delay on the part of the Applicant in obtaining the proceedings. He submitted that Section 350(1) of the Criminal Procedure Code set out the requirements for filing an appeal and that all the items required to file an appeal were available on 26th June, 2017. He submitted that the application was filed on 29th September, 2017 months after the proceedings were certified. He questioned the delay and submitted that it was inordinate and could not be explained.

Counsel submitted that it was clear from the proceedings that at the end of the trial there was no indication that the Applicant would appeal the decision. He submitted that a request for proceedings did not amount to an intention to appeal. He relied on **Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 others [2015] eKLR** to buttress his submission.

In reply, Mr. Karuri, submitted that there was no statutory provision under which the prosecution was mandated to inform the court of its intent to appeal on acquittal. He submitted that Section 349 of the Criminal Procedure Code was applicable as opposed to Section 350(1) thereof. According to the counsel, Section 349 makes it a requirement that the Applicant should possess a record of proceedings and not only the judgment of the court.

Determination

The principles to be considered by a court in an application for extension of time were set out by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others[2014] eKLR**, that. :

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- 2. A party who seeks for extension of time had the burden of laying a basis to the satisfaction of the Court;***
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- 6. Whether the application has been brought without undue delay; and***
- 7. Whether in certain cases, ..., public interest should be a consideration for extending time.***

The Applicant bases his application on the fact that the proceedings of the trial court did not reach their offices until five months after the decision in question. The judgment was delivered on 24th April, 2017 and by a letter dated 25th April, 2017 the Applicant requested for a copy of the certified ‘Proceedings and Judgment’ from the Executive Officer, Milimani Law Courts. He submits that the request was fulfilled on 25th September, 2017 which was five months after the judgment and when time for filing an appeal had long elapsed. The Respondent contends that the application is premised on ill will on the part of the Applicant and points to the fact that a certified copy of the judgment was available on 26th June, 2017 and that the Application would have been lodged much earlier.

The applicable provision in this is Section 349 of the Criminal Procedure Code which states that:

“An appeal shall be entered within fourteen days of the date of the order or sentence appeal 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.”

Section 350(1) of the Code unfortunately deals with filing of a Petition of Appeal. Therefore, the court may exercise its discretion to admit an appeal after the time period has elapsed where the delay was caused by the failure to obtain a copy of the judgment or order in question or a copy of the record. There is no contestation that the proceedings were received five months after the Judgment and that the Applicant filed this application a day after the receipt of the proceedings. The application for extension of time was therefore brought without undue delay. The Respondent’s submission that the judgment was available for a while prior to the application in question does not take away the fact that the proceedings were not received by the Applicant on time as expected. In the circumstances, I find that the Applicant has laid a basis for the extension of time and has satisfied this court of the reason for the delay.

I now consider whether allowing the extension of time will cause the Respondent to suffer any prejudice. In his affidavit he submitted that the appeal in question was motivated by malice and personal vendetta with the intention being to harass and antagonize him. He expounded on this by stating that it was motivated by the position and status of the civil cases filed against him where the basis of the claims made was the assumption of guilt. He deponed that it was imperative for the matter to be re-opened to provide a foundation for the money claim against him. These were very serious assertions that were however unfounded. The assumption that the decision in the civil cases would be determined by the finding in this matter was erroneous and baseless as respective parties must prove their case. It is also clear that the intended appeal would not interfere with his freedom as he is currently a free man. Although some inconvenience would be occasioned to his day to day routine it does not override the interests of justice that would be served by allowing the application.

I have also considered the decision in **Fahim Yasin Twaha case (supra)**. The same is distinguishable from the instant case in view of the fact that the case in question involved an ill advised decision of the litigant to apply to two courts seeking the same orders.

I accordingly allow the application. The Applicant is granted leave to file the appeal out of time. The same should be filed and served within seven days of this ruling. It is so ordered.

DATED AND DELIVERED THIS 23RD JANUARY, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Karuri for the Applicant*
2. *Mr. Njenga for the Respondent.*