



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

MISC. CRIMINAL APPLICATION NO.30 OF 2016

REPUBLIC.....APPLICANT

VERSUS

WILLIAM OKUKU NYAOKE.....RESPONDENT

RULING

1. By a chamber summons dated 11th August 2016, the State seeks to be granted leave to appeal out of time and upon such leave being granted then the annexed petition of appeal be deemed as duly filed.

2. In the supporting affidavit sworn by **AMMON OLUOCH OJWANG**, it is deposed that the respondent (**WILLIAM OKUKU NYAOKE**) was charged in **MBITA CRC NO.572 OF 2014** with the offence of grievous harm contrary to **Section 234** but was subsequently acquitted on 30/06/2016.

3. Upon conclusion of the matter, the complainant **BARNABAS ODHIAMBO OWITI** applied and paid for copies of the proceedings on 11/07/2015. However the proceedings were not immediately supplied and were only certified on 12/8/2016 and availed to the applicant on 15/08/2016.

4. Upon receipt of the proceedings and perusal thereof, this application was immediately filed because the period within which the appeal ought to have been filed had already lapsed.

5. The applicant contends that the delay was not inordinate and was in any event caused by the trial court not releasing the proceedings in time. The applicants maintain that the intended appeal is not frivolous and has overwhelming chances of success.

6. In opposing the application the respondent deposes in a replying affidavit that he was maliciously and wrongfully charged at Mbita Senior Resident Magistrate's court vide Criminal case No.572 of 2014 which proceed to a fair trial.

7. He states that there has been inordinate and unexplained delay in the matter and the application is simply intended to interfere with his constitutional rights after a rightful decision by the court.

In his view it was up to the prosecution to apply for the copies of the proceedings and not the complainant and he doubts the credibility of the annexed receipt which shows that the complainant paid for the proceedings.

8. The respondent also filed grounds of opposition in which he termed the application as a mere afterthought, brought in bad faith and only meant to abuse the court process.

9. **Section 349** of the **Criminal Procedure Code (Cap 75)** limits the appeal period to 14 days with a proviso that:-

“... the court to which these appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed ... 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 thereof.”

10. Technically the DPP is actually the advocate for the complainant. There is no provision whether legal or administrative barring an aggrieved individual from applying to the court for copies of proceedings so there was no mischief in what the complainant did. He acted diligently but the delay was on the part of the trial court, and by the time the proceedings were presented, the period within which to file the appeal had lapsed.

11. I have perused the letter written by the applicant requesting for the proceedings as well as the receipt issued in acknowledgment of the payment he made when he requested for the proceedings which was on 12/06/2016 and payment made vide receipt SN 2501707 issued on 11/7/16.

12. I have also perused the certified proceedings which show they were certified on 24/11/2016. Neither the complainant nor the office of the DPP Homa Bay contributed to the delay, which was solely caused by the court. I am satisfied with the explanation given and hold that the application is neither frivolous nor made with inordinate delay.

13. Consequently the applicant is granted leave to file appeal within 14 days hereof.

Delivered and dated this 4th day of April, 2017 at Homa Bay

H.A. OMONDI

JUDGE