



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL MISCELLANEOUS APPLICATION NO. 116 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CAROLINE MBULWA.....RESPONDENT**

**RULING**

1. The Applicant herein has filed an application dated 27<sup>th</sup> July, 2018 seeking for the following orders:-

***(a) That this court be pleased to admit the Applicant's Appeal out of time notwithstanding that it has been brought after 14 days.***

***(b) That the annexed petition be deemed as duly filed.***

2. The application is supported by the annexed affidavit of **Benard Ngetich** sworn on even date. The Applicant's case is that the delay in filing the Appeal has been caused by the inability of the Applicant to obtain the judgement and the copy of the court proceedings from the lower court over the same. It is further the Applicant's case that it has a good appeal with overwhelming chances of success.

3. The application was opposed by the Respondent who filed a Replying Affidavit sworn on the 29<sup>th</sup> October, 2018 in which she raised several grounds of objection *inter alia*: that the appeal by the Applicant is frivolous, unmeritorious and without basis and which should be struck out; that the matter was before a competent magistrate in the lower court; that the trial was conducted in a proper manner in accordance with the law and that both parties were given equal opportunities to adduce their evidence.

4. It was submitted by Mr. Machogu Learned Counsel for the Applicant that Section 349 of the Criminal Procedure Code gives this court discretion to admit an appeal after the period for filing it has lapsed 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 judgement or order appealed against. It was further submitted that the lower court judgement was delivered on the 13/04/2018 and that the Counsel watching brief for the Complainant brought the matter to the attention of the prosecution counsel on 25/05/2018 for purposes of consideration whether the matter was suitable for Appeal. A request for proceedings was made on 4/7/2018 and which took some time before they were supplied. It was submitted that the draft petition and grounds of appeal raise matters of law which ought to be considered by the High court as they have very high chances of success as provided for under Section 348 A of the Criminal Procedure Code. Learned Counsel sought reliance in the case of **Mohamed Shelie Maro =Vs= Republic [2013] eKLR** and submitted that it would be a miscarriage of justice if this court shuts out an Appellant who has come to court late but has given cogent reasons for the delay and should be entitled to enjoy rights to fair trial.

5. Mr. Nzioki Mutua for the Respondent submitted that the Appeal is only intended to waste the court's time and should be dismissed. He submitted that the Applicant is indolent and guilty of laches as no reason has been furnished as to why the appeal was not filed within the time stipulated under the law. It was finally submitted that the grounds of appeal hold no likelihood of success even if the appeal is admitted since the trial court had accorded both parties the opportunity to present their evidence and which was properly analyzed by the trial magistrate who eventually established that a prima facie case had not been established against the Respondent and acquitted her of the charges.

6. I have considered the Applicant's application and the rival affidavits as well as the submissions of both learned counsels. The guiding provision on this matter is Section 349 of the Criminal Procedure Code which provides as follows:-

***"An appeal shall be entered within fourteen (14) 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 to 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. It has been indicated by the Applicant that the judgment of the lower court was delivered on the 13/04/2018. Ordinarily the Appeal should have been lodged within 14 days thereafter. It appears this was not done by the Applicant. The Applicant has presented the reasons which led to the delay in filing the requisite appeal. The annexures to the Applicant's affidavit indicate that there had been a counsel watching brief for the complainant and who upon discussing the matter with their client resolved to lodge an appeal. Indeed a complainant or counsel watching brief in a criminal case does not have the right to directly lodge an appeal since the prosecution of cases is usually conducted by the Republic through the Director of Public Prosecution. It was on this basis that the counsel watching brief wrote a letter dated 21/05/2018 to the Director of Public Prosecution requesting that an appeal be lodged. The Director of Public Prosecution thus commenced the process of seeking for the record from the lower court. Indeed it is not in doubt that the period for lodging the appeal has since elapsed. The Applicant has presented reasons for delay which I find plausible. The complainant having been aggrieved by the judgement was entitled to approach the Director of Public Prosecution to lodge the appeal. Under Article 48 and 50 of the Constitution, the complainant herein is entitled to access justice as well as rights to fair trial. The Applicant has properly approached this court for redress and as such it would be a travesty of justice to shut out the Applicant who has given cogent reasons for the delay in lodging the appeal within the stipulated period. No prejudice will be suffered by the Respondent if the Applicant's application is allowed as she will have the opportunity to defend her acquittal by the lower court during the hearing of the Applicant's appeal.

8. It is noted that the Respondent's Counsel has submitted that the intended appeal is a waste of the court's time and ought to be dismissed. However upon perusal of the Applicant's draft petition and grounds of Appeal, I find the same raises certain legal issues which should be addressed by this court. I am not convinced that the appeal to be filed is for academic or cosmetic purposes as alluded to by the Respondent's Counsel. It is only during the determination of the appeal that the issue of whether or not the judgement of the trial court was free from any errors. The Respondent will not suffer any prejudice if the appeal is admitted as she shall have her day in court to challenge the said appeal.

9. In the result, I find merit in the Applicant's application dated 27/07/2018. The same is allowed in the following terms:

***(a) The Applicant to file and serve its Petition of appeal within ten (10) days from the date hereof.***

***(b) The draft grounds of appeal herein are deemed as duly filed.***

***(c) The Deputy Registrar is directed to open a criminal appeal file and call for the lower court record and commence admission processes and thereafter the parties herein shall proceed to take directions on the disposal of the appeal.***

***(d) There will be no order as to costs.***

It is so ordered.

**Dated and delivered at Machakos this 2<sup>nd</sup> day of May, 2019.**

**D.K. KEMEI**

**JUDGE**