



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC CRIMINAL APPLICATION NO. 14 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

GEORGE WAINAINA GAKUNYI.....RESPONDENT

RULING

1. The Respondent herein was tried in the lower court **Criminal Case No. 226 of 2015** before Michieka PM, on two counts. The first count was Doing Grievous harm contrary to **Section 234** of the Penal Code. The second count was Assault causing actual bodily harm contrary to section 251 of the Penal Code. He was placed on his defence and at the close of the trial acquitted under **Section 215 Criminal Procedure Code** on both counts. The judgment was read on 20th December 2016.
2. By the application filed on 22nd February 2017 the DPP seeks to have the time for filing appeal enlarged so as to admit the Petition of appeal by the Director of Public Prosecutions (DPP). The motion is brought under **Section 349 and 350** of the **Criminal Procedure Code**.
3. The main grounds relied on are that the Complainant and by extension the DPP are aggrieved by the outcome of the trial and that the Director of Public Prosecutions' request for trial proceedings to facilitate filing of the appeal was not acted upon in good time. Therefore the proceedings were received after the time limited for appeal had expired. Further, that the intended appeal is meritorious. That is the gist of the supporting affidavit sworn by **Henry Kinyanjui** on behalf of the Director of Public Prosecution.
4. The Respondent swore an affidavit in opposition to the motion. The Respondent views the application as unmerited, pointing to the inordinate delay on the part of the Director of Public Prosecutions. He swears that the intended appeal has no merit and that if allowed, the application will occasion him prejudice. He suggests that the Director of Public Prosecutions in bringing the application has acted on the instigation of the Complainant hence the failure by the Director of Public Prosecutions to act timeously soon after delivery of the judgment.
5. The **DPP** in a further affidavit discounts these assertions. The application was canvassed by way of written submissions which primarily took cue from the material filed by the respective parties. Briefly, the DPP's arguments restate the relevant events preceding the application and assert that the delay of about 2 months has been explained as occasioned by the late furnishing of proceedings to the DPP. Moreover that in taking the decision to file an appeal, the DPP was properly exercising his independent discretion and mandate and was not in any way influenced by the Complainant. The DPP argues that at this stage all that the Applicant is required to demonstrate is an arguable appeal. In this regard the decision of Ngugi J in **R -V- John Thuku Gicheha & Another [2017] e KLR** is cited.
6. The Respondent restated the applicable principles in considering extension of time by relying on the Supreme Court decision in **Nicholas Kiptoo arap Korir Salat -V- IEBC & 7 Others [2014] e KLR** and the Court of Appeal decision in **Mwangi -V- Kenya Airways Ltd.** The Respondent's view is that the **DPP** was to blame for failing to request proceedings at the earliest instance, upon the delivery of the lower court judgment and only moved at the instigation of the Complainant. Thus, the appeal is an afterthought and motivated by malice and lacking merit. The Respondent argues that he will be subjected to double jeopardy if the application is allowed.
7. The court has considered the material canvassed in respect of the application. Section 349 of the Criminal Procedure Code provides that:

“349. Limitation of time of appeal

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”

8. The Supreme Court of Kenya in the **Salat case** set out the principles to be applied in considering an application to extend time. The court stated

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discretion: “This being the first case in which this Court is called upon to consider the principles for extension of time, we derive discretion: the following as the under-lying 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 has 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, like election petitions, public interest should be a consideration for extending time.”*

9. Upon the uncontroverted evidence proffered by the **DPP**, the prosecuting counsel at the trial did not seek proceedings after the delivery of the judgment. The Complainant however subsequently raised his grievances in respect of the judgment of the lower court, prompting the request for proceedings on 10th January, 2017, which were supplied on 21st February 2017. The delay is therefore about 2 months. Is the delay inordinate as submitted by the Respondent? I do not think so, in light of the explanations given. The Respondents appeared to attribute malice to the DPP’s application, suggesting that the action was only taken because the Complainant raised a complaint. This has been denied by the DPP in the Further Affidavit.

10. There is no material to support the allegation that the DPP only acted because the Complainant raised a grievance in respect of the judgment of the lower court but certainly, the DPP did apply for proceedings subsequent to the complaint. The DPP in a further affidavit has explained that steps were taken to review the judgment before the DPP made the decision to file an appeal, having satisfied himself that there were grounds for preferring an appeal. In my view therefore the reason given to explain the delay is reasonable.

11. Regarding the question whether the intended appeal is meritorious, at this stage all that is required of the Applicant is to demonstrate that the intended appeal is arguable; as Ngugi J observed in **John Thuku Gicheha’s case**. Having looked at the grounds contained in the draft Petition of appeal, I am persuaded that it raises substantive and arguable matters.

12. The Respondent has submitted that he will be prejudiced should the application be allowed. In the **Salat case** the Supreme Court urged a consideration of the public interest component in the determination of applications to extend time. It is true that the Respondent is potentially faced with the possibility of new proceedings by way of appeal, if the application is allowed, and the appeal subsequently admitted to hearing. However there is no evidence that the delay in making the application will occasion him any appeal or trial related prejudice beyond the ordinary burden that comes with participating in court proceedings as a litigant. Any prejudice he may suffer, and his interests must be balanced against the public interest at the heart of the criminal justice system.

13. Under **Article 50(1)** of the Constitution every person has a right to have any dispute decided in a fair and public hearing. The right attaches to both the Accused person and the Complainant. In respect of the former, **Article 50(2)** further secures the accused’s rights to a fair trial. There is no indication that there will be unreasonable delay in concluding the appeal once admitted or that any of the accused’s rights under **Article 50(2)** will be unduly prejudiced in the appeal proceedings.

14. I am satisfied, in terms of **Section 349** of the Criminal Procedure Code, that there exists good cause to admit the late appeal. Moreover, that the Applicant’s inability to file appeal in good time was occasioned by administrative delays, and in particular, the inability of the Applicant to obtain copies of proceedings and judgment within the prescribed appeal period. I do therefore allow the motion and direct that the Petition of appeal be filed within 14 days of this ruling.

DELIVERED AND SIGNED THIS 27TH DAY OF JULY 2018.

In the Presence of:

For the Applicant – Mrs Abong’o

For the Respondent – Mrs Waweru

C. MEOLI

JUDGE