



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**HC.CR. NO.19 OF 2015**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**RAMCHANDRA SHANKARLAL BHATT.....ACCUSED**

**RULING**

1. The applicant, the Office of the Director of Public Prosecutions (DPP), has filed an application dated 28<sup>th</sup> September 2015 seeking leave to appeal out of time against the decision of the trial court in Kericho Criminal Case **No.633 of 2010 - Republic vs Ramchandra Shankarlal Bhatt**. In that case, the accused was charged with 12 counts of obtaining goods by false pretences contrary to section 313 of the Penal Code. After a full trial, he was acquitted of all charges under section 215 of the Penal Code.
2. The application is brought under section 349 of the Criminal Procedure Code and is supported by an affidavit sworn by the Managing Director of the complainant in the case, Rashmikant Meghji Shah Wholesalers. The application is based on the grounds that the judgment in the matter was delivered on 24<sup>th</sup> June 2015 and the accused in the matter was acquitted of all charges.
3. Being dissatisfied with the judgment in the matter, the state applied for certified copies of the proceedings with a view to lodging an appeal. However, the proceedings were not supplied either to the complainant or the State in time, and it was therefore not possible to lodge the appeal in time. The submissions of the state through Learned State Counsel, Ms. Keli, is that the delay in seeking these orders has not been intentional nor has it been inordinate. It was also her submission that the intended appeal has overwhelming chances of success, and the court should grant the orders sought in the application to file the appeal out of time.
4. The state relied on the decision in **Misc. Criminal Application No.100 of 2014 - R vs Jane Njeri Mwangi** in which the court granted the applicant leave to appeal out of time as it had not been able to obtain proceedings in order to appeal within the prescribed 14 days.
5. Counsel also relied on **Garissa High Court Cr. Misc. No.14 of 2012 - Mohammed Shark Emaru vs Republic**. In this case, the court considered section 349 of the Criminal Procedure Code and the discretion of the court to allow the applicant to file an appeal out of time where the applicant has not been able to obtain proceedings in time to file an appeal within the prescribed time.
6. Mr. Motanya for the respondent opposed the application in reliance on grounds of opposition dated 4<sup>th</sup> November 2016 and a replying affidavit of the same date. In the grounds of opposition, the respondent argues that the applicant lodged the notice of appeal against the decision of Senior Resident Magistrate, L. N. Kiniale dated 24<sup>th</sup> June 2015 on 28<sup>th</sup> September 2015 which was too late given the time allowed

for filing an appeal. Further, that the appeal is mischievous, malicious and a waste of the precious time of the court and that it lacks merit both in fact and in law.

7. According to the respondent, both parties in the matter were represented by qualified advocates. The matter had also taken a long time to determine, being a 2010 matter which was finalized in 2015. The respondent's submission was that much of the delay was caused by the prosecution which had at one time entered a *nolle prosequi*. The position of the respondent is that the delay was inordinate and unexplainable, and the applicant had not been diligent, having slept on his rights and not moved the Director of Public Prosecutions to fast track the appeal. Mr. Motanya urged the court to dismiss the application.

8. In reply, Ms. Keli reiterated that the delay in filing the appeal was not inordinate and was due to the fact that the proceedings were not supplied on time.

9. I have considered the application, the affidavits in support and in opposition thereto respectively, as well as the grounds of opposition filed by the respondent. I believe the issue for consideration is fairly straightforward: should the court grant the applicant leave to file an appeal out of time?

10. Section 349 of the Criminal Procedure Code provides 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 therefore.”*** (Emphasis added)

11. In the present case, judgment in the matter was delivered on 24<sup>th</sup> June 2015. I note from the record that the DPP wrote requesting for typed copies of the proceedings on 14<sup>th</sup> July 2014. A further letter from the DPP dated 22<sup>nd</sup> July 2015 indicates that the applicant had received copies of the proceedings in respect of the prosecution case but not in respect of the defence case, and requests for the proceedings in respect of the defence case. It is not clear from the application and the affidavit of the complainant when the complainant applied for copies of the proceedings, though he deposes that he did.

12. In **Misc. Criminal Application No.10/14 - R vs Jane Njeri Mwangi**, Ngaah J, in granting the applicant leave to file an appeal out of time, observed as follows:

***“The respondent’s counsel’s submission that the appeal does not raise any triable issue either in law or fact does not appear to have any legal basis; this is because under section 349 of the Criminal Procedure Code, the only consideration this court must give regard to in exercising its discretion to grant leave to file the appeal out of time is “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.” Whether the appeal will succeed or not does not seem to count at this stage.”***

13. In the present case, the application before me was filed on the 28<sup>th</sup> of September 2015, which was about three months from the date of the judgment. The complainant avers that he applied for the proceedings on a date that he does not indicate, while the DPP wrote to the court seeking the proceedings on 14<sup>th</sup> and 22<sup>nd</sup> July 2015. In the circumstances, I am minded to find that there was no inordinate delay on the part of the applicant in seeking the proceedings with a view to filing an appeal. As was observed by Mutuku J in her decision in **Mohamed Shehe Maro vs Republic (supra)**, courts ought to lean more to substantive justice than to technicalities. Accordingly, the application dated 28<sup>th</sup> September 2015 is allowed. The applicant may file his appeal within 14 days hereof.

14. In closing, however, and having considered the Petition of Appeal filed with the application dated 28<sup>th</sup> September 2015, it behooves me to draw the attention of the applicant to the provisions of section 348A of the Criminal Procedure Code with respect to the statutory right of appeal in the case of an acquittal. This section provides as follows:

***“When an accused person has been acquitted on a trial held by a subordinate 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, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law.”*** (Emphasis added)

**Dated, Delivered and Signed at Kericho this 1<sup>st</sup> day of February 2017.**

**MUMBI NGUGI**

**JUDGE**