REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIM APP 195 OF 03

REPUBLIC :: APPLICANT

VERSUS

BENJAMIN KYALO MUTUNE :::::::::::::::::: DEFENDANT

R U L I N G

The application dated 21.4.2004 is brought pursuant to Section 349 of the Criminal Procedure Code. The applicant is the State. The application is supported by the affidavit of Moses O"mirera the State Counsel who depones that the Respondent had been charged with the offence of assault contrary to Section 251 of the Penal Code in SPM Cr.C. 1783/03 and was acquitted on 12.1.2002 under Section 202 Criminal Procedure Code. He depones that certified copies of proceedings were applied for but none were supplied. He purported to have annexed the letter as MMI and MM2 but none was annexed to the application. That no proceedings have been supplied to them to date and they have merely annexed uncertified copies of proceedings. It is his contention that a question of law arises which is disclosed in submission that the prosecution was by an unqualified prosecutor.

The application was opposed and a replying affidavit filed by the respondent who depones that the nature of the issue of law is not disclosed, the delay in obtaining proceedings is not explained and no draft petition of appeal is annexed for the court to consider it and see if indeed there is an arguable appeal. When the case was dismissed under S.202 Criminal Procedure Code on 12.1.2004 the prosecutor applied for certified copies of proceedings but no reasons were given as to why they were required. Though counsel indicates that there were letters annexed to the affidavit requesting for proceedings none were annexed. There is no evidence that the applicant ever applied for certified copies of proceedings for purposes of appeal.

The applicant has annexed some uncertified copies of proceedings to the affidavit in support, and the court has no idea why they did not have them certified. They were very brief. In any event, they are incomplete, there is no charge sheet and the court cannot confirm that it is the correct record of the proceedings before lower court. No draft petition of appeal was annexed to the application. A draft petition of appeal would have enabled the respondent know how to respond to this application. It is crucial to such an application that the draft memorandum of appeal be annexed. The delay in filing the appeal is not satisfactorily explained and the material placed before the court is not sufficient to avail the order sought to the applicant. Even if the issue of law of unqualified prosecutor was apparent the applicant has to show that there was an arguable appeal with evidence that would result in a possible conviction if a retrial was ordered by this court. Accordingly the application is refused and dismissed.

Dated, read and delivered at Machakos this 7th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE