



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 25 OF 2016
REPUBLICAPPLICANT
VERSUS
MOSES OPARANYA OKOTH.....RESPONDENT
RULING

The Application

1. The State is the applicant in this case. By a Notice of Motion dated 18.05.2016, the applicant prays for leave to appeal the decision in Kakamega Chief Magistrate's Court Criminal Case No. SO Cr. 37 of 2014 out of time. The applicant also prays that the petition of appeal annexed to the application be deemed as duly filed.

2. There are two grounds set out on the face of the application and there is also an affidavit sworn by Patrick Oroni, Senior Prosecution Counsel in which he depones that the delay in filing the appeal within the stipulated time was partly occasioned by counsel then seized of the matter going on one week's training in Kisumu without disclosing location of the proceedings. The deponent also says that he received the complaint leading to the instant application from the complainant SALAMBA SHAF on 28.10.2015 and instructed her to pursue proceedings immediately which proceedings were received on an undisclosed date in November, 2015.

3. The application is opposed through the replying affidavit sworn by the respondent on 01.07.2016. The respondent opposes the application on grounds that;-

- while the petition of appeal speaks of criminal case number 3755 of 2014 at the Chief Magistrate's Court the actual case is Cr. Case No. 37 of 2014.
- the complainant in the case against him was Jane Masitsa and not Salamba Shaf
- the petition of appeal also talks about the ruling of the SPM Butali Criminal Case No. 162 of 2014 which did not involve the respondent.

4. The respondent prays that for the reasons stated above and for the further reasons that there was no overwhelming evidence to achieve a conviction against him the instant application should be disallowed.

Submissions

5. The applicant's and the respondent's counsel made very brief submissions. Mr. Oroni Advocate for the Applicant stated thus: "we seek leave to appeal out of time. We rely on our affidavit dated 18.05.2016.

We have also annexed copy of petition of appeal and proceedings. We do not have anything more useful to add. We also rely on the grounds on the face of the application.”

6. Mr. Mukabwa, counsel for the respondent submitted thus, “We rely on our replying affidavit sworn by Moses Oparanya, the respondent. Same is dated 01.07.2016. That is all we pray for a ruling date.”

7. In reply Mr. Oroni submitted. “I do not have anything more to say in reply.”

Determination

8. I have carefully considered the application. The same does not indicate the provision of the law under which it is brought. I have also carefully considered the response to the application. I note that there is some discrepancy regarding the case number in which the impugned ruling was made. While the Notice of Motion gives the case number as Kakamega CM’s Court No. SO Cr. 37 of 2014, the Petition of Appeal gives two conflicting case numbers: Criminal case No. SO Cr. 3755 of 2014 at Kakamega and SPM Butali Criminal Case No. 162 of 2014. The respondent says that the correct case number is SO. Cr. 37 of 2014, a fact which is supported by the proceedings annexed to the application by the respondent.

9. It is not lost to this court that the application as it stands is confusing as to which case the applicant’s intended appeal emanates from. Although the court is aware that the applicant’s right to appeal is unfettered, it is also aware that the respondent is equally entitled to proper information to assist him in responding to the case against him. As the application stands now, it cannot be said that the respondent has all the proper information to assist him in making an answer to the claims against him. The case to which the proceedings relate cannot have been before two different courts at the same time.

10. For the above reasons, the applicant’s notice of motion dated 18.05.2016, be and is hereby struck out. The applicant is at liberty to file a fresh application if it is still desirous of pursuing the intended appeal.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this 6th day of December,2016

RUTH N. SITATI

JUDGE

In the presence of ;-

Mr Mukabwa.....for Applicant

Mr. Ngetich.....for Respondent

Mr. Polycarp.....Court Clerk.