



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CRIMINAL APPLICATION NO. 94 OF 2018

REPUBLIC.....APPELLANT

VERSUS

DEVRAJ MANJI SERGANI & 3 OTHERS.....RESPONDENT

RULING

Leave to appeal out of time

[1] The significant orders sought in the Summons dated 11th July 2018 which is expressed to be brought under Section 349 of the Criminal Procedure Code CAP 75 Laws of Kenya is to admit appeal out of time.

[2] The grounds upon which the application is founded are contained in the application as well as the supporting affidavit of P. M. Namiti, Senior Prosecution Counsel. It is averred:-

- a. That the certified copies of the proceedings and judgment were served late.
- b. That notwithstanding, it was urged that the delay to file the intended appeal it is not inordinate.
- c. In addition, the appeal has overwhelming chances of success.

Brief facts

[3] The respondents were charged at the subordinate court in Maua with the offences of conspiracy to defraud contrary to section 317 of the Penal Code, permitting another person to be in possession of ID card contrary to section 14 (1) (11) of the Registration of Persons Act; and making use of identity card belonging to another person contrary to section 14(1) of the Registration of Persons Act. On 16th February 2018, the respondent was acquitted under section 210 of the Criminal Procedure Code. The complainant was dissatisfied by the acquittal and intends to appeal.

Respondent resisted

[4] The Respondent opposed the application and filed a replying affidavit of Devraj Manji Sergani sworn on 24th July 2018 and on behalf of his co-respondents. He deposed that after the proceedings were supplied in 14th June 2018 there is no explanation why the prosecution took another 28 days to file this application. That the 4th respondent Samji Lalji Vekariya is an Indian national operating on a temporary work permit and was forced to remain in Kenya from 2015 until case was determined. It would be grossly unjust to coerce the 4th respondent to travel back to Kenya for the sake of this application. It would form a persecution to drag them back into these proceedings. The application is an abuse of the court process and should be dismissed with costs.

ANALYSIS AND DETERMINATION

[5] Under section 349 of the CPC, the court has discretion of admitting appeal after the period for filing it has lapsed 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. See the full text of the section below:-**

349. 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.

[6] In this case the applicant stated that he was supplied with certified copies of the proceedings and judgment late and produced a certificate of delay dated 14th June 2018. It was further explained that, the senior prosecution counsel had to peruse through proceedings to establish that the appeal has chances of success.

[7] Applying the test of law, I am satisfied that the failure to enter the appeal within the prescribed period was caused by the inability of the applicant or its legal counsel 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. Therefore, 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 Meru this 1st day of November 2018

F. GIKONYO

JUDGE

In presence of

Kiarie for state

Muriuki for respondents

F. GIKONYO

JUDGE