



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISCELLANEOUS CRIMINAL APPLICATION NO. 21 OF 2017

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

PETER MCHARO KOMBO.....1ST RESPONDENT

PAUL KIPLAGAT CHERUIYOT.....2ND RESPONDENT

RULING

1. The Applicant herein, the DPP, made application by Notice of Motion dated the 22nd day of February, 2017 seeking leave to appeal out of time. The intended appeal emanates from the decision of Hon. M. Kasera in Eldama Ravine Principal Magistrate's Court. Cr. Case No. 426 of 2016 delivered on the 21st day of July, 2016; in which, the Respondents herein were charged with four counts of conspiracy to defraud, and theft of various monies, the property of, the Government of Kenya.

2. In a Petition of Appeal dated 15th May, 2017 and expressed to be made under sections 348, 349, 350 (1) (2) and 354 of the Criminal Procedure Code, the Applicant sets out his grounds of appeal as follows:

1. The learned trial magistrate erred in law and in fact by sentencing the accused without specifying the sentence for each count as the accused had been charged with four counts.

2. The learned trial magistrate erred in law by sentencing the accused persons to three years probationary sentence and time to pay the stolen amount of money, a sentence that was too lenient in the circumstances.

3. The learned trial magistrate erred in law and fact by failing to set out a criteria on how the money was to be paid and who was to supervise the payments.

3. Counsel for the Applicant, Ms. Macharia Ass. DPP swore a Supporting Affidavit annexed to the application urging that the Respondents were sentenced to serve probation therapy for a period of 3 years during which they were to pay back the Ksh.2.2 Million; failure to which the amount to be recovered from the respondent as a civil debt. That a complaint was made to the DPP's office in Nairobi over the leniency of the sentence meted out against the Respondent's. She stated that it took a while to respond to the complaint and for their offices at Kabarnet to be involved, by the time they were in receipt of the said complaint in the month of December, 2016. They had been informed that a judge would be sent to Kabarnet High Court in the month of January, 2017; and they opted not to direct their office in Uasin Gishu to file the application for leave out of time only to have the same transferred back to Kabarnet, and that the appeal has an overwhelming chance of success.

4. Counsel for the Respondents opposed the application for leave to file appeal out of time and for that purpose filed Grounds of Opposition dated 29th May, 2018 and a Replying Affidavit sworn by the 2nd Respondent on 16th June, 2018. The Respondents' objection to the application was, principally, that the Respondents will suffer an injustice, prejudice and double jeopardy if the court entertained the application; that the order for the repayment by instalment of the monies subject of the criminal charges was an order by consent of the parties, and no appeal could arise in such circumstances. That the intended appeal had been overtaken by events of the ongoing repayment by instalments. The application was an afterthought made after inordinate delay and without any legal basis. That the orders sought do not lie in the proper course of the justice system; that the applicant should have sought review; and that the applicant had no *prima facie* case on record to seek such prayers and to dispute/or challenge a judgment/sentence that exists by consent."

Issue for determination

5. Before the question of extension of time to file appeal may arise, the court must ascertain that the party has a right of appeal, and

consequently the issues for determination is whether the DPP has a right of appeal in the circumstances of this case and, if so, whether the court will exercise discretion to extend time to file the appeal.

Determination

Power to extend time for appeal

6. The time for filing an appeal and the power to extension of time for appeal is provided for under section 349 of the Criminal Procedure Code as follows:

“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.

7. An applicant for extension of time to file an appeal must, therefore, demonstrate a good cause for extension of time to appeal.

Reasons for the delay

8. As relevant to the case of revision of finding, sentence or order of the trial court, there is no time limit for the application for revision under section 362 of the Criminal Procedure Code, but consistent with the constitutional principle of justice without undue delay, the application must be made within a reasonable time.

9. In explaining the delay, the Applicant stated that the complaint against the decision was made to their offices in Nairobi and that it took a while for the offices in Kabarnet to make a response to the decision. Further the Applicant stated that on receipt in the month of December, 2016 they had information that the judge would be sent to Kabarnet High Court in the month of January 2017. The office of the DPP opted not to make an application to Uasin Gishu county office only to be transferred to Kabarnet and hence filed their application before this court. The reasons are not without merit when the practice of transfer of court matters to the appropriate court upon establishment of a High Court station as in this case is considered.

DPP's Right of Appeal

10. No right of appeal in the circumstances of this case, section 348A of the Criminal Procedure Code under which the DPP is granted a right of appeal in criminal trials, only applies to **acquittal, order for refusal or dismissal of charge**, as follows:

“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.

[Act No. 13 of 1967, s. 3, Act No. 12 of 2012, Sch, Act No. 19 of 2014, s. 19.]”

11. The trial subject of the intended appeal ended in a conviction and the DPP is only aggrieved by the sentence imposed therefor which is considered too lenient for the offences in the charge. There being no **acquittal, order of refusal or order of dismissal**, there is no right of appeal for the DPP. The convicted person may, of course, appeal the decision under section 347 of the Criminal Procedure Code.

Revision of the sentence

12. In opposing the application for leave to appeal out of time, the Respondents contended, as deponed in the affidavit of the 2nd Respondent that “the applicant’s only available optional limb of prayer to be sought would only be to seek for the court’s review and/or interpretation of the modalities of the sentence servicing as opposed to an appeal.” With respect, the Respondents are unwittingly right in referring to the remedy of review being available rather than an appeal. However, the correct recourse is for an application for **revision** not r of the sentence and order for compensation made by the trial court herein.

13. Section 362 of the CPC grants the High Court revisionary jurisdiction as follows:

“362. Power of High Court to call for records

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose

of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

14. Under section 364 of the CPC the High has the powers of revision as follows:

“364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

*(4) Nothing in this section shall be deemed to authorize the High Court **to convert a finding of acquittal into one of conviction.***

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

[Act No. 10 of 1970, Sch., Act No. 19 of 2014, s. 20, Act No. 25 of 2015, Sch.] ”

15. Subsections (4) and (5) of section 364 clearly imply that the procedure for revision by a prosecutor (DPP) as a party to the criminal trial is only available for review of sentence and other order, because - (a) the court cannot substitute a conviction where there has been an acquittal as it is entitled to do on appeal under section 348A (2) of the CPC, and (b) where appeal lies, revision is not available “*at the insistence of the party who could have appealed*”. No appeal lies in this case, and the DPP may properly apply for revision of the sentence and order for compensation made by the trial court.

Hearing of the Revision

16. At the hearing of the revision, the court has a discretion under section 365 of the Criminal Procedure Code as to hearing the parties as follows:

“365. Discretion of court as to hearing parties

No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

*Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and **nothing in this section shall affect section 364(2).**”*

17. Under section 364(2), no order adverse to an accused may be made against him without hearing him, save where the trial court has “***failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***”

Conclusion

18. The court finds that the DPP has no right of appeal from a sentence of the trial court upon conviction of an accused. Therefore, no question of extension of time to file an appeal from sentence arises in this case.

19. The DPP may, however, seek revision of the finding, sentence or order of the trial court pursuant to section 362 of the CPC. The High Court has under the said section power to hear or consider a revision which comes to its knowledge by application or otherwise. In this case,

having been made aware of the sentence and order of the trial court, the Court in exercise of its revisionary jurisdiction will call for the trial court file and conduct a revision hearing. Having already found the period of delay not to be unreasonable, the court will proceed to deal with the matter as a **Revision**. Pursuant to discretion of the court under section 364 (5) of the CPC, the court shall fix a revision hearing and grant both the applicant DPP and the convicted Respondents an opportunity to be heard thereon.

Orders

20. Accordingly, for the reasons set out above, the court makes the following orders:

1. The application for **“leave to file an appeal against sentence out of time”** herein by Notice of Motion dated 22nd February 2017 is dismissed.
2. The High Court, having been made aware of the sentence and order for compensation herein, shall take cognisance of the matter, and open revision proceedings under a revision file for purposes of review of the sentence and order for compensation made by the trial court.

21. For purposes of directions as to hearing of the revision application, the matter will be mentioned on a date convenient to court and counsel, when the DPP and the Respondents shall have filed respective submissions on the question of review of the sentence.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Macharia, Assistant DPP for the Applicant.

M/S Morgan Omusundi Law Firm, Advocates for the Respondents.