



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL MISC. APPLICATION NO. 12 OF 2017

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION...APPLICANT

VERSUS

JULIUS ASIBA KULUNDU.....RESPONDENT

RULING

By the Notice of Motion dated 1st March 2017 filed herein on 2nd March 2017 the applicant seeks leave of this Court to file an appeal out of time and to order the County Criminal Investigations Officer to inform the Respondent of the same.

The Notice of Motion which is expressed to be brought under Article 165 of the Constitution and Section 349 of the Criminal Procedure Code is premised on grounds that -

- “a. A ruling under section 210 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya was delivered by Honourable W.K. Onkunya (SRM) on 31/10/16, thereby acquitting the Respondent from criminal charges preferred in Criminal Case no. 171 of 2014.**
- b. The Ruling was delivered after the prosecution was pressurized to close its case while key witnesses had not testified.**
- c. The Complainant herein (Lake Basin Development Authority) required time to deliberate on the decision before issuing the applicant with instructions to appeal.**
- d. The petition of appeal herein is meritorious and has high chances of success.**
- e. The application herein should be allowed in the interest of justice and pursuant to the provisions of Article 50 of the Constitution of Kenya, 2010 on the right of all persons to fair hearing.”**

The application is supported by the affidavit of Jacinta Nyamosi who deposes that the intended appeal arises from the decision of the **Kisumu Chief Magistrate's Criminal Case No. 171 of 2014** delivered on 16th October 2016 wherein the Respondent was acquitted under Section 210 of the Criminal Procedure Code. She deposes that the prosecution was pressurized to close its case while key witnesses had not testified; she explains that the delay in bringing the appeal was occasioned by the need for the Complainant to deliberate on the ruling before giving the applicant instructions to appeal. She also deposes that the appeal is meritorious and has high chances of success and this application should be allowed in the interest of justice and in view of Article 50 of the Constitution which gives all persons a right to a fair hearing.

The respondent was not served with the application and so was not represented at the hearing. Mr. Muia, Prosecution Counsel, made brief submissions in which he urged this Court to allow the application principally because the appeal has high chances of success and it affects a public body.

Section 348 A(1) now gives the applicant the right to appeal from an order of acquittal whether by a subordinate court or the High Court, on a matter of fact and law. Section 349 limits the period to enter such an appeal to fourteen days of the order appealed against but has a proviso which gives power to the Court to which the appeal is made to admit the appeal out of time. That proviso provides -

“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.”

Whereas this proviso gives this Court the discretion to extend the time limited for filing an appeal the Court must be satisfied first that there is good cause to do so and second that the failure to enter the appeal within the prescribed period has been caused by the inability to obtain a copy of the judgment or order appealed against and a copy of the record within a reasonable time.

In this appeal it is not suggested that inability to obtain a copy of the judgment or order appealed from is the reason for the application. The issue for determination therefore is whether good cause has been demonstrated to warrant admission of this appeal out of time.

It is my finding that the applicant has not demonstrated good cause to warrant this Court to admit this appeal out of time. The ruling in this case was delivered on 16th October 2016. Even were we to hold that the applicant required the instructions of anybody to file an appeal, which is not the case, those instructions were communicated to her on 30th December 2016 (see annexure JN2). Nevertheless this application was not filed until 2nd March 2017 so that not only was there a delay after the ruling was delivered but even after the instructions to appeal were given. That delay has not been explained and is in my view inordinate. Moreover it is the law that the **Director of Public Prosecution** does not require the consent of any person or authority to commence criminal proceedings – See **Article 157(10)** of the Constitution of Kenya and **Section 6** of the Office of the Director of Public Prosecutions Act. Section 349 requires this Court to extend the time to admit the 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”.

However as I have stated, inability to obtain a copy of the ruling was not cited as a ground in this case. The mere fact that the case involved a public authority is of itself not sufficient ground to grant the application. The respondent too has a right to equal protection of the law and that is why the law requires that good cause be demonstrated before the time is extended. As for the appeal having high chances of success that would be an issue for the court hearing the appeal. There is no good cause shown to warrant this Court to exercise its discretion in favour of the applicant, and accordingly this application is dismissed.

Signed, dated and delivered at Kisumu this 23rd day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Chelengat for the Applicant

N/A for the Respondent

Serah Sidera: Interpreter