REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Misc Crim Appli 31 of 2004

REPUBLIC ::: APPLICANT

VERSUS

SAID JUME MASOUD :::::::::::::::::::::::::: RESPONDENT

R U L I N G

The application dated 26.4.2004 is brought pursuant to Section 349 of the Criminal Procedure Code seeking leave of the court to file appeal out of time. The applicant is the State and the application is supported by the affidavit of Moses O'mirera the Learned State Counsel.

The Respondent was charged in Criminal Case 1771/02 with 9 counts of forgery and 2 counts of stealing before Senior Principal Magistrate Court Machakos. He was acquitted on all the counts and that the State immediately applied for proceedings but none were forthcoming. The complainants Counsel then complained about the dissatisfaction with the decision of the court vide letter MM 3 dated 26.6.2003. The State sent a reminder to the court on 14.4.2004 when they were given the proceedings which are now before court. The State contends that a question of law arises in the lower court proceedings since the prosecution was conducted by an unqualified prosecutor who was Cpl Ngela and that they will be asking for a retrial.

A replying affidavit in opposition to the application was filed by Said Juma Masoud the respondent in which the respondent generally states that the delay in filing appeal is not explained and the annextures do not show why the delay; that the application has no merit as there is no draft petition of appeal annexed.

The judgement was delivered by the lower court on 26.6.2003.Indeed the prosecution applied for proceedings on same date though the reason for the application was not stated. It was not indicated that it was for purposes of appeal. The complaint by Mr. Kakonzi who held watching brief for the complainant was drafted on same date and received by Attorney General on 27.6.2003.There was no evidence that any application for proceedings was made by the Attorney General after that. The purported application dated 8.7.2004 is not dated, not stamped as received by court nor was it copied to the respondent. There is no evidence of application for proceedings. Annexture MM 4 was written 9 months after the judgement was delivered. The proceedings annexed were certified on 25.9.2003; 3 months after the delivery of judgement. The State does not have any letter for the court to show when the proceedings were issued. The conclusion I draw is that the State never really applied for proceedings and never bothered to get them since they were ready within 3 months and a delay of 10 months from date of delivery of judgement to the filing of this application has not been explained. The delay is inordinate and unreasonable under the circumstances.

I have perused the lower court record and indeed the prosecution was partly conducted by an Inspector of police and by one Cpl Ngela who is an unqualified prosecutor. That means that the proceedings before the lower courts were invalid and defective in light of Section 85 (2) Penal Code and Section 88 Penal Code and as per the decision in the case of **ROY ELIREMA V. REPUBLIC CR. APP. 67/03.**

The question is whether looking at the evidence on record the court would order a retrial. On a perusal of the record it is my view that the magistrate properly considered the evidence and there was not sufficient evidence to warrant a conviction and the court would not act in vain by ordering a retrial.

The State did not file a draft petition of appeal for the court to look at in considering the merit of the

appeal. That is a grave omission on their part. However in considering whether or not the court could order a retrial that would be part of the grounds of appeal. In conclusion I do agree with the respondent that the application lacks merit. It is hereby dismissed.

Dated, read and delivered at Machakos this 6th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE