



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 56 OF 2012

(Consolidated with Criminal Appeal No.57 of 2012)

DIRECTOR OF PUBLIC PROSECUTIONAPPELLANT/APPLICANT

VERSUS

CYRUS NJERU IRERI.....1ST RESPONDENT

NYAGA KIANYA 2ND RESPONDENT

From original conviction and sentence in Cr. Case No. 1079 of 2012 at the Chief Magistrate's Court Embu by HON. E.K. NYUTU – RM on 14/10/2011

R U L I N G

1. This is the Notice of motion dated 15/5/2014 brought under section 349 Criminal Procedure Code seeking an order admitting out of time the petition of appeal dated 14th November 2011 and filed on the same day. It is supported by several grounds and an affidavit by Mr. Walter Wanyonyi the Assistant Director of Public Prosecution Embu County.
2. The application has been opposed by the Respondents who filed a replying affidavit through the 1st Respondent. The main reason is that the Applicant was granted leave three times before and has not complied to date.
3. The factual background is that a Ruling was delivered in Embu Chief Magistrate Criminal Case No.1079/10 on 14/10/2011 acquitting the Respondents under section 210 Criminal Procedure Code. The State through the Director of Public Prosecution was aggrieved and filed Appeals numbers HCRA NO.56/12 & 57/12 on 4/11/2011, which was out of time by six (6) days.
4. The said office filed a Misc. Criminal Application No.44/11 seeking leave to file appeal out of time. The leave was granted on 22/3/2012 by consent of the parties.. There was a further order that the appeal be filed within 14 days. This was not complied with.
5. When these Orders were being made it was not known to the Court that appeals No.56/12 and 57/12 had already been filed on 4/11/2011. In spite of having been received by the registry on 4/11/2011 the said appeals were registered as though they had been filed in the year 2012. I have yet to receive an explanation for this.
6. I have looked at the Notice of Motion the basis of Misc. Criminal Application No.44/11 which was not opposed by the Respondents herein. Prayer Number 2 of that application stated;

“That the annexed Petition of Appeal be deemed as duly filed and served”.

This is a prayer that was overlooked by the Court.

7. Meanwhile the Registry Staff routinely brought before me HCRA NO.56/12 and 57/12 which were admitted on 26/4/2013. All along this Court was not notified of the relationship between HCRA NO. 56&57/12 and Misc. Criminal Application No.44/11 until Mr. Wanyonyi State Counsel came on record for the State.

8. Had the Director of Public Prosecution in the 1st instance on 22/3/2012 informed this Court that they had already filed HCRA NO.56 & 57/12 out of time and they wanted the same to be deemed as duly filed in time and served, we would not be having the circus that has been exhibited around this application.

9. To bring this circus to an end I hereby set aside the Orders made in Misc. Criminal Application No.44/11 on 22/3/2012 and 21/6/2013. In their place shall be an Order to the effect that Leave to file appeal out of time is granted. The Petitions of appeal in HCRA NO.56/12 and 57/12 to be deemed as duly filed and to be served. A copy of this Ruling to be placed in Misc. Criminal Application No.44/11.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18TH DAY OF JULY 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Miiri for State/Applicant

Mr. Mugo for Respondents

Njue – C/c

Respondents – present