



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Crim. Appli. 550 of 2008

REPUBLIC.....APPLICANT

- VERSUS -

ABDIKADER ABDULGAFUR ALIRESPONDENT

RULING

This application is, on the face of it, a simple one carrying just the single prayer that the applicant be granted leave to file an appeal out of time. The application is by way of Notice of Motion dated and filed on 29th October, 2008 and brought by virtue of s. 349 of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

The general grounds founding the application are; that the applicant is dissatisfied with the ruling of Ag. Principal Magistrate Mr. Muneeni dated 5th August, 2008 in Makadara Law Courts Criminal Case No. 3382 of 2007, and desires to prefer an appeal against the same; and that the applicant was unable to lodge the appeal within 14 days in accordance with the applicable rules, owing to delay on the part of the Court in availing a certified copy of the said ruling, which is required to accompany the petition of the appeal at the time of filing.

The State Counsel having the conduct of the matter, *Mr. George Muriithi* has sworn a supporting affidavit, to which is attached a draft petition of appeal.

It is deponed that the learned Ag. Principal Magistrate had delivered a ruling acquitting the respondent, on 5th August, 2008, and the applicant, being desirous of lodging an appeal, thereafter applied to the Makadara Law Courts Executive Officer for a copy of the ruling, on 18th August, 2008. The ruling requested was, however not supplied until 28th October, 2008 – “long after the appeal days had lapsed.” The deponent avers that no prejudice will be occasioned to the respondent if the State is granted leave to appeal out of time.

In the draft petition of appeal, it is contended that the learned Magistrate had erred in law, in acquitting the respondent, when the prosecution had established a *prima facie* case. It is also contended that the trial Magistrate had erred in law, in that he “grossly misdirected himself on the ingredients of [the offence] of giving false information to a person employed in the public service contrary to s. 129(b) of the Penal Code.”

The decisions to be sought in the appeal are: (i) that retrial of the primary matter be ordered, to take

place before a different Magistrate's Court; and (ii) (in the alternative) that the ruling and orders made by the learned Ag. Principal Magistrate be set aside, and the respondent be put to his defence in the primary matter.

This application was stoutly opposed by the respondent, who got his advocate in the primary matter to swear a replying affidavit, the main elements of which run as follows: that the applicant's letter requesting copy of the ruling was unorthodox in format; that the said letter was dispatched only close to the date of expiry of the period limited for lodging an appeal; that the proposed appeal is a hopeless one; that the proposed appeal is motivated by bad faith and by the object of harassing the respondent; that no good cause had been shown why the time limit for lodging an appeal should be enlarged by the Court.

Learned counsel *Mr. Muriithi* discounted the replying affidavit, on the ground that the advocate who swore it was not involved in this matter and so, there was no information that he could depone in good faith, in aid of the respondent's case. It was *Mr. Muriithi's* contention that the deponent of the replying affidavit had devoted his averments to minor issues which bore no consequence in terms of the applicant's prayers.

In his response, counsel for the respondent, *Mr. Sarvia*, urged that an appeal may be filed belatedly only for good cause, under s. 349 of the Criminal Procedure Code, but that the instant application lacked good cause.

Counsel urged that by s. 348(a) of the Criminal Procedure code, only the Attorney-General can appeal against an acquittal, and only on a point of law, and yet the request which had been made for a certified copy of the judgment had not come from the Attorney General.

Mr. Sarvia submitted that the applicant cannot complain about not getting the trial Court proceedings within 14 days – period was about to expire; and so “the State made it impossible for itself to obtain those proceedings.”

The merits of the matter would be for resolution during the appeal hearing, if appeal is allowed; and this Court, which is only concerned with the question whether or not the limited time may be enlarged, to enable the applicant to lodge an appeal. The appeal forum is a proper setting for canvassing the merits of the case. Whether, therefore, there is or there is not a good appeal, is not to be considered here; it is enough that one party desires to lodge appeal.

I have not seen much weight lodged in the contest on the point whether good motives attended the request for the trial Court's proceedings, for the purpose of lodging appeal. It is clear enough that, inside the fourteen-day period following the delivery of ruling, the appellant had asked for the proceedings, by the medium of a letter which was officially received by the Makadara Law Courts. This Court takes judicial notice that, with contemporary developments in computer technology, it was perfectly possible to have the said proceedings retrieved instantaneously and duly supplied to the applicant.

The decisive consideration, however, is one of merit. This Court recognizes that an appeal is an opportunity for the appellate Court to consider matters of substance and merit, and to rectify any errors such as may have occurred in the Court below; and consequently, to be taken before an appellate court is not to be subjected to an objectionable consequence or a penalty of sorts. Thus, in the regular practice of this Court, practically all intending appellants seeking enlargement of time to lodge appeals, have their prayers granted.

The instant prayer is coming from the Attorney-General, who contends that the Court of first instance had fallen into error. Is there good cause to prevent the Attorney General from laying his claim on the resolution table, by way of appeal? In principle, no.

This appeal is therefore allowed. The Attorney-General shall file his appeal within 14 days of the date hereof; and thereafter, the file shall be taken through the admission process in the normal manner.

Order accordingly.

DATED and DELIVERED at Nairobi this 22nd day of January, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Muriithi

For the Respondent: Mr. Sarvia