



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

Misc Appli 4 of 2008

CRIMINAL LAW.

-Extention of time for filing of an Appeal

-Grounds for

-Criminal Procedure Code (Cap 75, Laws of Kenya)S. 349

BASHOW ISSAK DAKAT.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

The Applicant was sentenced to 23 years imprisonment on 13th September 2007 by the learned Senior Resident Magistrate, Mandera. He was granted 14 days within which to appeal but the 14 days expired before he could do so.

In the Supporting Affidavit of Counsel, Edwin M. Njiru sworn on 4th February 2008, the said Counsel depones **inter alia** that due to financial constraints and distances involved, it was only on 17th December 2007 that the Applicant's family issued instructions to the firm of Ahmednasir Abdikadir and Co. Advocates to take up the matter and appeal against both the conviction and sentence of the Applicant. And the said firm of Advocates received certified copies of Judgment and proceedings on 19th January 2008. Counsel depones that the Intended Appeal has overwhelming chances of success, and that the Applicant stands to suffer irreparable harm if the orders sought are not granted.

Mr. Ringera Counsel who argued the application wanted the court to take judicial notice of the situation in the country since about December, 2007 and delay in receiving the certified copies of the Judgment and proceedings from Mandera town in the extreme North East of the Country.

Mr. Oluoch, learned Deputy Chief Litigation Counsel opposed the application. He submitted that there was no adequate explanation for the delay of 60 days from the date of instructions on 17th December, 2007 and the application ought to have been filed latest on 31st December 2007 when the 14 days following instructions expired. Instead the application was filed on 5th February 2008, some 135 days from the 27th September 2007 when the 14 days allowed for the appeal to be filed had expired.

The learned Deputy Chief Litigation Counsel also submitted that there was no certificate of delay from the court showing that the filing of the intended appeal was delayed due to the Court's delay. For all those reasons Counsel submitted that the application ought not to be allowed.

The Application herein is brought under the provisions of Section 349 of the Criminal Procedure Code, Chapter 75, Laws of Kenya. The said Section provides:-

“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 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”

My understanding of the proviso to Section 349 is that the court shall admit an Appeal out of time (i.e. of the 14 days) if the Court is satisfied that delay was caused by the inability of the Appellant or his Advocate to obtain a copy of the judgment or order appealed against within a reasonable time of applying to the court for the said copy of the Judgment or order appealed against.

The Applicant's Counsel depones that they were instructed on 17.12.2007, and immediately requested for the copies of the Judgment and Proceedings. These they received on 19th January 2008, and filed the application herein on 5th February 2008 that is say some seventeen (17) days after receipt of the copies of the Judgment and proceedings from the Senior Resident Magistrate's Court in Mandera. Although beyond the **“fourteen”** days after receipt of the proceedings and Judgment, I am prepared to say that the Advocate acted without undue delay in filing the application herein as well as the intended appeal.

Section 36 1(8) of the Criminal Procedure Code prohibits the filing of any appeal from a decision of the High Court to the Court of Appeal. If this Court were to deny the Applicant an opportunity to appeal out of time, then his goose would have been cooked for him. He would have no where else to go to seek justice. See the case of **Ngua vs Republic [1983] KLR 529**. Such leave to appeal out of time must however be earned. It is not automatic. It must satisfy the conditions laid down in the proviso to section 349 of the Criminal Procedure Code as outlined above.

Mr. Ringera learned Counsel for the Applicant asked the court to take Judicial Notice of the times between December 2007 and 5th February 2008 when the application was filed. In addition to taking notice of those times – holidays and Presidential Elections and the chaos that ensued disrupting normal transport and communication, I also take judicial notice of the remoteness, absence of reliable and regular transport system, extremely poor road network and harshness of the environment generally in the area of Senior Resident Magistrate Mandera Court. There are therefore many imponderables that could cause a delay in filing an appeal within fourteen days including absence of any office of an Advocate in the area of jurisdiction and hence the briefing of an Advocate in Nairobi.

For all these reasons, I am of the view that the Applicant has satisfied the conditions of the Proviso to Section 349 of the Criminal Procedure Code, and the Applicant's Chamber Summons dated 4th February 2008 is allowed in terms of prayers 1-3 inclusive subject to payment of any outstanding fees on admission of an Appeal.

These shall be orders accordingly.

Dated and delivered at Meru this 15th day of February 2008.

M.J. Anyara Emukule

Judge.