



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO.134 OF 2016

REPUBLICAPPLICANT

VERSUS

BENJAMIN KIMAIYO KIPTANUI1ST RESPONDENT

FRANCIS NDINDA MUTUA2ND RESPONDENT

RULING OF THE COURT

1. The Applicant herein has filed a Notice of Motion dated 2/11/2016 under Section 349 of the Criminal Procedure code seeking for the following reliefs:-

- (1) THAT the court be pleased to admit the applicant's Appeal out of time notwithstanding that it has been brought after 14 days.**
- (2) THAT the annexed Petition be deemed as duly filed.**

The Application is supported by the affidavit of **JACKLINE ABUGA** and the following grounds:-

- (a) THAT the court delayed in supplying the proceedings in Machakos Criminal EACC 13/2015 until the period for appeal had lapsed.**
- (b) That the Applicant has a good appeal with overwhelming chances of success.**
- (c) That the delay in filing the appeal is not inordinate and was occasioned by the delay by court in supplying the certified copies of the proceedings.**
- (d) That it is in the interest of justice that the Appeal be admitted and heard on merit.**

2. The Application was vehemently opposed by the Respondents. The 1st Respondent filed a replying affidavit on his own behalf and on behalf of the 2nd Respondent which raised the following grounds of opposition:-

- (1) THAT the Applicant's learned counsel one Jackline Abuga received a signed copy of the ruling in court at the time the same was delivered.**
- (2) THAT the trial court properly acquitted the Respondents under Section 210 of the Criminal Procedure Code.**

(3) THAT the intended appeal does not have any merit and is only academic which should be dismissed.

3. Submissions:

Learned counsels herein presented oral submissions. Mr. Machogu for the Applicant submitted that they were unable to file appeal in time due to the delay in receipt of the certified copies of the proceedings. He further submitted that even though the proceedings were received much later, the Applicant had already filed the present application for leave to file appeal out of time. Counsel finally relied on the provisions of Section 349 of the Criminal procedure code and urged this court to allow the Application.

Mr. Nthiwa for the Respondents submitted that the Application is not merited since the Applicant was present during the delivery of the ruling counsel further submitted that the Applicant has not explained why it did not even file a holding appeal and further the issues raised in the proposed Memorandum of Appeal to comprise mainly matters of fact which offends provisions of Section 349 of the Criminal Procedure Code. Counsel relied on the following cases:-

(a) REPUBLIC VS HARPEET SINGH LOTAY - NBIHC CR. MISC. APPLICATION NO. 436 OF 2012.

(b) REPUBLIC VS JOHN MUTINDA MASWII - MACHAKOS HCCR.MISC.APP. NO. 178 OF 2015.

4. Determination:

I have considered the Applicant's Application as well as the Respondents Reply thereto. I have also considered the two cases cited herein. I find the issues for determination is as follows:-

(1) Whether the delay in filing appeal was unreasonable to the extent that the Respondents would be prejudiced.

(2) Whether there is an arguable appeal to merit the exercise of this court's discretion in favour of the Applicant.

(3) As regards the first issue, regard has to be made to the express provisions of Section 349 of the Criminal Procedure Code which provide for a time limit to file an appeal and which could be extended by a court if an Applicant shows that he was prevented to do so by good cause. The said Section 349 provides thus:-

“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 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 Judgement or order appealed against and a copy of the record within a reasonable time of applying to the court thereof”.

The decision sought to be appealed against was delivered on the 7th October, 2016 and the application herein seeking for leave to file appeal out of time was filed on the 2/11/2016. The Applicant attached two letters dated 7/10/2016 addressed to the Deputy Registrar and Executive Officer seeking for supply of certified copies of proceedings and ruling. The Applicant maintains that they are yet to receive the said proceedings and further maintain that they received the ruling and proceedings on 10/11/2016 but by then they had already lodged the present application. If it is true that the ruling was delivered on the 7/10/2016 as alluded to by the Applicants and it appears the same is not disputed by the Respondent, then it would mean that the said application for leave was made slightly about three weeks after the date of the ruling. I have perused the ruling which indicates that the same was delivered on 7th October, 2015. I would suppose that the year was erroneously indicated since all the parties appear to agree that

the same was delivered on the 07/10/2016. If the latter is correct then the appeal should have been lodged latest by the close of business on the 21st October, 2016. Even though the Applicant failed to file the appeal within the requisite 14 days as provided by Section 349 of the Criminal Procedure Code, I find the filing of the present application was not inordinate in any considered view. Hence I find the Respondents have not been unduly prejudiced by the Applicant's move in filing the Application three weeks after delivery of the ruling. The two cases cited above are quite relevant and more particularly the second case of REPUBLIC VS JOHN MUTINDA MASWII (Supra) where Justice P. Nyamweya rejected a similar Application that had been filed one year and two months after delivery of judgment. In the present case, the Applicant was late by about three weeks and has given a reasonable explanation that the delay was due to late supply of proceedings. I am satisfied by the said explanation and thus find the delay was reasonable and excusable. The Respondent's Counsel's submissions that a holding appeal could have been filed and to be amended afterwards not tenable since the Applicant could not first draft and file a draft Memorandum of Appeal without the benefit of receipt and perusal of the proceedings and ruling.

As regards the second issue, the Applicant submits that it has an arguable appeal while the respondents are of the contrary view. Section 345 A of the Criminal Procedure Code provides as follows:-

“When an accused person has been acquitted on a trial held by a subordinate court or where an order refusing to admit a complaint of formal charge, or an order dismissing a charge, has been made by subordinate court, the Director of Public Prosecution may appeal to the High Court from the acquittal or order on a matter of law”.

From the above provision, it is clear that an appeal against acquittal is only permitted when the error is purely legal and a pure question of law which will not require matters of fact to be delved into. The draft Petition of Appeal presented by the Applicant raises the following grounds:-

(1) “That the learned trial Magistrate erred and misdirected herself in failing to make a distinction between the standard of proof required under Section 210 of the Criminal procedure Code (prima facie case) and under section 215 (beyond reasonable doubt).”

(2) “That the Learned trial Magistrate erred in law and fact in failing to appreciate the distinction between legal burden of proof (which never shifts) and evidentiary burden (which does shift upon prosecution meeting certain requirements).”

(3) “That the learned trial Magistrate erred in law and fact by failing to hold that the Prosecution having established that the money in question and the fact that the possession and the fact that the possession was a matter within the peculiar knowledge of the accused, shifted the evidentiary burden to the accused”.

(4) “That the learned trial Magistrate erred in law and fact by failing to appreciate that in corruption cases the complainant is EACC and not the reportee.”

A perusal of the above grounds of appeal reveals that there are serious questions of law which have been raised by the Applicants in the draft Petition of appeal meriting the court's determination. Hence I find the Applicant's Appeal is arguable and which merits this court to grant the Application. It is in the interest of justice and fair play that the Applicant be given leave to ventilate its appeal. The Respondent will not be prejudiced”

The upshot of the foregoing observations is that I find the Applicants Application dated 2nd November, 2016 has merit. The same is allowed in terms of prayer (1) thereof. The Applicant is ordered to file and serve Petition of appeal within seven (7) days upon the Respondent.

It is so ordered.

Dated and delivered at Machakos this 29TH day of MARCH 2017.

D. K. KEMEI

JUDGE

In the presence of:

Mutinda for Respondent.....

Machogu for Applicant.....

C/A: Muoti