



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO.436 OF 2012

REPUBLIC.....APPLICANT

VERSUS

HARPEET SINGH LOTAY.....RESPONDENT

RULING

On 11<sup>th</sup> July 2012, Achode J dismissed an application which had been filed by the Director of Public Prosecution, on behalf of the Republic, which sought leave to file an appeal out of time. The application was predicated on **Section 348A** of the **Criminal Procedure Code**. The Learned Judge held that the draft petition of appeal did not raise any weighty matters of law sufficient to form a basis for the appeal as required by the law. The Applicant was not satisfied by this decision. On 17<sup>th</sup> September 2012, the Applicant, again, made another application under the same section of the **Criminal Procedure Code** seeking leave to file appeal out of time. The Applicant explained that the reason why the previous application was dismissed was because the Applicant had inadvertently failed to annex the proceedings of the trial court to the affidavit in support of the application. The Applicant argued that if the court looked at the proceedings and Ruling of the trial court, it would be satisfied that the intended appeal raises weighty issues of law and in the circumstances the Applicant should be granted leave to file appeal out of time. The application is opposed. The Respondent argued that there was no provision in law for the re-hearing of an application for leave to file appeal out of time which had been dismissed. The Respondent was of the view that the Applicant was, in essence, abusing the due process of the court.

During the hearing of the application, this court heard oral rival submission made by Mr. Kabaka for the Director of Public Prosecution and by Mrs. Ondieki for the Respondent. The court has carefully considered the said submission. The issue for determination by this court is whether the Applicant laid sufficient basis for this court to reconsider its application to be granted leave to lodge an appeal out of time. **Section 348A** of the **Criminal Procedure Code** 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 Attorney General may appeal to the High Court from the acquittal or order on a matter of law.”***

In the present application, the Applicant’s previous application to be granted leave to appeal out of time was considered by the court. The court found that there was no weighty issue of law that was raised by the draft petition of appeal that was sufficient for the court to grant leave to the Applicant to file appeal out of time. It is a requirement under **Section 348A** of the **Criminal Procedure Code** for the State to establish that there exist a matter of law which forms the basis of the appeal. In an application where the State seeks to be granted leave to file appeal out of time, it must establish that its draft petition of appeal raises a matter of law which ought to be considered by the High Court.

In the present application, the court has already found that the draft petition of appeal does not raise any matter of law. What the Applicant was required to do, if dissatisfied by the said decision, was to appeal against the same to the Court of Appeal. It will not do for the Applicant to re-litigate the same issue before a court of concurrent jurisdiction. There is no procedure in the **Criminal Procedure Code** that

allows an aggrieved party to review a decision that has been rendered on the basis that the court failed to consider a certain aspect of the application, like in the present application the issue of the proceedings and ruling of the trial court, when it rendered its original decision. That jurisdiction is only provided under the **Civil Procedure Act**. This court therefore agrees with the Respondent that once the Ruling was rendered by this court on the application for leave, it was not open for the Applicant to file another similar application before this court seeking the same orders. For all intents and purpose, the issue as to whether or not the Applicant should be granted leave to appeal, has been determined by a court of competent jurisdiction.

For the above reasons, the application filed by the Applicant cannot be allowed. It is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2014**

**L. KIMARU**

**JUDGE**