

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Misc Crim Appli 126 of 2004

REPUBLIC.....APPLICANT

VERSUS

BARMASAI TOROITICH.....1ST RESPONDENT

PATRICK KIPKEMOI.....2ND RESPONDENT

ISAAC KEMBOI MARINDICH.....3RD RESPONDENT

RULING

This is an application by the Attorney General by way of a notice of motion brought under **Section 348A** and **349** of **Criminal procedure Code Cap 75** of the **Laws of Kenya** . The applicant prays that he be granted leave to lodge an appeal out of time against the orders of the learned principal magistrate **Mrs. S. Muketi** acquitting the respondents under **Section 210 of the Criminal Procedure Code** in Chief Magistrate Criminal Case No. 600 of 2003. The application was supported by an affidavit sworn by Richard Kipmoi Koech, a state counsel in the Attorney General office Nakuru. The respondents were arraigned in court on the 19th of march 2003 and jointly charged with two counts of forgery contrary to **Section 349** of the **Penal Code** and the offence of conspiracy to defraud contrary to **Section 317** of the **Penal code** and they denied the two charges. They were tried and in a ruling delivered on 14th of May 2004 the learned magistrate acquitted them under **Section 210** of the **Criminal procedure Code**. Mr. Koech deposed that the learned trial magistrate erred in law by making the acquittal orders without considering and evaluating the evidence which was adduced before the court by the prosecution witnesses. Mr. Koech further stated that he was requested by the officer in charge of police prosecution and the complainant to lodge an appeal against the acquittal orders. However, he did not state when those instructions were given to him. The record shows that the applicant applied for certified copies of the proceeding and ruling on the 15th of June 2004 and the same were ready and were supplied to the applicant on 30th of August 2004. The Attorney General then filed this application on 30th of September 2004.

In his submissions, Mr. Gumo Assistant Deputy Public Prosecutor said that there was no inordinate delay in making the said application. He further submitted that the intended appeal had overwhelming chances of success and he drew the court's attention to a draft of the petition of appeal which was annexed to the application. He further submitted the respondent will not suffer any prejudice if the application was allowed. Mr. Ngigi for the respondents opposed the said application and filed grounds of objection to the same. He stated that the application was an abuse of the due process given that the appellant failed to prefer the appeal within 14 days as stipulated by **Section 349** of the **Criminal Procedure Code**. He further submitted that the Attorney General had no legitimate grounds of appeal and that he was being misused by the complainant to settle scores with the respondent. He said there had been inordinate delay in preferring this application given that it took over one month for the applicant to move the court after he been supplied with copies of the proceedings and ruling. He further submitted that the right of appeal by the state in a matter where accused persons had been acquitted was limited to points of law and not facts as had been demonstrated by the draft petition of appeal. Counsel further submitted that the respondents' rights under **Section 77(5)** of the constitution of Kenya were in danger of being violated by the application and the intended appeal and urged the court to dismiss the application.

I have carefully considered the said application, the affidavit in support of the same as well as the grounds of objection that were raised by the respondents' advocate. I have also carefully perused the proceedings and the ruling by the learned trial magistrate. I am in agreement with Mr. Ngigi that there was inordinate delay in filing this application given that the ruling was delivered on the 14th of September 2004. I believe that the same was delivered in the presence of the prosecutor who should have notified the officer in charge of police prosecutions of the outcome immediately thereafter. The complainant is also deemed to have known the outcome of the ruling soon after its delivery. In the circumstances the applicant took about 30 days before it applied for certified copies of the proceedings and ruling and even after they were supplied on 30th of August 2004 it took a period of another 30 days to file the application. That delay has not been explained away. The certificate of delay that was annexed to the application justified the period of upto 30/8/2004 when the proceedings were supplied to the applicant.

Having perused the proceedings and the ruling and also considered the proposed petition of appeal I am not satisfied that there are any serious matters of law which arose and which can be the basis of an appeal as required under **Section 348A** of the **Criminal Procedure Code**. The respondents stand to suffer prejudice if an appeal is preferred against them at this time. For these reasons I declined to grant the leave as sought and dismiss the applicants' application.

DATED, SIGNED AND DELIVERED at Nakuru this 31st day of March, 2006.

D. MUSINGA

JUDGE

31/3/2006

Ruling delivered in open court in the presence of Mr. Gumo, Assistant Deputy Public Prosecutor.

D. MUSINGA

JUDGE

31/3/2006