



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPL. NO. 4 OF 2018

REPUBLICAPPLICANT

-VERSUS-

JOB ANUNDA BARONGO.....RESPONDENT

RULING

The state has moved this honorable court by a motion dated 12th February, 2018 seeking its leave to appeal, out of time, against a decision of the lower court delivered on 5th December, 2017 in **Nyeri Chief Magistrate's Court Anti-Corruption Case No. 5 of 2009**; in that decision, the Respondent was acquitted of all counts of willful failure to comply with applicable procedures and guidelines relating to the management of funds, and a charge of abuse of office contrary to certain provisions of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003**.

The motion is filed under **section 349** of the **Criminal Procedure Code, (Cap 75), Laws of Kenya**, mainly on grounds that; the delay in filing the appeal is not inordinate; that the intended appeal has high chances of success; that the applicant is yet to obtain a certified copy of the proceedings; and, it is in the best interests of justice that the application be allowed.

The learned counsel for the state, Mr. Gitonga Murang'a, has sworn an affidavit in support of the motion; counsel has deposed that upon delivery of the judgment, he applied for its certified copy after which he forwarded it to the Director of Public Prosecutions in Nairobi for appropriate directions on the next course of action. He received the response vide the Director's letter dated 31st January, 2018 but which was received on 7th February, 2018.

The respondent opposed the application and in that regard his learned counsel, Mr. George Morara Gori, swore a replying affidavit in response to the motion. Counsel has sworn that the magistrate's court case took over ten years before conclusion and it will be prejudicial to the respondent to be subjected to another outdated round of litigation. In any event, counsel has sworn that the communication between the state office at Nyeri and Nairobi is an afterthought since, being a learned counsel, the prosecution counsel did not require any advice from the Director of Public Prosecutions on whether or not to appeal against the magistrates' decision.

Both counsel reiterated the positions they adopted in their affidavits in their submissions when the motion was finally heard. Mr. Njue, the learned counsel for the state added that even if the appeal had been filed within time, it would not have been heard by the time his application was argued.

On his part, Mr. Gori urged that his client had been interdicted from his employment for the entire period that case against him was pending in the magistrate's court but he had been reinstated after his acquittal; it would be prejudicial to him if the applicant is allowed to file an appeal against that acquittal out of time and long after he had been reinstated. I understood his fear to be that his client's position in government would be rendered uncertain until such time that the intended appeal is concluded.

The law applicable to this sort of application is **section 349** of the **Criminal Procedure Code** which the applicant has correctly invoked; it reads as follows:

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.

This provision is more or less self-explanatory; an appeal must be filed within fourteen days of the date of the decision of the court. It may, however, be admitted out of time for 'a good cause' and, if the appellate court is satisfied that the delay to file the appeal arose from the intended appellant's or his counsel's failure to obtain a copy of the impugned judgment or order early enough to file the appeal. Time for applying for the judgment or order is essential because it counts whenever the court has to consider whether these documents were or weren't

supplied in time to file the appeal within the mandatory statutory period.

Turning back to the applicant's application, Mr Murang'a deposed in his affidavit that the application for a copy of judgment was made after the delivery of the judgment. It is not apparent in his affidavit when this application was made; however, based on the available evidence, it appears that this document was obtained by the state counsel soon after the judgment was delivered. I gather this information from a copy of the letter dated 31st January, 2018 addressed to Mr. Wesley Nyamache by Director of Public Prosecution on the subject of the state's intention to appeal. The letter which is exhibited to counsel's affidavit reads as follows:

Mr. Wesley Nyamache

Prosecution Counsel

Central Region

PC's Office, Block A, 3rd Floor

P.O. Box 463-10100

NYERI

RE: ANTI-CORRUPTION CASE NO. 5 OF 2009

REPUBLIC VERSUS JOB ANUNDA BARONGO

We acknowledge receipt of your letter Ref NYR/EACC&EC/2017(29) dated 15th January 2018 forwarding a copy of the judgment in the referenced case.

A earlier directed by the former DPP, any acquittal in a corruption related matter should be appealed immediately.

This is therefore to instruct you to proceed and file an appeal against the said judgment and keep the office updated on the same.

Signed.

C.N. GAKOBO

SNR. ASST, DIRECTOR OF PUBLIC PROSECUTINS

FOR: DIRECTOR OF PUBLIC PROSECUTIONS

This letter suggests that the applicant was in possession of a copy of the judgment as at 15th January, 2018. In the absence of any evidence to the contrary, I am entitled to assume that the applicant obtained a copy of the judgment on 5th December, 2017, well within the statutory period to file the appeal.

But the judgment or order intended to be appealed against is only one of the documents necessary to file an appeal; the other document is a copy of the record. In considering whether to allow an application for leave to file an appeal out of time, the appellate court has to consider also whether both the judgment or order appealed against and the record were obtainable within a reasonable time so as to file the appeal within the prescribed timeline. It is for this reason that the proviso to section 349 states in part that, the court may admit the appeal out of time "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."(emphasis and underlining mine).

The immediate question that arises is, when did the applicant make its application for the record? The answer to this question lies in a copy of a letter dated 2nd February, 2018, exhibited to the affidavit in support of the motion, applying for typed proceedings. Due to its significance to this application, it is also necessary that I reproduce the entire letter here:

Ref: NYR/EACC & EC/2018/32 Date: 2nd February, 2018

The Chief Magistrate

P.O. Box 70

NYERI

RE: ANTI-CORRUPTION CASE NO. 5/2005

REPUBLIC -VS- JOB ANUNDA BARONGO

The above matter refers.

Kindly supply us with typed proceedings in this case for our further action. Judgment was delivered on 5th December, 2017.

WESLEY NYAMACHE

PROSECUTION COUNSEL

FOR: DIRECTOR OF PUBLIC PROSECUTION

It is apparent on the face of the letter that the application for a copy of the record was made almost two months after the delivery of the judgment and, in any case, way after the statutory period within which the appeal ought to have been filed.

The only explanation given why there was such a delay in applying for the proceedings is that the state was waiting for the Director of Public Prosecution's advice on whether or not to proceed and appeal against the trial court's decision. I must say that I found this explanation untenable for at least three reasons; first, either party in a trial is entitled to appeal against the decision of the trial court if, in its opinion, it has good grounds for such an appeal. As far as the state is concerned, the opinion of the Director of Public Prosecutions to file the appeal would be unnecessary, if the state counsel who is actively seized of the prosecution of the case is convinced that there exist sufficient grounds to lodge an appeal against the decision of the trial court. In such case, he would proceed to file the appeal, as a matter of right, without any reference whatsoever to the Director.

If, according to its own internal operations, it is the policy of the Office of the Director of Public Prosecutions that the Director's opinion must be obtained before an appeal is filed, then it is incumbent upon that office to ensure that the necessary advice is sought and given timeously so that the appeal is filed within the time prescribed by the Criminal Procedure Code. In other words, the administrative intricacies of the office of the Director of Public Prosecutions are subservient to the law and neither the director himself nor any of his representatives can be heard to say that they could not comply with the law because of the manner they conduct their own internal affairs.

The second reason why I would not agree with the explanation given for the delay is that, assuming the Director's opinion was necessary, it is evident from the Director's letter that the prosecution counsel need not have written to him seeking his blessings before he could proceed with the appeal. That letter reminded the prosecution counsel that if he was seeking any permission to file the appeal, that permission had been granted earlier by way of a directive, directing all prosecution counsel to appeal against any decision of acquittal in anti-corruption cases.

What this means is that the delay in filing the appeal cannot be because the prosecution counsel was seeking authority to file the appeal since he already had the unequivocal permission from the Director himself to file the appeal irrespective of whether there were grounds for such an appeal or not.

Closely related to this reason is the fact the letter from Director is indicated to have been received in the Central Region's office on 7th February, 2018, but it was until the 14th February, 2018, one week later that the applicant filed the present application. No explanation has been offered for this delay. Where a statute expressly provides that in taking a particular action time is of essence, every day of inaction counts and it behoves the party seeking extension of time to explain the delay to the satisfaction of the court.

Last but not least, diligence demands that a party aggrieved by a decision of the trial court ought to apply for a copy of the judgment and the record at the earliest opportunity possible, if not for anything else, for the appellant to beat the deadline set for the filing of the appeal. More often than not, a party may end up not filing any appeal but, as a precautionary measure, it is always advisable to seek for these documents as soon as the decision is delivered; in any event the application is usually informal, made orally in court. Regardless of whether the Director of Public Prosecutions was going to sanction the intended appeal, it would not have cost the prosecution counsel anything if he applied for a copy of the record for the same reason, I suppose, he applied for a copy of the judgment.

I am inclined to conclude, for the above reasons, that there is no good cause why the appeal was not filed in time. Similarly, no satisfactory reason has been given for the delay in filing the application for extension of time. In the ultimate, the only order that lends itself to me is that of dismissal of the applicant's application; accordingly, it is hereby dismissed.

Dated, signed and delivered in open court this 7th day of December, 2018

Ngaah Jairus

JUDGE