



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

MISC CRIMINAL APPLICATION NO.45 OF 2017

REPUBLIC.....PROSECUTOR

-VS-

KANA TURA MAMO & 3 OTHERS.....RESPONDENT

RULING

Extension of time to appeal

[1] By Notice of Motion Application dated 20th June 2017 and brought pursuant to Section 357 of the Criminal Procedure Code CAP 75 of the laws of Kenya, the State is seeking leave of court to file appeal out of time.

[2] The Application is premised on the grounds that:

- i) Certified copies of the proceedings and judgment were served on the Appellant late.
- ii) Again, the delay was occasioned by extensive consultations between the Appellant and the Ethics and Anti Corruption Commission on whether to prefer an appeal or not. He says that the appeal has overwhelming chances of success.

[3] The supporting affidavit reiterates the grounds stated herein above. Except, it provided the following important details:-

- a) That they intended to appeal against the lower court's verdict in CMCC No. A/C 3/2015, in which the court acquitted the Respondent herein; and
- b) That the office of the ODPP was served with certified copies of the proceedings and judgment on 19th April 2017, while the judgment was delivered 24th February 2017.

[4] The Respondent opposed the application and filed Grounds of Opposition *inter alia*:-

- a) That the Application was an afterthought;
- b) That there has been inordinate delay in filing the application, that is to say, it was filed more than 120 days after delivery of judgment;

c) That the grounds cited for delay were a sham as the Applicant even after receiving the typed and certified proceedings from the lower court took more than four months to lodge this Application; and

d) That no draft memorandum of appeal was annexed to enable the court determine whether the intended appeal was arguable.

DETERMINATION

[5] When the application came up for hearing on 17th October 2017, parties urged the court to determine the application on the basis of the affidavits and grounds of opposition filed. I shall so proceed.

Venial error

[6] One venial but embarrassing error; the application before me is for admission of appeal out of time; yet it is expressed to be brought under section 357 of the Criminal Procedure Code (hereafter CPC) which deals with ‘*Admission to bail or suspension of sentence pending appeal*’. The correct provision of the law is section 349 of the CPC. Nonetheless, such error is mere technicality of a kind that was completely rendered impotent by article 159(2) (d) of the Constitution. I will, therefore, determine the application on merit.

Delay be explained

[7] On consideration of the arguments presented, I take this view of the matter. Under section 348A of the CPC, the prosecution may appeal from an acquittal of an accused person or an order of court on a matter of fact and law. Such orders include but not limited to order of court refusing to admit a complaint or formal charge, or an order dismissing a charge. See the full text of section 348A of the CPC below:-

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 section (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.

[8] Having said the foregoing, the test to be applied in determining a request for extension of time to file appeal is set out in section 349 of the CPC as follows:-

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

[9] Therefore, in determining whether good cause has been shown, the failure to file appeal in time must be explained. Among the major considerations include: a) That the failure to enter the appeal within the prescribed time was 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.

[10] Applying this test, I note that the Applicant has contended that the delay in filing this appeal was occasioned by fact that the matter involved different government agencies which needed time to consult on whether to prefer an appeal or not. He further contended that judgment was delivered on 24th February 2017 and certified copies of the proceedings and judgment were served on the Applicant on 19th April 2017. I note that this application was filed on 21st June 2017 which is slightly two months from 19th April 2017 when the certified copies of judgment and proceedings were received by the Applicant. The explanation given for the delay is that they needed to consult with EACC. From the averments of parties, it seems the case appealed from relates to corruption and or economic crimes and or leadership and integrity- matters of which, under the law and the Constitution, the Ethics and Anti-corruption Commission (hereafter EACC) has the full mandate to investigate and submit reports on the results of investigations to DPP with recommendations on prosecution or otherwise of the person involved. DPP on the other hand is the office which is constitutionally mandated to prosecute offences investigated by EACC. There is a statutory nexus between the two independent institutions- EACC and DPP- of which courts should take judicial notice. Therefore, whereas these two offices are independent, the law and the Constitution has created areas of interdependence between institutions in the enforcement of the law. And so, it is not hot air or mere excuse when the prosecutor says that there were consultations between the two offices; they are simply engaged on real convenience of institutional interdependence as created by law. Accordingly, the explanation for the delay in filing appeal is reasonable and I excuse the delay. I allow the Applicant to file and serve appeal within 14 days from today. It is so ordered.

Dated, signed and delivered in open court at Meru this 18th day of December. 2017

F. GIKONYO

JUDGE

In the presence of:

Mr.Nyangire advocate for Mr. Kaumbi advocate for Respondent

Mr. Kinyua for State

F. GIKONYO

JUDGE