



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 458 of 2012

REPUBLICAPPLICANT
VERSUS

WYCLIFFE SIMIYU WASIKE1ST RESPONDENT

SUSAN KIKWAI2ND RESPONDENT

R U L I N G

1. Before me for hearing is the application by the Director of Public Prosecution dated 25th September 2012 seeking leave of this court to file appeal out of time. The application was supported by the affidavit of the Learned Senior Principal State Counsel M/s. Emily Kamau.
2. Briefly stated the 1st Respondent was charged in count I with willful failure to comply with applicable procedures and guidelines relating to the management of funds contrary to **Section 45(2) (b)** as read with section **48(1)** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**.
3. In Count II the 1st and 2nd Respondents were charged with abuse of office contrary to **Section 46** as read with **Section 48 (I)** of the **Anti-Corruption and Economic Crimes Act No.3 of 2003**. They were acquitted on 21st June 2012 on both counts.
4. M/s. Kamau submitted for the applicant that subsequent to the conviction, the state applied for proceedings and Judgement on 29th June 2012 and they were availed later on 25th July 2012. Upon receipt of the proceedings, they were subjected to internal mechanisms to establish whether the state had a case worth appealing. They formed an opinion that they had an arguable appeal against the acquittal of each Respondent. This internal process of reviewing the lower court record consists of submitting the record before more than one State Counsels. The application for leave to file the appeal out of time was therefore filed 3 months later on the 25th September 2012.
5. The learned state counsel submitted that the delay of three months occasioned was not inordinate and relied on the case of **Republic versus Tom Obuya 2006 eKLR**, in which similar reasons were advanced for delay. In particular, the issue of delay in obtaining the typed proceedings in the cited case was advanced as the cause for the inordinate delay and the Judge concurred. Pointing out that this was a regular occurrence in our Court registries. The Respondent was acquitted on 18th January 2006 and the application for leave to appeal out of time was filed on 7th April 2006 almost 3 months later.
6. The application was opposed and a replying affidavit was sworn by the 1st Respondent Wycliffe Simiyu Wasike on 14th November 2012. The main ground of opposition is that there was inordinate and unexplained delay in filing of the appeal.

7. Having briefly examined the applicant's prayers as well as the submissions made by the learned counsels, the issues that arise for determination are whether the delay in seeking leave to appeal out of time was unreasonable and therefore prejudicial to the respondents, and whether there is an arguable appeal.

8. Before the court can exercise its unfettered discretion to extend time in favour of the applicant, the applicant has to show, among other things that the appeal or the intended appeal is not frivolous, that the application has been brought without inordinate delay and that the respondent would not suffer undue prejudice if the application is allowed (see WASIKE v SWALA [1984] KLR 591).

9. It is the learned State Counsel's view that there has not been inordinate delay in filing this application for leave to appeal out of time in the circumstances. It's her view that the appeal is arguable and raises a question of law thus the application should be allowed to enable them file their appeal.

10. On the question as to whether there was inordinate delay in filing the application for leave to appeal out of time and whether it was prejudicial to the Respondents. I note that though the State Counsel submitted that they applied for proceedings and Judgement of the lower court on 29th June 2012 after the Respondents were acquitted on 21st June 2012, there is no evidence to that effect. The only important information in the court record in this regard is the fact that they did receive the proceedings and judgment on 25th July 2012 as evinced by a letter from the Principal Magistrate of the anti-corruption court addressed to the Office of the Director Public Prosecutions and received on 25th July 2012, informing them that the typed proceedings and Judgement were ready for collection.

11. Counsel for the 1st Respondent Mr. Ogamba in opposing the application relied on the affidavit of the 2nd Respondent filed on 14th November 2012. He submitted that the applicants had not provided sufficient explanation to warrant the exercise of the court's discretion in their favor. He pointed out the discrepancy in the dates of certification of the proceedings on the applicant's document and theirs. The applicant's document was dated 17th July 2012 whereas theirs was dated 13th July 2012 which discrepancy was not explained.

12. Secondly, it was urged that the delay of two months in reviewing the Judgment at the DPP's office from the 25th July 2012 to 29th September 2012 was not justified. That they did not document the process, of internal review and that the delay of 94 days against the statutory limit of 14 days constituted inordinate delay, and would occasion prejudice to the 1st Respondent if the application was allowed in view of his reinstatement back to work after being acquitted.

13. Mr. Katwa, Counsel for the 2nd Respondent submitted that after receiving the proceedings on 25th July 2012, the applicant brought their application 60 days later on 25th September 2012. He argued that to attribute this delay to the fact that they had to study and decide whether or not to appeal was not reasonable.

Secondly, requiring the 2nd Respondent who had since been relieved from work to come back to court 90 days after her acquittal to start all over again was not only punitive but also an addition of salt to injury.

14. Lastly, on the question as to whether there was an arguable appeal on a point or points of law. The applicant submitted that the learned trial magistrate did not fully comprehend the ingredients of the offences in **Counts I and II** of willful failure to comply with applicable procedures and guidelines relating to the management of funds contrary to **Section 45(2) (b)** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act No.3 of 2003**, or abuse of office contrary to **Section 46** as read with **Section 48 (I)** of the **Anti-Corruption and Economic Crime Act No.3 of 2003**. I note from the court record that she made a clear finding that there was no evidence of personal benefit to the Respondents.

15. The record shows that the 1st Respondent was out of the country when the cheque for payment was

signed whereas the 2nd Respondent was out of the country when the procurement was done. There was no evidence that at any point they jointly worked on the matter, which gave rise to the charges

16. In **Count I** the learned trial magistrate found that the Prosecution did not prove it's case against the 1st accused person beyond reasonable doubt, and gave him the benefit of doubt, making reference to **Sections 74** as read with **Section 29** of the Public **Procurement & Disposal Act**.

The said Section 74 provides as follows:

(1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied -

(a) There is only one person who can supply the goods, works or services being procured; and

(b) There is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied -

(a) There is an urgent need for the goods, works or services being procured;

(b) Because of the urgency the other available methods of procurement are impractical; and

(c) The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

17. On the basis of the provision above, I note from the court record that the Respondents Company, Keninvest had already used direct tender in the supply of five computers. The 34 computers that the 1st Respondent was instructed by Top Management on 27th October 2008, to ensure had been supplied was a re-order and the court record bears this out.

18. Further it is instructive to note that the 1st Respondent had been instructed by the Top Management to ensure that the computers were supplied by 3rd November 2008 which request was urgent and which the 1st Respondent complied with. These computers were supplied and later returned to the supplier on 3rd November 2008, after a meeting called by **PW1** for Top Management, regarding an anonymous SMS to him that the 1st Respondent had flouted procurement procedures.

19. I note that Top Management had a meeting on 27th October 2008 that sanctioned the procurement of the said computers. This meeting was attended by 4 people, yet only one person in that meeting, the 1st Respondent was charged in court.

20. This court has unfettered jurisdiction to allow extension of time to appeal. This discretion must however be exercised reasonably having regard to all circumstances of each case.

In the case of **RATMAN -VS- CUMARASY [1964] 3 ALL ER 993**, it was observed that:

“The rules of this court must “prima facie” be obeyed, and in order to justify a court in extending time during which step in procedure requires to be taken, there must be material on which the court can exercise its discretion, If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time liable for the conduct of litigation.”

21. I have carefully considered the application before me, the affidavit in support thereof as well as the

grounds of objection raised by the respondents'. I have also perused the lower court record together with the proposed petition of appeal. Firstly, I am not satisfied that there are any serious matters of law which arose and which can be the basis of an appeal as required under **Section 348** of the **Criminal Procedure Code**. Secondly, in the instant case, it is the internal review by the State to determine whether or not they had an arguable appeal which took long, and is the main reason for the delay in filing the appeal. Thirdly the respondents stand to suffer prejudice if an appeal is preferred against them at this late stage in time.

For these reasons I decline to grant the leave sought and dismiss the applicants' application.

SIGNED DATED and **DELIVERED** in open court this *14th* day of *March* 2013.

L. A. ACHODE
JUDGE