



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL MISC. APPL. NO.2 OF 2014
REPUBLIC.....APPLICANT
VERSUS
MARTHA NYABOKE BOSIRE.....RESPONDENT

R U L I N G.

1. The Application before me, is the one dated 17th February, 2014 and filed on the same day. It has been brought under **Section 49** of the **Criminal Procedure Code**. It seeks leave to file an appeal out of time in Sotik S.P.M's Court Cr. Case No.238 of 2012.
2. Its supported by the affidavit of **Doreen Kituku** the Legal and Administration Manager Sotik Tea Company who were the Complainants in the Cr. Case before the Sotik Court.

She explains that though judgment was delivered on 1st October, 2013 and judgment and proceedings requested for they were only able to receive the same on 12th November, 2013.
3. The same were forwarded to the Director of Public Prosecution's office Kericho for perusal and launching of an appeal. That by this time the 14 days for lodging an appeal had lapsed.
4. She says the appeal is meritorious and they should be granted the leave sought. A copy of the judgment and petition of appeal were annexed.
5. Mr. Benard Nyagaka Ogari the Respondent's advocate filed a Replying Affidavit in response to the Application on 21st July, 2015. He opposes the application and says the judgment by the learned trial Magistrate was already typed at the time of delivery of the same.
6. He further depones that the judgment should have assisted the Applicant file the appeal sought. He says there is unexplained inordinate delay by the Applicant and the Petition only raised general grounds of appeal.
7. When the appeal came for hearing both Counsel submitted.

M/s Kivali learned State Counsel submitted that the proceedings were forwarded to the Director of Public Prosecution's office Kericho but because of shortage of personnel in the said office, Mr. Mutai who was the only one there could not cope with the workload hence the delay.

She further stated that the appeal had high chances of success and leave should be granted to enable them file the appeal. That the Respondent would not be prejudiced she said.

8. In reply Mr. Ogari Counsel for the Respondent opposed the application saying there was nothing to show that judgment was not received within 14 days.

To him the reason for delay has not been explained.

He further said the grounds of appeal are so general.

9. I have considered both affidavits and the submissions by Counsel. It is not disputed that the judgment the Applicant wishes to challenge was delivered on 1st October, 2013. No appeal was filed within the 14 days provided for under the Criminal Procedure Code.

10. The Applicant's main ground in support of this application is that they applied for proceedings but the same were not ready until 12th November, 2013.

11. The Complainant could not appeal by itself. It had to seek the counsel and advice of the Director of Public Prosecution. This is because the State is the Prosecutor of all Public Prosecutions.

12. Mr. Ogari for the Respondent submitted that at the time of the delivery of judgment, the same had been typed.

To this the Applicant said its proceedings and not judgment they received on 12th November, 2013 and the Director of Public Prosecution had to peruse them.

13. The Application here was filed on 17th February, 2014 and not 17th February, 2013 as shown by the Court Stamp. The period from receipt of the proceedings and the filing of the present application is exactly three (3) months.

14. Given the workings of Government and the shortage of staff then at the Director of Public Prosecution's office Kericho I find the delay of three (3) months not to be inordinate. And even if it was, it has been explained by Counsel.

15. A right of appeal may only be denied when the delay is too long and has not been explained. It does not matter whether the intended Applicant is the State or an individual.

Its now two (2) years and not three (3) years as submitted by Mr. Ogari for Respondent, since the judgment was delivered.

16. I have read the two grounds of appeal. The Applicant is saying that the learned trial Magistrate did not appreciate the law and the evidence that was adduced. In as much as they may appear to be general grounds, I find them to be raising serious issues, which should be decided on merit.

17. After evaluating all the material before me, I am of the view that it would be fair and just to allow the application to enable the Applicant argue its appeal on merit.

I therefore grant leave for the Applicant to file an appeal out of time.

18. The appeal should be filed at Bomet High Court and served within 14 days from today's date.

DELIVERED, SIGNED AND DATED THIS 21ST DAY OF DECEMBER, 2015.

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H.I.ONG'UDI

JUDGE