



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E063 OF 2021**

**REPUBLIC.....APPLICANT**

**-V/S-**

**AHMED FAKIR MOHAMED.....RESPONDENT**

**RULING**

**Application**

1. The application dated 9<sup>th</sup> July 2021 was brought under Sections 348A and 349 of the Criminal Procedure Code and all other enabling provisions of the law.
2. The Applicant seeks for orders that leave be granted to the Applicant to file an appeal out of time and that the annexed draft petition of appeal be deemed as duly filed.
3. The application was premised on the grounds that the Respondent was charged with the offence of forgery contrary to Section 349 of the Penal Code in Mombasa Chief Magistrate Criminal Case No. 1760 of 2018. On 23<sup>rd</sup> February 2021, the trial court acquitted the Respondent of the said charges. The 14 days within which the right to appeal lies has since lapsed owing to delay in supplying of copies of the proceedings and judgment and that the intended appeal has overwhelming chances of success.
4. The application is supported by the Applicant's affidavit sworn by Karnael Nyawinda a prosecution counsel at the Director of Public Prosecutions on 9<sup>th</sup> July 2021 with such other grounds.

**Response**

5. The Respondent filed grounds of opposition dated 2.8.2021 in response to the Notice of Motion application dated 9.7.2021 and an affidavit in response sworn by Ahmed Fakir Mohamed on 1<sup>st</sup> October 2021. That the application is an abuse of the court process and it is in the interest of justice that the application be dismissed with costs to the Respondent.
6. The Respondent stated that vide a demand letter dated 17.3.2021, a notice to the Attorney General dated 17.3.2021, and a notice to the DPP, AG and the Complainant dated 7.6.2021 stated his intention to institute civil proceedings against all the said parties, securing special damages, general damages for malicious prosecution and defamation, and costs and interests. That even despite receipt of the documentation, neither the prosecution nor the complainant made any steps towards lodging appeal.

**Applicant's Submissions**

7. The Applicant submits that the ground upon which the application has been brought is that there was a delay in supply of the copies of the typed proceedings and judgment proceedings to be appealed against by the court registry.
8. The Applicant submits on the DPP's right of appeal by citing Section 348A of the Criminal Procedure Code under which the DPP is granted a right of appeal in criminal trials, applies to acquittal, order of refusal or dismissal of charge
9. The Applicant submits on limitation of time for filing appeals by citing Section 349 of the Criminal Procedure Code which provides that *'an appeal shall be entered within fourteen days of the date of the order or sentence appealed against: provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within the period has been caused by the inability of the appellant or his advocate to obtain a*

copy of the judgment or order appealed against, and a copy of the record within a reasonable time of applying to the court therefore.’ The Applicant further submitted that the jurisdiction of this court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of court.

10. The Applicant submits by citing the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR where it was held that, ‘The law does not set out any minimum and maximum period of delay. All it state is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.’ The Applicant submits that a close interrogation of the above reveals that this Honourable Court is afforded discretion to grant leave for an appeal to be filed out of 14 days period, set in the proviso in that Section. The court in exercising that discretion is required to consider if good cause can be shown by the applicant and the court should admit an appeal out of time if it is satisfied failure to file the appeal out of time is caused by the trial court’s judgment and record not being supplied within reasonable time on being applied for. The Applicant further submits by citing the cases of *Director of Public Prosecutions v Enos Juma Robert* [2021] eKLR, *Silas Okumu Diang’a/ODPP v George Onyona Arek* [2020] eKLR and *Duncan Mwangi Ngatia v Republic* [2018] eKLR where the court considered the DPP’s application to file appeals out of time.

11. The Applicant submits that on the other hand, Article 159 (2)(d) of the Constitution espouses the principle of disregard of undue procedural technicalities as was settled in the cases of *Jaldesa Tuke Dabelo v IEBC & Another* [2015] eKLR, *Raila Odinga & 5 Others v IEBC & 3 Others* [2013] eKLR, *Lemanken Arata v Harrum Meita Mei Lempaka & 2 Others* eKLR, *Patricia Cherotich Sawe v IEBC & 4 Others* [2015] eKLR where the courts summarized the import of the principle that, rules of procedure are handmaidens of justice, a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case, and the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice.

12. The Applicant submits that it is clear from the provision of the above Section 49 of the Criminal Procedure Code that the court in considering an application to file an appeal out of time is not required to consider the merits or otherwise of the appeal. The Applicant then prayed that the application be allowed to file the appeal out of time.

### **Respondent’s Submissions**

13. The Respondent Submits that the only issues arising from the entirety of facts/evidence presented and the law pleaded are whether the Applicant has demonstrated a bona fide intention to appeal within the prescribed appeal period but could not file the appeal due to failure to obtain the proceedings, and whether the Applicant has accounted for or explained the delay in initiating the appeal.

14. The Respondent submits on whether the Applicant has demonstrated a bona fide intention to appeal within the prescribed appeal period but could not file the appeal due to failure to obtain the proceedings that by a cursory glance at the supporting affidavit sworn on 9.6.2021 by the Applicant, it is worth noting that no proof has been annexed to make known of the efforts that were made by the Applicant in procuring proceedings for the judgment delivered. The Respondent submits that the Applicant has not disclosed any good cause to warrant this honourable court to allow the instant motion for leave to lodge an appeal out of time. The Respondent submits by relying on Section 107, 109, 120 of the Evidence Act and Section 349 and 348A (1) of the Criminal Procedure Code. The Respondent submits further by citing the cases of the *Director of Public Prosecutions v Peter Mcharo Kombo & Another* [2018] eKLR, *Republic v Livingstone Nyaga Muthuri* [2020] eKLR and *Republic v Wiliam Macharia Murathe* [2016] eKLR.

15. The Respondent submits on whether the Applicant has accounted for or explained the delay in initiating the appeal by citing *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others* [2014] eKLR, *Republic v Hassan Daniel Nodoro* [2020] eKLR and *Alex Salaiyo Abraham v Republic* [2020] eKLR. The Respondent submits that the Applicant has not accounted for or explained the delay in lodging an appeal against the trial court’s decision.

16. The Respondent submits that the Applicant has not sufficiently made out a prima facie case and/or sufficient case on the merits to warrant grant of any of the prayers sought in the Notice of Motion application dated 9.7.2021. The Respondent urged the Honourable Court to wholly dismiss the Applicant’s instant motion.

### **Analysis and Determination**

17. This court has considered the Notice of Motion application dated 9.7.2021 and submissions of the parties therein, as well as Section 348A of the CPC which grants office of the DPP a right to appeal and Section 349 of the CPC on limitation of time of appeal.

18. The decision sought to be appealed against arises from the prosecution of the Respondent that commenced in 2018. The judgment sought to be appealed against was delivered on 23.2.2021 and the Applicant had the right of appeal within 14 days. The time within which the Applicant was required to file the appeal lapsed on 9.3.2021 without filing of the said appeal. The Applicant now applies for filing of the appeal out of time citing the delay in supplying copies of proceedings and judgment.

19. In the Respondent’s grounds of opposition and affidavit in response, the Respondent argued that a notice was sent to all concerned parties on the intention to institute civil proceedings to secure reliefs for special damages, general damages for malicious prosecution and defamation, and costs and interest. The Respondent further argued that even despite receipt of the documentation, neither the prosecution nor the complainant made any steps towards lodging the appeal. That the Petition of Appeal annexed thereto is itself devoid of any arguable issue.

20. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] KLR – SCK, the Supreme Court set out the principles to be considered by court in exercising the discretion to extend time for filing an appeal as follows:-

**(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.**

**(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**

**(3) Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis.**

**(4) Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court.**

**(5) Whether there would be any prejudice suffered by the respondents if the extension was granted.**

**(6) Whether the application had been brought without undue delay and finally whether in certain cases like election petitions public interest ought to be a consideration for extending time.**

21. This court however notes that the Applicant did not annex a copy of the request for certified copies of the proceedings or judgment. This court further notes that the copy of judgment annexed to the Respondent's affidavit in response was certified on 7.4.2021, while the Applicant's Notice of Motion application is dated 9.7.2021 and filed on the same date. Contrary to the Applicant's averment of delay in being supplied with copies of the proceedings and judgment, the judgment was available almost 3 months prior to filing of the application for leave to file an appeal out of time.

22. This court has also considered the draft petition of appeal annexed to the Notice of Motion Application where four grounds of appeal have been set out therein. However, this court has not found sufficient reasons for the delay to exercise discretion in favour of the applicant.

23. In conclusion, the application has no merit and it is hereby dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 14TH DAY OF DECEMBER 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Turuki- Court Assistant

Mr. Mulamula for Applicant – N/A on official duty in Nairobi

Mr. Ngonze for the Respondent

Court: Notice of Ruling to be issue to Applicant's Counsel

Certified copy of ruling to be supplied to counsel for parties on payment of copying charges.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**