



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 51 OF 2018**

**(FROM ORIGINAL ANTI-CORRUPTION CASE NO. 1 OF 2015 CM'S COURT AT MALINDI)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**RIZIKI MATANA CHOGA.....1<sup>ST</sup> RESPONDENT**

**RENNICK MKALA NYAMU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Republic through the Director of Public Prosecutions (DPP) by the notice of motion dated 20<sup>th</sup> June, 2018 and filed in court on the same date seek leave to file an appeal out of time. There is also a prayer that the annexed petition of appeal be deemed as duly filed with leave.
2. The application is premised on Section 348 of the Criminal Procedure Code, Cap. 75 (CPC) and is supported by an affidavit sworn on the date of the application by Vincent Sammy Monda, Senior Assistant Director of Public Prosecutions.
3. The affidavit in support of the application discloses that the delay, though not inordinate, was caused by the failure of the trial court to supply copies of proceedings of the trial, which had been applied for.
4. Riziki Matano Choga, the 1<sup>st</sup> Respondent and Rennick Mkala Nyamu, the 2<sup>nd</sup> Respondent vehemently opposed the application. The 1<sup>st</sup> Respondent opposed the application by swearing an affidavit dated 19<sup>th</sup> October, 2018. On his part the 2<sup>nd</sup> Respondent opposed the application through his replying affidavit sworn on 16<sup>th</sup> October, 2018.
5. The 1<sup>st</sup> Respondent has through his affidavit asked for the dismissal of the application on the grounds that the Applicant never applied for a certified copy of court proceedings hence rendering the procurement of a certificate of delay suspect; that the Applicant is guilty of inordinate delay, an example being that it took the DPP a good 26 days to file this application upon obtaining the certificate of delay; that the Applicant has not demonstrated that it has an arguable appeal; and that if the intended appeal succeeds it would jeopardise the 1<sup>st</sup> Respondent's trial rights as a retrial will ensue thus infringing his rights as protected by Article 50(2)(a) of the Constitution.
6. The 2<sup>nd</sup> Respondent's affidavit contains grounds of opposition similar to those of the 1<sup>st</sup> Respondent and it is therefore not necessary to reproduce the same.
7. Parties agreed to dispose the matter through written submissions but it is only the Applicant and the 1<sup>st</sup> Respondent who filed written submissions. Counsel for the 2<sup>nd</sup> Respondent was, nevertheless, allowed to make oral submissions when the matter came up for hearing on 22<sup>nd</sup> November, 2018.
8. Although the application was brought under Section 348 CPC, the Applicant through the submissions indicated that the application was made under Section 349 CPC.
9. In their submissions the advocates for the respondents urged this court to dismiss the application on the basis that it was based on the wrong law. The respondents' argument is correct as the proper provision for seeking leave to appeal out of time is Section 349 of the CPC.
10. Without saying more, I am of the opinion that the defect in the application is cureable by application of Article 159(2)(d) of the

Constitution. Matters should not be determined on procedural technicalities. The court should endeavor to address the substantive issues before it. The claim that there is no proper application before this court is therefore without merit.

11. Section 349 CPC states:

**“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.”**

12. The instant application being one for leave to appeal out of time the same is premised on the proviso to Section 349 CPC. A reading of the proviso shows that there are two grounds for allowing an application seeking the admittance of an appeal out of time. The first one is where the party seeking leave to appeal out of has shown **“good cause.”** The second ground, which is somehow mandatory, is if the court **“is satisfied that the failure to enter the appeal”** on time was caused by **“the inability of the appellant or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”**

13. The instant application is entirely based on the second ground. In order for the Applicant to succeed it must satisfy this court that there was a delay by the trial court in supplying the proceedings.

14. The respondents have submitted that on 27<sup>th</sup> July, 2017 when the ruling the Applicant intends to appeal was delivered, the prosecutor did not apply for certified copies of proceedings but simply applied for a typed copy of the ruling, photocopies of the handwritten ruling and the release of the exhibits that had been produced by the prosecution

15. Although the Applicant did not exhibit any letter showing that they had applied for certified copies of the proceedings, the 2<sup>nd</sup> Respondent exhibited two letters from one F. Wambua to the Executive Officer of Malindi Law Courts. The first letter dated 14<sup>th</sup> April, 2018 states:

**“Please note that we requested for proceedings in regard to case number 1/2015 Republic vs Riziki Chonga Matano which was concluded on 27<sup>th</sup> July 2017, but the same was delayed.”**

16. The second letter dated 25<sup>th</sup> May, 2018 is as follows:

**“I acknowledge receipt of proceedings for the above mentioned matter, which I received on 17<sup>th</sup> day of April 2018.**

**I request to be supplied with a certificate of delay because I requested for certified copies of proceedings and ruling upon the conclusion of the matter.**

**Your prompt assistance in this regard is highly appreciated.”**

17. The certificate dated 25<sup>th</sup> May, 2018 shows that the application for the proceedings was made on 27<sup>th</sup> July, 2017 and the request was fulfilled on 17<sup>th</sup> April, 2018.

18. Much as the respondents gave the impression that the documentation in respect of the request for supply of proceedings was not made in good faith, I would be hesitant to read ill motive in respect of documents prepared by public institutions in the usual discharge of their duties. I will take the certificate of delay at its face value.

19. The delay of 26 days in filing this application after the certificate of delay was availed to the Applicant cannot be said to be inordinate.

20. In the circumstances of this case the Applicant has satisfied this court that the delay in filing the appeal was caused by the delayed supply of proceedings by the trial court. The application to file an appeal out of time is therefore allowed. The Applicant shall proceed to file and serve its appeal within 14 days from today’s date.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of December, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**