

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Misc Crim Appli 2 of 2007

REPUBLIC APPLICANT

VERSUS

SAMSON KIMONDWO TUWEI RESPONDENT

R U L I N G

This is an application dated 17th January, 2007 by the Prosecution for leave to file an appeal out of time under the provisions of Section 349 of the Criminal Procedure Code. The State wishes to appeal against the Ruling of the Senior Resident Magistrate, Eldoret in CMCC. No. 8033 of 2002 delivered on 4th October, 2006.

The learned trial Magistrate acquitted the Respondent under Section 210 of the Criminal Procedure Code. In an affidavit sworn on 17th January, 2007, the Senior State Counsel, Ms. Mary Oundo stated that the Complainant sought directions from her and she applied for certified copies of the Ruling on 8th November, 2006, for purpose of appealing. Proceedings were furnished on 4th January, 2007. After perusal, she was convinced that there was a miscarriage of justice and that she decided that an appeal ought to be lodged. She added that the intended appeal raises triable issues and has a high chance of success.

The proposed Respondent and former accused person through his Counsel, filed Grounds of Opposition on 24th January, 2007 raising the following grounds that:-

- (a) The application is without merit as the letter requesting for typed proceedings and marked "MCO.1" is clearly written out of the stipulated time.
- (b) There is no valid reason or at all explaining the delay in requesting for proceedings for filing a notice of appeal.
- (c) That certified proceedings and ruling are a prerequisite for the preparation of a Record of Appeal and not a Petition of Appeal.
- (d) As per the proceedings, it is evident that the accused was never identified as by law required.
- (e) The appeal is without merit since the investigating officer never testified.

Mr. Maondo, Counsel for the former Accused person, reiterated the said points in his submissions.

I have considered the application, the supporting affidavit, grounds of opposition and submissions by Counsel.

The trials in the Subordinate Court are usually prosecuted by Police Prosecutors. Any complainant aggrieved by a decision in his case has a right to make a request to the Attorney General's Chambers to consider an appeal. A State Counsel to whom such a request has been made cannot file an appeal unless and until he/she appreciates the contents of the decision, the issues involved and the basis thereof. In such a decision, the State Counsel has to be objective and fair and not act under any pressure from the

Complainant or Prosecutor. Considering the work-load of the Attorney General's office, decision may take longer to make. I have taken into account the said facts.

Secondly, I have taken into account that the State Counsel had to procure and obtain the proceedings before making the decision. I do not think the delay herein was unreasonable or inordinate. The Complainant has as much rights as the Accused in criminal proceedings. Above all, the right of appeal is also conferred to the Prosecution. Taking into account all the circumstances, I think that it is just and fair to grant the extension sought. The proposed Respondent shall not suffer any prejudice as a result of the appeal being filed and heard on its merits.

I do hereby grant leave in terms of prayer (a). The Appeal shall be filed and served within the next fourteen days.

Dated and delivered at Eldoret on this 1st day of February, 2007.

M. K. IBRAHIM

JUDGE