



REPUBLIC OF KENYA

High Court at Kericho

Criminal Miscellaneous Application 8 of 2012

REPUBLIC-----APPLICANT
VERSES

CHARLES KIPKORIR-----1st RESPONDENT

JOSEPH KIPKURUI TERER-----2nd RESPONDENT

RULING

The application dated 11th July, 2012 by the Director of Public Prosecutions office is by way of Notice of Motion. It is brought pursuant to **Article 22(3) (d) of the Constitution of Kenya, 2010; Section 348A and Section 349 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya**. The applicant seeks leave of this Court to file an appeal out of time. The intended appeal is against the decision of the Sotik Principal Magistrate in Criminal Case No.169/2009. The Respondents in the matter were charged with the offence of Stealing contrary to **Section 283 of the Penal Code**. They were tried and acquitted under **Section 210 of the Criminal Procedure Code**.

The learned State Counsel deponed that the 14 days within which they were to appeal elapsed on the 19/8/2011. The applicant intended to appeal but due to change of guard at the Divisional Criminal Investigation Office (DCIO), Bureti, and the Director of Public Prosecutions office (DPPs), Kericho there was delay in filing the intended appeal. Further that it took them long to obtain typed proceedings from Sotik Law Courts. Finally, that the intended appeal had a high chance of success.

In the intended Appeal it was averred that the Magistrate was biased and had a predetermined mind to acquit the Respondents, an act he did inspite of glaring evidence in support of the case.

In his submissions Mr. Rogoncho, State Counsel reiterated what was stated in the body of the application and the affidavit in support thereof. He contended that the delay in filing of the appeal was not inordinate. He called upon the court to overlook technicalities while considering the issue of filing the case out of time. He also argued that orders sought would not prejudice the Respondents.

The Respondents by way of a Replying Affidavit opposed the application. It was deponed that they applied for proceedings and obtained the same on the 17/8/2011 and even served it on the Complainant's advocates in HCCC No.40/2009. They averred that a delay of one year was inordinate.

Mr. Cherutich for the Respondents argued that no dates had been given for the change of guard at the

DCIO's office and the DPPs office. He said the Complainants in Criminal Case No.169/2009 had an advocate on record hence they should have acted accordingly. No good reason had been given by the applicants why they had not exercised the discretion at their disposal.

I have taken into consideration rival submissions by both counsels for the Applicant and the Respondents.

The application is brought under **Article 22(3) (d)** of the **Constitution, 2010** which provides as follows:-

“(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and”

The sub article is in regard to what the Chief Justice should take into consideration while making rules to be followed by courts while enforcing the bill of rights under Article 22.

The application is also pursuant to **Section 348 A** of the **Criminal Procedure Code** which stipulates as follows:-

“348A. 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 Attorney-General may appeal to the High Court from the acquittal or order on a matter of law.”

The section basically gives the DPP authority to appeal against an order of the subordinate court on a matter of law.

Section 349 of the Criminal Procedure Code provides 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.”

The proviso to the section gives the court the discretion to admit an appeal out of time. However, the court must be satisfied that there is a good cause to do so and further be satisfied that failure to file the appeal within the time limited for filing it was caused by the inability of the applicant's advocate to obtain a copy of judgment/order within a reasonable time of applying for the same.

This means that as a court exercises the discretionary power to grant leave to appeal out time the power must be done judiciously and judicially regarding the matter before it.

This fact would not have been put in better terms than what was stated in the case cited of **JUMA-VERSES-DIESEL AND AUTO-ELECTRIC SERVICES LTD AND OTHERS;E.A.L.R (2008) IEA, 148**

Where it was held as followsx:

“It is common knowledge that the court has discretion to extend the time within which to file an application for leave to appeal. That such discretion is to be exercised judicially is also elementary. However, in the exercise of such power, the requisite condition is that sufficient reason has to be given

for such extension.”

When exercising the discretion this court will also take into consideration what was held in the case of:

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“The decision whether or not to extend time for appealing is essentially discretionary. The court will take into account (1) The length of delay (2) the reason for delay (3) the chances of the appeal succeeding if the application is granted, and (4) the degree of prejudice to the respondent if the application is granted.”

The issues I therefore have to consider are whether:-

- 1) The length of delay to apply for leave to appeal was inordinate.
- 2) The respondents will be prejudiced if leave to appeal is granted
- 3) The appeal has a chance of success.
- 4) There is a good cause for granting orders sought.

1) The Ruling in Criminal Case No.169/2009 was delivered on 5/8/2011. Proceedings were subsequently typed and certified. According to paragraph 5 of the replying affidavit the respondents collected the proceedings on the 17/8/2011. Annexure “CKKI” is a receipt that was issued in that regard. It is dated 17/8/2011. There was no action taken on behalf of the applicant. The applicant has explained that no action was taken because there were changes in both the office of the DCIO, Bureti and the DPP, Kericho. In paragraph 8 of the affidavit in support of the application it is stated that it also took them long to obtain typed certified proceedings from Sotik Law Courts. It is evident that certified typed proceedings were available at the law courts by 17/8/2011. It is not stated when the alleged change of guard took place at the DCIO Bureti and DPP Kericho offices respectively. In determining whether or not the delay was occasioned by transfer of officers it was important for such evidence to be availed. This is a case where the intended appeal was filed on the 11/7/2012, some eleven (11) months after the decision of the subordinate court was delivered. In his submissions the learned State Counsel asked the court not to look at technicalities. He was indeed asking this court not to adhere strictly to the spirit of the law. In the circumstances this court must ensure that justice is done. In an endeavor to ensure justice is done I did peruse HCC NO.40/2009 alluded to in paragraph 6 Of the replying affidavit. In the matter PW1, PW2, and PW3 in Crc. No. 169/2009 are the defendants while the 3rd plaintiff is the 1st Respondent herein. He filed a list of documents which included a copy of proceedings (Sotik Criminal case No.169/2009) on the 2/3/2012. This means that as at March 2012 the advocate representing the complainants who are represented by the state counsel had seen the proceedings. The question begging is why they waited till four months later to act? Without evidence of the averment in the supporting affidavit, the delay in the circumstances was inordinate.

2) It was submitted by the state counsel that the delay in lodging the appeal does not prejudice the respondents as the civil case between the respondents and applicants had been disposed off. A perusal of the file revealed that the case is still active. A list of documents filed on 2/3/2012 includes the ruling in Crc No.169/2009. The question to be posed is whether the intended appeal could be intended to interfere with the civil matter? There is a possibility of the Respondents being prejudiced by the order being sought.

3) Whether the appeal has a chance of succeeding is a matter that the court cannot tell at this stage as it is not privy to the original court record.

4) The inordinate delay having not been explained by the applicant to the satisfaction of this court, there is absolutely no good cause that warrants granting of orders sought.

For the reasons I have aforesated I decline to grant leave to the applicant to appeal out of time. The application is hence dismissed.

DATED at **KERICHO** this 10th day of November 2012

LILIAN N. MUTENDE
JUDGE

COUNSEL APPEARING

Mr. Cherutich, Advocate, for the Respondents

Mr. Rogoncho, State Counsel, for the Republic

Mr. R. Koech, Court clerk