



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
MISCELLANEOUS CRIMINAL APPLICATION NO. 11 OF 2019

(In the matter of an intended Appeal)

BETWEEN

REPUBLIC.....APPLICANT/PROSECUTOR

-VERSUS-

KARISA KENGA KALIWI.....RESPONDENT/ACCUSED PERSON

CORAM: Justice R. Nyakundi

Ms Ruttoh h/b for Omwancha for the Respondent

Ms Sombo for the State

Karisa Kenga Kaliwi

RULING

Criminal Practice and Procedure – application for leave to file a notice of appeal out of time – the time limits fixed the principles laid down that discuss the law on extension for leave within which to file an appeal.

The Office of the Director of Public Prosecutions (hereinafter DPP), through Senior Prosecution Counsel Alice Mathangani, brought an Application under **Section 349 Criminal Procedure Code** seeking leave to appeal out of time the decision of Hon. Nyawiri SPM delivered at Malindi in **Criminal Case No. 363 of 2011** on the 8th of February 2018.

Appellant's Case

The Application was supported by an affidavit sworn by Renson Igonga, Assistant Director of Public Prosecutions, and Malindi on 28th March 2019 and filed on even date. He averred that judgment in **Criminal Case No. 363 of 2011** was delivered on 8th February 2018 and on 9th February 2018, a Mr. Vincent Monda wrote a letter to the executive officer Malindi law courts requesting for the proceedings. It was further averred that the Office of the DPP received a certified copy of the proceedings from the Chief Magistrate on the 13th February 2019 accompanied by a certificate of delay dated 22nd February 2019 showing that the proceedings were delayed due to no fault on the part of the prosecution for the undue delay. It was also deponed that that the Appellant had prepared the grounds to be relied upon during the appeal and that it was in the interests of justice that the court ought to admit the appeal.

Respondent's Case

The Respondent and Accused person Karisa Kenga Kaliwi by an affidavit sworn on 27th February 2019 and filed on even date averred that the Applicant's/Prosecutor's Application was misconceived, sham, illegal, non-starter, vexatious and a total abuse of the Court process and the gist of it ought to be dismissed with immediate effect for lack of disclosure of material and documentary evidence being relied upon the entire Application.

It was further averred that all the State had done was present mere sweeping statements that had no backing by annexed documents that would have demonstrated that indeed the averments stated are true so that the Court is fully convinced and guided on whether the delay was excusable or not. It was deponed that what the Applicant/Prosecutor was heavily relying on had been stated in passing but not actually annexed for this Honorable Court to believe that indeed efforts were made to write a letter to the Executive Officer and that a Certificate of Delay was issued. It was deponed that the statements were unsubstantiated and could not be believed. That if at all any steps were made it was absurd how the proceedings could not have delayed up to a period of one year as alleged.

According to the Respondent, no good and/or tangible reason had been advanced for the delay and neither had the draft grounds of Appeal been attached to convince this Honourable Court that there exist chances of success. That from the onset the Applicant/Prosecutor slept on his rights for more than one (1) year hence the instant Application was an afterthought founded on unsubstantiated facts and not based on delay occasioned by the Court.

The Respondent deponed that ignorance has always not been a Defence, the Applicant/Prosecutor had not demonstrated convincing reasons for the inordinate delay so the Application lacked merit and should be dismissed. The explanation given for the delay was not satisfactory but a ploy to mislead this Court because from the Application it seems that the Applicant/Prosecutor had no intention of appealing that is why the application on the face of it was just shoddy and enlarging time would mean entertaining an afterthought which was inconsistent with a quest for justice.

It was averred that that it is trite law that the decision to extend time for appealing is discretionary but the law required that the Court must be satisfied that failure or delay to appeal in time was inordinate so as to be at par with the maxim of equity that he who seeks equity must be vigilant and not indolent. Furthermore, that Courts should not fail to take into account the pain of the Respondent/Accused person who had been continuing with his life only to be bombarded with an Appeal after a reasonable time has lapsed.

On the foregoing grounds, the Respondent urged the court to dismiss the Application herein for the interest of justice.

Analysis and Determinations

Being fully apprised of the contesting positions, I find that the sole issue for determination is whether the court ought to grant the leave to file the appeal out of time.

The instant Application has been brought under Section 384A Criminal Procedure Code which seems to be an inadvertent error as the said Section is non-existent. The attendant section for appealing acquittals is **Section 348A of the Criminal Procedure Code** which provides:

“348A. Right of appeal against acquittal, order of refusal or order of dismissal

(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.”

However, under **Section 349**, the time within which such appeal may be brought is provided for in the following terms:

“349. Limitation of time of appeal

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.”

As per the law therefore, for such leave to file an appeal out of time to be granted, all the Appellant had to do was demonstrate that the failure to enter an appeal within the prescribed period had been occasioned by its inability to obtain a copy of the judgement or order appealed against or a copy of the record. In the affidavit sworn by Renson Ingonga Assistant DPP, it was averred that after judgment in **Criminal Case No. 363 of 2011** was delivered on 8th February 2018, on 9th February 2018, a Mr. Vincent Monda wrote a letter to the executive officer Malindi law courts requesting for the proceedings which were duly availed on the 13th February 2019 accompanied by a certificate of delay dated 22nd February 2019.

However, as has been argued by the Respondent, a perusal of the Affidavit sworn by Renson Ingonga reveals that the cited annexures to wit the letter to the executive officer and the certificate of delay are missing. Be that as it may, upon a further perusal of the lower court file, I came upon a letter dated 9th February 2018 to the Executive Officer Malindi Law Court, from one Vincent Monda Senior Assistant DPP. This letter bears the stamp of Malindi Law Courts marking it received on the 9th February 2018. In addition, there is a memo dated 13th December 2018 from the Executive Officer Malindi to the Hon. Chief Magistrate seeking directions on how to proceed given the DPP had applied for typed proceedings and the same had not been availed as there were gaps in it. There is also a further letter dated 17th December 2018 and addressed to the Chief Magistrate Nakuru Law Courts who per the Record had occasion to handle **Criminal Case No. 363 of 2011**. This letter seeks the Hon. Magistrates assistance in filling the gaps in the typed of the proceedings.

Finally and most tellingly, the Record reveals a Certificate of Delay dated 22nd February 2019 and bearing the stamp and signature of the Hon. Chief Magistrate Malindi. This certificate acknowledges the Office of the DPPs Application for typed proceedings and explains the delay in availing said proceedings as being necessary for typing, proof reading and certification of the proceedings and judgement.

The Supreme Court of Kenya in **Nicholas Kiptoo arap Korir Salat –V- IEBC & 7 Others [2014] eKLR** set out the principles to be applied in considering an application to extend time. The court stated:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 should 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. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

Faced with a similar Application as in the instant matter, **Limo J** in **Republic v John Mwangangi Icharia Criminal Miscellaneous Application No. 33 of 2018 [2019] eKLR** held:

“6. This court has considered this application and grounds upon which it has been made. I have considered the grounds of opposition. The provisions of Section 384 A of the Criminal Procedure Code gives the Director of Public Prosecution a window to appeal from an acquittal and Section 349 gives it 14 days to do so. This court is however given discretion under Section 349 to admit the appeal after the period of 14 days has lapsed if it is satisfied that failure to enter the appeal has been caused by inability to obtain a copy of the judgment or order or copy of the record within a reasonable time of applying for the same.

7. It is quite clear from this application that the Office of the Director of Public Prosecution was prompted to action by the complainant who had reservations about the acquittal of the Respondent in the trial court. I have noted that he tried to get proceedings vide a letter dated 20th August, 2018 five months after the judgment was delivered and though he has not enclosed an earlier letter dated 9th April 2018, I am inclined to give him the benefit of doubt for purposes of upholding his right to access justice under Article 48 of the Constitution of Kenya 2010. Courts will always exercise their discretion in a manner that does not unnecessarily impede right of parties to access justice and it is only in that spirit that I am inclined to allow this application. The state (Office of the Director of the Public Prosecution) is granted 14 days leave to file its appeal. The Respondent's bond is extended until the appeal is filed and determined.”

Juxtaposing the principles espoused in the immediate foregoing authorities against the facts as discussed in the preceding discourse, this court is convinced that the failure to enter the appeal within the prescribed period was caused by the inability of the Applicant 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 thereof.

In the upshot, I find that the application is meritorious and I allow it. The applicant shall file appeal within 14 days of today.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 5TH DAY OF JULY 2019

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R NYAKUNDI

JUDGE