



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS CRIMINAL APPLICATION NO. 10 OF 2014

REPUBLIC.....APPLICANT

VERSUS

JANE NJERI MWANGI.....RESPONDENT

RULING

The state, through its counsel, Mr Solomon K. Njeru, filed a Notice of Motion dated 2nd May, 2014 seeking for leave to file an appeal out of time. The application was made under **section 349** of the **Criminal Procedure (Cap 75 Laws of Kenya)**.

The application was supported by the affidavit sworn by the state counsel himself; in that affidavit Mr Njeru has deposed that on 29th April, 2014, the complainant in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 614 of 2012** visited his office to inquire on the appeal against the judgment delivered in that court on 20th January, 2014.

Apparently, when the complainant received proceedings of the criminal case in the magistrate's court on 10th February, 2014, she immediately proceeded to the office of the Director of Public Prosecutions in Nairobi to seek advice on whether the appeal could be lodged. She was advised by that office that the proceedings would be forwarded to the Director of Public Prosecution's branch office in Murang'a for action.

As Mr Njeru was not involved in the prosecution of the criminal case in the magistrate's court, he was not aware of the position of the case until the complainant visited his office on 29th April, 2014; it is only then that he called and was informed by the Nairobi office that the proceedings had been forwarded to Murang'a. He later learnt that indeed the proceedings had been sent to Murang'a but to the County Commissioner's office where he was initially accommodated before he moved to his current office. As a result of this information, he retrieved the documents from the County Commissioner's office on 30th April, 2014 and immediately thereafter lodged this application.

In these circumstances, the state counsel has deposed that the delay in filing the appeal was not deliberate but was occasioned by circumstances beyond his control and that it is in the interests of justice that the state be given a chance to file its appeal.

After studying the proceedings, the state counsel believes that the intended appeal has overwhelming chances of success.

Counsel for the respondent vehemently opposed the application; he filed grounds of objection and argued, as I understood him, that the circumstances under which the delay in filing the petition do not fall within

the proviso to **section 349** of the Criminal Procedure Code under which the application is made.

In any event, so counsel argued, there is no evidence of any form of correspondence to demonstrate that the complainant applied for the proceedings or followed up on the progress of typing these proceedings or that she communicated to the office of the Director of Public Prosecutions on the possibilities of appealing. There is also no evidence of any correspondence between the offices of the applicant in Nairobi and Murang'a.

Counsel also argued that no satisfactory explanation has been given for the complainant's delay in applying for certified copies of the proceedings, collecting the proceedings once they were ready for collection and approaching the office of the Director of Public Prosecutions.

Finally, counsel for the respondent has submitted that the intended appeal does not raise any triable legal or factual issue which warrants an appeal; in a nutshell, the judgment of the subordinate court was proper and should not be disturbed.

Section 349 of the **Criminal Procedure Code Cap 75** under which the applicant's motion was brought states as follows:-

349. 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.

Counsel for the applicant swore that he was not personally involved in the prosecution of the case at the magistrate's court; he was therefore not aware of when the judgment in that case was delivered until such time that he got the proceedings on 30th April, 2014.

I am satisfied that if the learned counsel for the state had been on record from the very beginning, he would have been hard-pressed to explain why it took him so much time to file the appeal once a copy of the judgment was made available. As it were, he only came to know of this judgment much later from a complainant who had sought for the opinion of the Director of Public Prosecution on the possibility of appealing against the decision of the subordinate court.

It is not clear how the complainant secured the proceedings and the judgment; she may or may not have applied for these proceedings either formally or orally. It may be difficult in the circumstances for the applicant to exhibit any form of communication between the court and the complainant.

It may also be possible that the documents were forwarded to the applicant's counsel's former office without any covering letter; the absence of such letter, in itself, should not be interpreted to mean that the proceedings and judgment could not have been left with the counsel's head office in Nairobi and only forwarded to Murang'a at a later date.

The respondent's counsel's submission that the appeal does not raise any triable issue either in law or fact does not appear to have any legal basis; this is because under **section 349** of the Criminal Procedure Code, the only consideration this court must give regard to in exercising its discretion to grant leave to file the appeal out of time is ***“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.”*** Whether the appeal will succeed or not does not seem to count at this stage.

For the reasons I have given I am persuaded that it is for a good cause that the appellant's intended appeal be filed out of time; whether it is an appeal that should be summarily rejected or admitted for hearing is a

question that I believe will be answered at the appropriate time as provided under the Criminal Procedure Code.

I will in the circumstances allow the applicant's application dated 2nd May, 2014. The applicant is hereby ordered to file and serve its appeal within fourteen days of the date hereof. There is no order as to costs.

Signed, dated and delivered at Murang'a this 10th December, 2014

Ngaah Jairus

JUDGE