



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISC. CRIMINAL APPLICATION NO 15 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**WILLIAM MACHARIA MURATHE.....RESPONDENT**

**RULING**

By a Notice of Motion dated 28<sup>th</sup> May 2015, the State (hereinafter referred to as the applicant) applied to this court for leave to file an appeal out of time under the provisions of Section 349 of the Criminal Procedure Code.<sup>[1]</sup> The said Section provides 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 lapsed, 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 judgement or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor" (Emphasis added)*

The grounds upon which the application is premised are contained in the supporting affidavit of a one **Job Kaigai Karundu**, an advocate employed at the Office of the Director of Public Prosecutions in charge of Nyeri County. He avers that the proceedings were received late as the complainant in the lower court brought them on 13<sup>th</sup> May 2015, that upon perusal of the proceedings he believed that the intended appeal has overwhelming chances of success and that for the interests of justice it would be and just if the application is allowed.

The application is opposed. The Respondent argues in his replying affidavit that the application is without merit, and instituted by his brother and that the application before the court is an abuse of the court process and that the state in this application is acting at the instigation of the complainant in the lower court.

At the hearing of the application, **Miss Chebet**, counsel for the DPP adopted the affidavit in support of the application and urged the court to allow the application. The application was vehemently opposed by **Mr. Karweru** for the Respondent who argued that no material was placed before the court to show when the proceedings were applied for or received from the court, and that since the proceedings are alleged to have been obtained by the complainant in the lower court, no receipt was attached to show when they were paid for. Counsel also submitted that even though proceedings were attached to the court copy, he was not served with the same and further that the proceedings in the court the court file are improperly

before the court since they were not exhibits to the affidavit in support of the application and urged the court to expunge the proceedings from the court record. However, counsel softened on this point after the court expressed the need to determine matters without undue regard to technicalities of procedure.

Counsel took issue with the fact that it is the complainant who prompted the DPP to file the present application or make the decision to prefer the intended appeal yet the law states that the DPP shall act independently without direction from any person. Counsel questioned why it was the complainant who applied for the proceedings and forwarded them to the DPP, and suggested that the application before the court was not filed pursuant to an independent decision by the DPP. Counsel urged the court to dismiss the application on that basis.

In reply counsel for the applicant insisted that the decision to appeal was arrived at by the DPP independently.

Section 348A of the Criminal Procedure Code<sup>[2]</sup> provides for right of appeal against acquittal, order of refusal or order of dismissal. The said Section provides as follows:-

*348 A (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 of 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."*

The right of appeal conferred to by the above section is subject to the limitation provided under Section 349 cited above which provides that *"an appeal shall be entered within fourteen days of the order or sentence appealed against."*

The proviso to Section 349 cited above provides that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has lapsed, 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 judgement or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor" (Emphasis added)

The issues that fall for determination in this application are **(a)** whether the applicant has disclosed a good cause as provided in the above proviso to warrant this court to allow the application under consideration. In other words, has the applicant demonstrated a *bona fide* intention to appeal within the prescribed appeal period but could not file the appeal due to failure to obtain the proceedings; or has the applicant accounted for or explained the delay in initiating the appeal; **(b)** Did the DPP act independently in preferring the intended appeal and **(c)** does the proposed appeal have merits.

With regard to the first issue, I find myself in agreement with the words of Justice Nadel, in *R. v. Monrad*<sup>[3]</sup>, who citing relevant decided cases stated *inter alia* that "In the final analysis, the principal consideration is whether the applicant has demonstrated that justice requires that the time be extended."

The court has unfettered discretion to allow extension of time to appeal but this discretion must be exercised reasonably having regard to all the circumstances of each case.<sup>[4]</sup> Also of useful guidance is the decision in the case of *Ratman vs Cumarasy*<sup>[5]</sup> where it was held that:-

*" The rules of this court must "prima facie" be obeyed, and in order to justify a court in extending time during which a step requires to be taken, there must be material on which the court can exercise its discretion....."*(Emphasis added)

The wording of the proviso to section 349 is very clear. It places a duty on an applicant to satisfy the court 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 therefor"

There is nothing on record to show that the DPP ever applied for the court proceedings. The affidavit in support of the application states that the proceedings were brought to the DPP by the complainant. Sections 348 and 349 cited above do not mention a complainant. The said sections only mention the appellant and the appellant in the intended appeal is the State. There is nothing to show that the DPP took any action which can point to an intention to appeal. This lends credence to the assertion by the Respondents' counsel that the DPP was prompted by the complainant to institute the intended appeal hence the present application. There is no explanation as to why the complainant took it upon himself to obtain the proceedings and then forwarded the same to the DPP. There is nothing to show that prior to the complainant taking the proceedings to the DPP, the DPP had taken any steps to obtain the proceedings. In view of the above, I find that the requirements to the proviso to section 349 cited above has not been satisfied and accordingly my answer to issue number (a) above is in the negative.

Regarding the second issue, counsel for the Respondent correctly submitted that the DPP is required to act independently in the discharge of his duties. Article 157 (10) of the Constitution of Kenya 2010 provides that:-

*"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority."*

The above position is also replicated under Section 6 of the Office of the Director of Public Prosecutions Act[6] in the following terms:-

6. Pursuant to Article 157 (10) of the Constitution, , the Director of Public Prosecutions shall-

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.

The above provisions require the DPP to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction of instructions or instigation of any other person. The admission by the applicant that the proceedings were procured by the complainant and delivered to their offices raises genuine doubts as to whether or not the decision to file the appeal was instigated by the complainant. This suspicion is strengthened by the fact that there is nothing to show that the DPP had taken any steps to institute the appeal before the proceedings were availed by the complainant as admitted. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Where the decision is surrounded by doubt or even mere reasonable suspicion as in the present case, such a decision cannot be allowed to stand.

I also find myself in agreement with the decision in **Republic vs Attorney General ex-parte Arap Ngeny**[7] where the court stated that *"a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."*

Even though the above decision related to a criminal trial as opposed to an appeal, the decision can also apply to an appeal instituted without proper factual foundation, or under circumstances that suggest that it was instigated by the complainant.

The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. Therefore, the DPP must carefully consider whether or not to prosecute or whether or not to institute an appeal. This decision must be seen to have been arrived at by the DPP independently. Under no circumstances should the DPP appear to have been prompted by another person to institute any proceedings. Such a scenario, even if it is mere reasonable suspicion would amount to a violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act<sup>[8]</sup> cited above.

The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the Director of Public Prosecutions, and thereby to State Counsel and police and public prosecutors, demand nothing less.

D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

*“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense.”*<sup>[9]</sup>

In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and therefore his officers) must be independent. The Constitutional provision in Article **157 (10)** of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system *“should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.”*<sup>[10]</sup>

The following observations are useful to bear in mind:-

*“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”*<sup>[11]</sup>

The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.<sup>[12]</sup> It is said that the prosecutor acts in the general public interest and so it must be. That is where he prosecutor's ultimate loyalty and responsibility lie. Mere or reasonable suspicion that the DPP did not act independently is in my view sufficient to taint the proceedings. The upshot is that my answer to issue number two is in the negative.

Even assuming that the complainant acted in good faith, there is no court receipt or letter addressed to court showing when the proceedings were applied for or paid for and the court is left guessing as to when the proceedings were obtained. In other words, there is nothing to show that the proceedings were not available within a reasonable time of applying for the same from the court. Thus, the requirements stated in the proviso to section 349 cited above have not been proved making it impossible for the court to determine whether indeed the appellant was prevented from filing the appeal by the inability to obtain the proceedings within the time required for filing an appeal.

Regarding the third issue, even though I am not determining the appeal, I found it necessary to carefully

examine the proposed appeal, the proceedings and the judgment of the lower court so as to satisfy myself whether that the intended appeal has chances of success. The record shows that the complainant and the accused in the lower court are brothers, that the complainants key witness was his wife, hence no independent witness was called and more crucial is the fact that the family had a history of bad blood which culminated in previous litigation. Further, I have carefully considered the decision of the lower court and I strongly hold the view that the intended appeal has no chances of success. My answer to issue number three is in the negative.

Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. I am not persuaded that the intended appeal advances public interest in any manner.

The upshot is that the applicant has not satisfied the necessary considerations to warrant this court to allow the application under Section 349 of the Criminal Procedure Code.<sup>[13]</sup> As observed earlier, in the final analysis, the principal consideration is whether the applicant has demonstrated that justice requires that the time be extended and owing to my above findings, I am not persuaded that justice requires so in this case. Accordingly, I find that the applicants' application has no merits both in law and in substance and the same is hereby dismissed.

Orders accordingly

Dated at **Nyeri** this **29<sup>TH</sup>** day of **January** 2016

**John M. Mativo**

**Judge**

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[1] CAP 75, Laws of Kenya.

[2] Ibid

[3] [2012] O.J. No. 398 (C.J.)

[4] *R vs Wycliffe Simiyu Wasike & Another*

[2013]eKLR

[5] {1964} 3ALL ER 993

[6] Act No. 2 of 2013

[7]HCC APP NO. 406 of 2001

[8] Supra

[9] Infra

[10] <http://www.pacii.org/fj/other/prosecutors-handbook.pdf>

[11]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[12] (see *Boucher v the Queen* (1954) 110 CCC 263, 270).

[\[13\]](#) Supra