



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC CRIMI APPLI 51 OF 2004

(From original Protection and Discipline case No. 7 of 2003 of the Senior
Principal Magistrate's Court at Machakos: P. M. Muriuki Esq.)

REPUBLIC APPLICANT

VERSUS

PATRICIA MUSAU KIMEU RESPONDENT

RULING

Before me for hearing was the application by the Attorney General dated 13.9.94 seeking leave of this court to be granted to the Attorney General so that they can file appeal out of time. The application is supported by the affidavit of the Learned State Counsel Moses O'mirera.

Briefly the applicants case is that the respondent had been charged before the Children's Court – Protection and Discipline 7/2003. He was acquitted on 29.1.04 under Section 210 Criminal Procedure Code and that the Children's Officer applied for proceedings but the file went missing. A reminder was sent to the Deputy Registrar and proceedings were then forwarded to them on 6.7.2004 but were received on 27.8.2004. It is the State Counsels view that there has not been inordinate delay in filing this matter. It is his view that the appeal raises a question of law and the application should be allowed to enable them file their appeal.

The application was opposed and a replying affidavit was sworn by the Respondent Patrick Kimeu. The main ground of opposition is that there has been inordinate and an explained delay in filing of the appeal.

I have carefully considered this application and my first observation is that though the State Counsel submitted that the Children's officer applied for proceedings of the lower court after the order of dismissal was made, there is no evidence to that effect.

The first application for proceedings is that of 3.3.2004. This was just over a month since the dismissal order was made. There is no explanation for that delay.

The said application for proceedings was made to the Deputy Registrar which I do agree was irregular. This was a lower court case and the person charged with responsibility of availing proceedings would have been the Chief Magistrate or Executive Officer. Deputy Registrar is an officer who deals with matters of the High Court. This misdirection of the letter must have contributed to the delay.

As per the certificate of delay dated 2.9.2004, it is apparent that these proceedings were typed by 6.7.2004 but the court does accept blame that they were wrongly dispatched but they were forwarded to Attorney General's office on 27.8.2004. The State Counsel however admits having received the

proceedings by 29.7.2004 contrary to the contents of the certificate of delay. So, even having received the proceedings on 29.7.2004 the applicants did not file this application till 5.9.2004. There was a delay over 1½ months. Again this delay is not explained by the State Counsel.

I do agree with Respondent counsel that the proceedings of the lower court were not properly introduced because they are not referred to in the affidavit in support of the application. That be as it may, I believe the failure to mention the proceedings in the affidavit has not prejudiced the respondent. Proceedings of the lower court are necessary for such application and the court can still allow a filing of a further affidavit to have them introduced. There is no evidence that they are not the proper record of the lower court.

Indeed this application was riddled with several defects as to form but the court has also to look at the merits. I do note that the appeal does raise a question of law in that the court was not properly constituted when the order of dismissal was made as the clerk and court prosecutor were absent. Further to the above this was a case relating to children. This case was dismissed before it was heard. This being a children's matter it is only fair that the matter be given a chance to be canvassed fully, so that the orders made should only be in the best interest of the children. Despite the inordinate delay in bringing the application the court finds that for the ends of justice to be met, it is only fair that this application be allowed.

I therefore allow the application to have the appeal filed out of time and the appellant is given 14 days within which to have the appeal record prepared and placed before the judge for admission so that a hearing date can be taken thereafter. Orders accordingly.

Dated at Machakos this 9th day of November 2004.

R. V. WENDOH

JUDGE