

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPLICATION NO.27 OF 2004**

REPUBLIC.....APPLICANT

V E R S U S

MANYESO SULUBU CHANZE.....RESPONENT

R U L I N G

By Notice of Motion dated 4/3/2003 the State through State Counsel Ms Mwaniki seek orders for leave to file an appeal out of time under the provisions of Section 349 of Criminal Procedure Code, Cap.75 Laws of Kenya.

The grounds are set out on the application and in the supporting affidavit of the State Counsel.

It is disclosed that the Respondent was charged with an offence under Section 339(1) of Penal Code committed between 25th August, 2000 and 27th November, 2002. The trial commenced on 11.6.2003 and terminated on 6/10/2003 with an acquittal at the stage of no case to answer under Section 210 Criminal Procedure Code aforesaid. The proceedings attached show that the prosecution was conducted by unauthorized person and that he presented evidence of 4 witnesses. That is Pc Mukonesi.

The court has perused the record. It is clear that the criminal intent to commit the offence is not proved. The complainant PW.1 was not in the country when the alleged offence was committed. PW.2's evidence is not reliable. He himself took two doors from the building. He said "later I passed the scene and I realized the house had been demolished." He was not an eye witness. Then he says:- "We also thought that the Accused had agreed with PW.1 on the destruction of the house." From the above it is quite clear that it was not proved under what circumstances the complainant's house was broken into. PW.2 could have broken the house to take his doors and the weighing machine. On the whole the prosecution of the case was based upon hearsay. It would appear that the complainant applied for a copy of the proceedings from the court and the same was not provided until 22/12/03 as the record shows. The period between 6.10.2003 when judgment was read and 11.12.2003 when he applied for the record is a delay of more than 14 days from the date of judgment. It is more than 2 months. I find this to be inordinate delay. The complainant then brought the proceedings to the State Law Office on 23.2.04. Again I find this to be unreasonable delay.

And then this application was not filed until 4.3.2004. The grounds advanced that there is sufficient evidence to obtain a conviction has no merit. I have stated above that in my view the charge was not proved beyond reasonable doubt and therefore any appeal would have little chance of success. That the complainant lost property worth Kshs.100,000/- was not proved. The structure is said to have been of mud and makuti. The doors were recovered by PW.2 together with the weighing machine. No evidence was produced of the value now claimed.

Further, that no prejudice will be suffered by the Respondent is also without merit. It is sought to put the Respondent at risk of a criminal trial a second time without good justification. This is against his constitutional rights.

After making above comments I find that the delay in filing appeal within the prescribed time is unjustified and that the complainant is guilty of inordinate delay in bringing the matter to the office of Attorney-General. I also find that it would be prejudicial to the interests of the Respondent who is opposing this application to grant leave after such a lengthy delay.

The application is therefore dismissed.

Dated at Mombasa this 24th day of May, 2004.

JOYCE KHAMINWA

J U D G E