



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CRIMINAL APPLICATION NO. 61 OF 2019

REPUBLIC.....APPLICANT

VERSUS

ZABERIO MUTUA.....RESPONDENT

RULING

1. By a Chamber Summons dated 15/10/2019 brought under *Section 349 of the Criminal Procedure Code CAP 75 Laws of Kenya*, the applicant sought leave to appeal out of time.

2. The grounds upon which the application was grounded upon were set out in the body of the Summons and the supporting affidavit of **P. M. Namiti** sworn on 15/10/2019. It was contended that the delay in filing the appeal, which has overwhelming chances of success, was not inordinate. That the prosecution was served with the certified copies of the proceedings and judgment late. That the intended appeal will serve the interests of justice.

3. The application was opposed vide the replying affidavit of **Zaberio Mutua** sworn on 1/01/2020. He denied that copies of the judgment were supplied late. That from the record of the lower court, the complainant applied for the copy of the judgment for which assessment was made and paid for on 7/01/2019. The complainant received the copy of the judgment on 10/01/2019.

4. He further contended that on his part, he applied for the copy of the judgment on 4/1/2019 and received the same on 9/1/2019. In his view, the application was occasioned by his demand made on 25/9/2019 to the complainant for having given false information against him. In the premises, the respondent contended that the application lacked merit and should be dismissed as the prosecution had more than ample time to file an appeal, if it so desired.

5. Although the court had on 15/6/2020 directed the parties to file their respective submissions, only the respondent who filed his. It was submitted on his behalf that there had been inordinate delay in filing the application. That the period of 9 months was un-acceptably long.

6. *Section 349 of the Criminal Procedure Code* provides: -

“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 that 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 therefor”.

7. From the said provision, an appeal should be filed within fourteen days of the date of the judgment, order or sentence appealed against. However, the Court is given the discretion to allow an appeal to be filed out of time. The conditions for allowing an appeal out of time are two fold, firstly, if the application is made within reasonable time, and secondly, if the failure to file the appeal is caused by the inability to obtain a copy of the judgment or order appealed against, and a copy of the record.

8. In **Republic v William Macharia Murathe [2016] Eklr**, Mativo J held: -

“The issues that fall for determination in this application are (a) whether the applicant has disclosed a good cause as provided in the above proviso to warrant this court to allow the application under consideration. In other words, has the applicant 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; or has the applicant accounted for or explained the delay in initiating the appeal; (b) Did the DPP act

independently in preferring the intended appeal and (c) does the proposed appeal have merits.”

9. This court adopts the foregoing pronouncement. The judgment the applicant seeks to appeal against was delivered on 4/01/2019. By that judgment, the respondent was acquitted under **section 215 of the Criminal Procedure Code** of the offence of assault causing actual bodily harm contrary to **section 251 of the Penal Code**.

10. The complainant was aggrieved by the said acquittal and applied for the judgment on 7/1/2019 which was well within the period for appealing. The judgment was supplied to him on 10/1/2019 which was still well within the time for appealing. However, it is on 7/10/2019 when he informed the applicant of his intention to appeal. The applicant studied the matter and formed the opinion that the intended appeal has high chances of succeeding.

11. The current application was filed on 16/10/2019 which is about nine months after the judgment was entered and supplied to the complainant. There was is inordinate delay which required to be explained by the applicant. From the record, it is clear that the complainant duly received the judgment on time but took no action.

12. It would seem that for 8 months, he did nothing but was jolted into action after receiving the respondent’s threat of a civil action vide a letter dated 25/09/2019 from the latter’s advocates.

13. In view of the foregoing, it is clear that the complainant and the prosecution well knew the outcome of the lower court’s decision and were in possession of the judgment within time. Both took no action for nearly 9 months which was in my view inordinate. If there was any genuine intention to appeal, nothing would have prevented them from lodging the appeal either within time or make the present application earlier than October, 2019.

14. To this Court’s mind, there is no bona fides in the current application. There was no explanation given for the delay between January and October, 2019. The application was motivated by ulterior motive, to counter the threat of a civil action by the respondent.

15. Accordingly, I am of the view that the applicant failed to meet the criteria set out for under **section 349 of the Criminal Procedure Code**. In this regard, I find the application to be without merit and I hereby dismiss the same.

DATED and DELIVERED at Meru this 16th day of July, 2020.

A. MABEYA

JUDGE