REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANOUS CRIMINAL APPLICATION NO. 178 OF 2015

REPUBLIC.....APPLICANT

VERSUS

JOHN MUTINDA MASWII.....RESPONDENT

RULING

On 3rd September 2014, Hon. L. Simiyu Ag. SRM delivered a ruling on case to answer in **Chief Magistrates Court Criminal Case No 2507 of 2010 – Republic vs John Mutinda Maswii**, and acquitted the accused person therein, who is the Respondent herein, under section 210 of the Criminal Procedure Code. The Respondent was facing four charges in the said criminal case, namely one count of grievous harm contrary to section 234 of the Penal Code, and three counts of assault causing actual bodily harm contrary to section 251 of the Penal Code.

On 10th November 2015, the Prosecution Counsel in the Office of the Director of Public Prosecutions filed an application by way of a Notice of Motion dated 9th November 2015, seeking leave that the Applicant's appeal be admitted out of time, notwithstanding that it has been brought after 14 days. A Petition of Appeal was also filed on the same date. The application by the Applicant is supported by a an affidavit and supplementary affidavit both sworn by Shijenje Johnson, a Prosecution Counsel in the Office of the Director of Public Prosecution, on 9th November 2015 and 14th March 2016 respectively.

The main ground for the application is that the Applicant applied for the certified copies of the trial court's proceedings soon after the judgment therein was delivered, and only received the same on 21st September 2015.

The Respondent opposed the application in a Replying Affidavit he swore on 23rd January 2016 wherein he stated that the typed proceedings of the trial Court were available at the time of the delivery of the ruling, and that he applied for and received the said proceedings on 6th October 2014. Further, that the application is made to defeat a civil case he has filed in **Machakos CMCC No 697 of 2015-John Mutinda Mswii vs Paul Maingi & 4 Others**, which is based on the outcome of **Machakos Criminal Case No. 2507 of 2010.** He annexed copies of pleadings of the civil case.

The Respondent also averred that the hearing of **Machakos Criminal Case 2507 of 2010** took four years, and the application has been brought more than one year after the ruling, and that he will be prejudiced if the appeal is heard.

The application was canvassed by way of written submissions. The learned prosecution counsel, Shijenje

Johnson filed submissions dated 6th June 2016, while Mulyungi & Mulyungi Associates, the Respondent's learned counsel filed submissions dated 12th July 2016. The Applicant submitted that section 349 of the Criminal Procedure Code empowers this Court to admit an appeal out of time, if it is satisfied that the failure to enter the appeal within the stipulated time was caused by inability to obtain a copy of the judgment and the record within reasonable time. It was urged by the Applicant in this regard that they were not able to obtain the record for reasons beyond their control.

Further, that pursuant to section 193A of the Criminal Procedure Code, the pendency of the civil proceedings is no ground to stay or prohibit the criminal proceedings. Lastly, it was submitted that any attempt to deny any party access to justice including to the Appellate Court will violate Article 48 of the Constitution.

The Respondent on his part submitted that it was the duty of the Applicant to get a certificate of delay to support his claim that the proceedings were delayed, and that there was no evidence exhibited to show that the proceedings were availed on 21st September 2015. Further, that no reason was advanced as to why it thereafter took 2 months of the said receipt of proceedings to bring this application.

Lastly, it was reiterated that the application is meant to scuttle the Respondent's civil suit, and that the appeal had minimal chances of success, as the Petition of Appeal is generalised and does not seek any specific or clear relief.

The issues that arise for determination are whether the delay in seeking leave to appeal out of time was unreasonable and prejudicial to the Respondent, and whether there is an arguable appeal to merit the exercise of this Court's discretion in favour of the Applicant. S**ection 349** of the **Criminal Procedure Code** provides for a time limit of fourteen days within which to file an appeal, however, the court has powers to extend time to file an appeal out of time if the applicant shows that he was prevented to do so by good cause. *Section 349* provides as follows in this regard:-

> ***"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."***

The decision which has been appealed against was delivered on 3rd September 2014, whereas the Petition of Appeal was filed one year and two months later on 10 November 2015.The applicant attached a letter dated 22nd September 2014 addressed to the Executive Officer at the Chief Magistrates Court in Machakos requesting for the certified copies of proceedings and judgment. The Applicant stated that they received the proceedings on 21st September 2015.

A delay of one year and two months in filing a criminal appeal is clearly inordinate and is not reasonable. In addition, the responsibility of preparing the appeal record and filing the appeal within time rests solely with the Applicant, and the onus is upon it to demonstrate a good cause for the delay if this Court is to grant the leave sought to file the appeal out of time. The only evidence provided by the Applicant in this regard is the letter requesting for the proceedings dated 12th September 2014. No other evidence of follow up requests or of actual receipt on 21st September 2015 is provided. The only conclusion this Court can reach in the circumstances was that the Applicant was indolent and slept on its rights.

The Applicant has relied on Article 48 of the Constitution on access to justice. The Article equally applies to the Respondent, who in addition has a right to a fair trial which includes the right to have their trial begin and conclude without unreasonable delay under Article 50 (2)(e) of the Constitution. The Applicant underwent a trial for four years, was acquitted, and will definitely be prejudiced to undergo the expense, inconvenience and stigma of additional criminal proceedings after two years of freedom and liberty.

While still on the issue of prejudice, I also find that the Respondent was led by the Applicant's delay to act on the belief of his innocence and his liberty, and filed a civil suit namely **Machakos CMCC No 697 of 2015-John Mutinda Mswii vs Paul Maingi & 4 Others**, for malicious prosecution, and there is a real possibility that the filing of the said civil suit in September 2015 may have prompted the Applicant to file the instant application two months later.

Lastly on this issue, I find that section 193A of the Criminal Procedure Act is inapplicable to this application, as there are no pending criminal proceedings in existence as against the Respondent.

As to whether the Applicant has an arguable appeal that should in the interests of justice be heard, this Court shall be guided by the statutory right of appeal in the case of acquittals as provided for under *section 348A* of the Criminal Procedure Code which states 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 or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law."**

An appeal against acquittal is only permitted when the error is purely legal, and a pure question of law in this regard is one which will not necessitate or entail further fact finding. I have perused the Petition of Appeal dated 9th November 2015 filed on 10th November 2015. The ground for the appeal is stated as follows:

> "**The learned trial magistrate erred in law in acquitting the Respondent under section 210 of the Criminal Procedure Code when the circumstances of the case did not warrant the acquittal"**

In light of the statutory requirement and limitation that its appeal from an acquittal shall be on points of law only, it was incumbent upon the Applicant to be specific and detailed as regards the circumstances which it is alleged did not warrant the acquittal, to enable this Court make a finding if there is a serious question of law being raised by the appeal. In addition, the Court notes that the Applicant in its Supplementary Affidavit seeks to rely on, and confirm the evidence of medical records it is alleged were produced before the trial Court, and on which the said Court is alleged to have given conflicting findings. These are issues of fact which clearly cannot be raised in its appeal.

I accordingly decline to grant the leave sought for the foregoing reasons and dismiss the Applicant's Notice of Motion dated 9th November 2015.

DATED AT MACHAKOS THIS 20TH DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE