

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Miscellaneous Criminal Application 64 of 2009

REPUBLIC:.....APPLICANT

VERSUS

FRED NJONGESA PETER:.....1ST RESPONDENT

GEOFFREY JUMA NYONGESA:.....2ND RESPONDENT

MARTIN BARASA NYONGESA:.....3RD RESPONDENT

RULING

This is an application brought under section 349 of the Criminal Procedure Code cap.75 of the Laws of Kenya. It is brought on behalf of the Attorney General for leave to be granted to file appeal out of time. It is based on the grounds that the Applicant was prevented by sufficient cause from lodging appeal on time and the applicant's intended appeal has overwhelming chances of success and finally that the interests of justice demand that the trial court's decision be reconsidered on appeal. That application is supported by the sworn affidavit of Andrew Jeremiah Omutelema the Senior Principal State Counsel in the Attorney General's Office at the time stationed in Eldoret. He deponed that on the 19th June 2009 his office was served with High Court Criminal Appeal No.3 of 2008 in which Geoffrey Juma Nyongesa is challenging this conviction under S.296(1) of the Penal Code in Eldoret Chief Magistrate's Criminal Case No. 699 of 2007. That it was upon the deponents' perusal of the court proceedings that he formed the opinion that the Respondent was wrongly acquitted under S.296(2) of the Penal Code and that the High Court should look into the trial court's judgment. That it was well beyond the statutory fourteen days when the deponent became aware of the case.

At the hearing of the application the state's case was that this is a fit and proper case for leave to be granted to file their appeal out of time for the interests of justice to be met. The state put the Respondents on notice that in any event at the hearing of the Respondents' appeals the state will be praying that the Respondents' acquittal under S.296(2) of the Penal Code be quashed and conviction be entered under S.296(2) instead.

In reply the Respondents' case was that had they not filed the appeal the state would not have wanted to file their appeal and the state knows the law and they should not have been late for two years.

The Chief Magistrate's case No.699 of 2007 was finalized on 24th December 2007. It was not denied that the State Law Office became aware of the case on being served with the 2nd Respondent's appeal No.3/2008 on 19/06/2009. The state then put in their application under consideration on the 15th October, 2009, a period of some four (4) months after service of the appeal. It may be argued that the state should put into place a system whereby all cases prosecuted by the police in the Chief Magistrate's court (if such system be not in place) are brought to the attention of the State Counsel that handles High Court cases which include the Respondent's appeal. Such argument would be valid in which case then the state would in this case be late by nearly two years from 24/12/2007 to 15/10/2009 when they brought their application. However even if that were so and considering that the said application was brought about four (4) months after notification of

the same, would such period be considered undue delay? In my opinion and in the circumstances of this case I find that there was not undue delay. I take the view that this case must be determined on its merits and consequently the application dated 15/10/2009 is found to have merit and is allowed. The appeal will be filed within SEVEN (7) days of the date of this ruling in default of which the same shall lapse.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF MAY 2010

P.M.MWILU
JUDGE