



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 20 OF 2017

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

BERNARD MURATHI CHARLES.....1ST RESPONDENT

DANIEL MUGAMBI NJERU.....2ND RESPONDENT

RULING

A. Introduction

1. This is a ruling on an application dated 9th October 2017 seeking for orders for extension of time to file an appeal.
2. The respondents and another not before court were charged of the offence of malicious damage to property under **Section 339 (1) of the Penal Code** and subsequently acquitted under **Section 210 of the Criminal Procedure Code**. Being dissatisfied with the ruling of the magistrate in Embu Criminal Case No. 941 of 2015, the applicant moved the court to provide them with copies of the court proceedings as well as the judgement vide a letter dated 18th July 2017. The applicants state that they received certified copies of the ruling on the 27th September 2017.
3. In response to the application, the 1st respondent deposing on his behalf as well as that of the 2nd respondent deposed that the application was an abuse of the court process as the applicant had not given good reasons why the appeal was not filed on time since no proceedings were required to lodge the appeal.
4. The respondents further deposed that they were acquitted under section 210 of the Criminal Procedure Code as there was no evidence against them and further that the annexed petition of appeal did not raise any triable issues.

B. Applicant's Submissions

5. The applicant submits that the failure to procure the certified copies of the ruling and the judgement from the court on time occasioned the delay in filing the appeal. Ms. Mati for the applicant submitted that the ruling was delivered on the 16th May 2017 after which they wrote to the court seeking certified copies of the proceedings for purposes of appeal on the 18th July 2017 however the same were only provided by court on the 27th September 2017.
6. Ms. Mati relying on **Misc Criminal Application 10/2014; Republic v Jane Njeri** submitted that the only consideration that a court must give regard to in exercising its discretion to grant eave to file an appeal out of time was the inability of the appellant or his advocate to obtain a copy of the judgement or order appealed against and not whether the appeal would succeed as was held by Ngaah J. in the aforementioned case.
7. The respondents did not file submissions in respect of this application.

C. Analysis of the Law

8. The law on enlargement of time is clearly outlined under section 349 of the Criminal Procedure Code proviso therein which states as follows:

“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 applicant or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record, within a reasonable time of the applying to the court therefore.”

9. The reading of the provision to section 349 lays emphasis on the offender/accused or applicant to obtain a copy of the judgement and or record within a reasonable time from the time of conclusion of the matter. The time requisite of 14 days within which an applicant has to lodge an appeal to the High Court is under section 349 and the time required to obtain a copy of the judgement or record of proceedings in my view will be excluded.

10. The first stage of lodging an appeal is to file a notice of appeal and secondly to file the petition itself. The legitimate expectation of Section 349 on 14 days limited period to an aggrieved party would be compelled to file a notice of appeal stating that one is dissatisfied with conviction, sentence or acquittal of the trial court. By that action alone the appellants would have satisfied the provisions of Section 349 as to the 14 days period.

11. Under **Section 350 (1)** it provides interalia that:

“Every petition to the High Court unless the court so desires be accompanied by a copy of the judgement or order appealed against.”

12. What this means is that an applicant in filing the petition should attach the copy of the judgement of the trial court which is intended to be contested on appeal. The time to file an appeal begins to tick from the date such a ruling or judgement has been pronounced and not the day the copy of judgement or order appealed from was obtained. The applicants are therefore caught up on time reference of 14 days under Section 349 and in the provisions of Section 350 (1) requirement of attaching a copy of order or judgement appealed from.

13. From the pleadings before this court it is undisputed that the learned trial magistrate delivered his judgement on 16th May 2017. The 14 days period within which to file the petition under section 350 (a) of the Criminal Procedure Code ended on 5th June 2017. The applicant wrote to the court seeking certified copies of the proceedings for purposes of appeal on the 18th July 2017. There is no evidence that the appellants had received the extracted order or copy of judgement to be attached to the petition of appeal.

14. This court has been presented with the key reason for the delay being the failure to procure the certified copies of the ruling and the judgement on time. As the application demonstrates from the averments in affidavits, the applicant overshot the period of appeal by more than a month. That cannot be said that they were negligent nor guilty of laches to file the intended appeal. Even if they were to file the petition of appeal this court takes judicial notice that the applicant only received the copies of the proceedings and judgement on the 27th September 2017

15. Therefore, weighing one factor after another it is my opinion that the applicant has demonstrated good cause for this court to exercise discretion conferred by the code to find that the interest of justice would be best served by allowing this application for extension of time.

16. The application is hereby allowed and the applicant has fourteen (14) days to file the appeal. In default, these orders will automatically lapse.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for applicants

Respondents present