



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Misc Crim Appli 85 of 2008

REPUBLIC APPLICANT

VERSUS

PAMELA KHAYAMBA RESPONDENT

RULING

The applicant is the Republic of Kenya. She seeks leave to the court to lodge an appeal against the acquittal of the respondent herein.

The respondent was acquitted by the trial court on 24th October 2008. That verdict caused the complainant to be dissatisfied.

The complainant therefore approached the state law offices at Kakamega, and requested Mr. Daniel I. Karuri, the learned state Counsel, to appeal against the acquittal. The request to the state counsel was made on 29th October 2008.

In response to the complainant's request, the state counsel promptly wrote to the Chief Magistrate, Kakamega Law Courts, on 29th October 2008.

The trial court did provide the state counsel with a typed copy of the proceedings on 19th November 2008. And after perusing the proceedings, the state counsel formed the opinion that the proposed appeal was arguable. It is then that the state applied to this court for leave to appeal out of time.

In the opinion of the state counsel, the proposed appeal should be given an opportunity to be filed and prosecuted, as it was in the interest of justice to do so.

In answer to the application, the respondent pointed out that there was no certificate of delay annexed to the application, so as to fortify the deposition of the state counsel.

The respondent believes that the state was only jolted into action after the complainant had realized that the respondent was about to sue her for malicious prosecution. In that regard, the respondent exhibited a letter dated 8th January 2009, which was a demand Notice from the respondent to the applicant.

As the learned state counsel had occasion to say, herein, there is absolutely no way that the steps which were taken by both the complainant and by the state counsel could have been provoked by the demand notice. My reason for so finding is that the state counsel had written to the trial court on 29th October 2008, which was more than two months before the respondent wrote her demand notice.

The respondent also submitted that the intended appeal had no merit, as the trial court had evaluated the prosecution case before acquitting the respondent.

Whilst it may or may not be true that the learned trial magistrate did evaluate the evidence which the prosecution had tendered, that alone cannot imply that the intended appeal was without any merit. Furthermore, if the appeal lacked merit, the appellate court would still find in favour of the respondent herein, even if the appeal were to be filed and prosecuted.

Finally, the respondent submitted that the attempt to appeal against her acquittal, smacks of vengeance and a vindictive applicant or complainant. Her reason for so saying was that the offence of assault, for which she had been acquitted, was a minor offence.

I must say that I did not quite appreciate why an attempt to appeal can be described as vindictive just because the offence for which the proposed respondent had been tried was minor. To my mind, it is not the magnitude of the offence which is relevant, but the question as to whether or not the trial court had erred, by acquitting the accused person.

Furthermore, the fact that the respondent herein has given notice of intention to sue the complainant is indicative of the seriousness which the respondent attaches to the whole issue. Surely, it cannot be right for the respondent to take the matter so seriously, whilst in the same vein, the respondent should expect the complainant to consider the issue to be a minor one.

Had the respondent been convicted, she could have been liable to imprisonment for five years. The said sentence cannot be considered to be minor.

Finally, the applicant has acted with promptitude. They applied for the proceedings within 5 days of the acquittal.

For all the foregoing reasons, I hold that there is merit in the application. I therefore grant leave to the state to appeal out of time. The intended appeal should be filed within the next **TEN (10 DAYS)**.

Dated, Signed and Delivered, at Kakamega this 28th day of April, 2009.

FRED A. OCHIENG

J U D G E