



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CRIMINAL APPEAL NO. 1 OF 2018

REPUBLIC.....APPELLANT

VERSUS

REGINA CHEPKEMOI ROTICH.....1ST RESPONDENT

JIMMY MUTUKU KIAMBA.....2ND RESPONDENT

STEPHEN OGAGA OSIRO.....3RD RESPONDENT

LILIAN WANJIRU NDEGWA.....4TH RESPONDENT

NANCY WAITHERA KIRURI.....5TH RESPONDENT

(Being an appeal against the ruling of Chief Magistrate's Milimani

Chief Magistrate's Court in Case No. 7 of 2015 delivered

by Hon K. Bidali Chief Magistrate on 5th September 2017)

RULING

1. The applicant who is the 5th Respondent filed the application dated 5th February 2018 by way of chamber summons. She seeks the following orders.

(i) The name of the 5th Respondent be struck out and expunged from the record of this Appeal.

(ii) Costs of this application be born by the Appellant.

2. The application is supported by the applicant's affidavit. She has deponed that she was the 5th accused in Nairobi Chief Magistrate's Anti Corruption Court Case No 7 of 2015, where she had been charged with only one count of which she was acquitted (EXB NWK 1).

3. The appellant did not appeal against the Ruling nor file an application for revision. She deponed that inclusion of her name in the appeal was illegal and mischievous. She asked for her name to be struck out from the record of appeal.

4. Mr Ogotu for the applicant submitted that all the respondents were charged in Chief Magistrate's Anti Corruption case No. 7 of 2015. On 5th September 2017 the applicant was acquitted under section 210 Criminal Procedure Code. The rest were also acquitted under section 215 Criminal Procedure Code after a full trial.

5. The appellant then filed this appeal against all the respondents. He submitted that this was un procedural and lacks any legal basis. He argued that the appeal is against the Judgment.

6. Responding to the replying affidavit filed out of time he wondered whether leave had been sought to do so. He argued that the applicant

was not part of the judgment being appealed against.

7. He contended that there is no ground in the grounds of appeal targeting the applicant. It was his submission that the applicant would be gravely prejudiced since she will not have an opportunity to defend herself.

8. In response to the application the appellant filed a replying affidavit by Hellen Mutellah. She was part of the prosecuting team in the lower court and explained why the State did not appeal against the applicant's acquittal in good time. She deponed that they elected to await the outcome of the case against the other respondents.

9. That the applicant would suffer no prejudice and all they were just being prudent in having a joint appeal. She deponed that failure to appeal immediately was a technicality that should not bar the appeal against the applicant from being heard.

10. Mr Okello for the State opposed the application saying failure to seek leave to appeal out of time was a procedural technicality. He asked the court to treat it as such under Article 159(2) of the Constitution.

11. Mr Okello further submitted that the other respondents who had been acquitted under section 210 on count 1 have not raised any issues on that. That their first ground of appeal is on the acquittals under both sections 210 and 215 Criminal Procedure Code. It was his view that the appeal should be against all the respondents and the applicant would not suffer any prejudice. He submitted that failure to seek leave was an oversight. The 1st-4th respondents did not object to the application by the 5th respondent.

12. The background to this appeal is not disputed. The respondents were all charged in Nairobi Chief Magistrate's Anti-Corruption Court case No 7 of 2015 with one common count of conspiracy to commit an offence of Economic Crime contrary to section 47(A)(3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No 3 of 2003 (ACECA).

13. At the close of the prosecution case all the respondents were acquitted of the common charge (count 1) under section 210 Criminal Procedure Code. This was on 5th September 2017. Subsequently the 1st-4th respondents were placed on their defence, the defence heard and a Judgment delivered on 18th January 2018, whereby 1st-4th respondents were acquitted under section 215 Criminal Procedure Code

14. The appellant being aggrieved by the judgment filed this appeal against all the respondents including the applicant.

15. There is a procedure for filing appeals from the subordinate courts section 348A Criminal Procedure Code provides:

“Section 348A.

(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

Section 349.

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

16. This is a procedure that is in the statute and cannot be said to be a technicality. It is true that the 1st -4th respondents were placed on their defence on the various counts from counts 2-10. They were not placed on their defence on count 1 from which they were all acquitted. Therefore the appeal in respect to the acquittal on count 1 will still have to be heard. If the applicant is enjoined she will only defend herself in respect to the 1st count. I do not see any prejudice that will be caused to her.

17. That notwithstanding due process must be followed. Section 348 A Criminal Procedure Code gives the State the right to appeal against an acquittal and other orders. Secondly section 349 Criminal Procedure Code gives the limitation period of filing an appeal as 14 days. There is a rider allowing the filing of a late appeal. The appellant is not immuned from that process, and failure to adhere to it cannot be dismissed as a technicality under article 159(2)(d) of the Constitution.

18. The application before me is not seeking leave to appeal out of time and I will therefore not deal with that here. What is clear is that the acquittal of the applicant was on 5th September 2017. The appeal enjoining her was filed on 25th January 2018 outside the limitation period, and without the leave of the court. It cannot stand unless the due process is followed.

19. I therefore allow the application and strike out the 5th Respondent's name from this appeal. Let the DPP follow the due process if keen on pursuing an appeal against her.

20. There shall be on order as to costs.

Dated, signed this 27th day of June 2018 in the open Court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE