



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

**Misc Crim Appli 36 of 2006**

**REPUBLIC.....APPLICANT**

**VERSUS**

**TOM OBUYA.....RESPONDENT**

**RULING**

The Republic sought for leave to appeal out of time against the decision of B. M. Mararo, District Magistrate (as he then was) to acquit Tom Obuya, the Respondent herein on 18<sup>th</sup> January 2006. The application is expressed in a motion dated 7<sup>th</sup> April 2006 filed pursuant to Section 349 of the Criminal Procedure Code. Vincent Sammy Monda filed an affidavit of the motion. The motion is strenuously resisted by the Respondent who swore a replying affidavit. It is the submission of Mr. Monda the learned state counsel that the Republic delayed in filing the appeal because there was a delay by the registry to supply the proceedings. There is a Certificate of Delay showing that it took time to secure the proceedings typed. The Republic is of the view that it has an arguable appeal hence it should be given a chance to argue the appeal to test the acquittal order. The learned state counsel has annexed a copy of the proposed petition of appeal annexed to the affidavit he swore in support of the motion.

Mr. Gikandi advocate for the Respondent on the other hand is of the view that the motion should be dismissed because the delay is inordinate. The learned advocate pointed out that there was no evidence that the Respondent ever applied for proceedings in time.

I have considered the rivaling submissions plus the pleadings placed before me. This court is given a wide discretion under Section 349 to admit an appeal out of time so long as good cause is shown. It is also a requirement under the section that there must be evidence that proceedings were applied and it took time for the same to be supplied within a reasonable time. Though there is no evidence that the Respondent ever applied for proceedings, there is evidence that there was a delay in supplying typed proceedings to the Republic. This is a regular occurrence in our court registries. I also take judicial notice of the fact that the learned state counsel was not the one who conducted the case on behalf of the Republic in the lower court hence it is possible that the matter was not brought to his attention in time. I have perused the proposed petition of appeal and I am satisfied that the intended appeal has arguable grounds. I also acknowledge the fact that the Respondent has raised serious concerns about the time taken in lodging this application. After a careful consideration I am convinced that the motion was filed a bit late but in my humble view the delay is not inordinate. The same is excusable due to the reasons I have just advanced.

In the end and for the above reasons, I grant leave of 10 days to the Republic to lodge an appeal out of time against the decision of B. M. Mararo of 18<sup>th</sup> January 2006.

Dated and delivered this 19<sup>th</sup> day of October 2006

**J. K. SERGON**

JUDGE

In open court in the absence of the parties.